



**IMPLEMENTATION OF RESTORATIVE JUSTICE IN
UKRAINE**

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ABSTRACT

The purpose of this research was to investigate the process of restorative justice implementation in Ukraine. The research provides an analysis of the current situation and evaluates the necessity of support of restorative justice practice by the State (i.e. by legislation, law enforcement and conventional justice systems).

To achieve objectives of the study methods of qualitative research were applied and consisted of analysis of specialized literature and a number of semi-structured and unstructured interviews. The interviewees included employees of the Ukrainian Centre for Common Ground (the UCCG) and practicing mediators from Simferopol branch of the UCCG. In addition there were conversations with random people aiming to learn their points of view on restorative justice and its possibilities.

The findings revealed that though much work had been done after restorative justice was introduced in Ukraine in 2003, it had not advanced much. Moreover, due to the problems experienced, there can be observed a tendency towards a decrease of the restorative justice practice. The failure of the post-Soviet law enforcement and the systems of justice to earn the people's trust caused a strong disbelief in innovations in this sector. The major challenges include absence of sufficient financing of the mediation centers and lack of cooperation of the law enforcing structures and the system of justice with mediators.

The conclusion is that the State's active cooperation in implementation of restorative justice, including legislative and financial support, is crucial in achieving positive results in this sphere.

Key-words: Ukraine, restorative justice, mediation, implementation, criminal justice, law enforcement.

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LIST OF ABBREVIATIONS AND ACRONYMS

AERA - American Educational Research Association

EU – European Union

IDRC - International Development Research Centre

PR – Public Relations

PTDC - Pre-Trial Detention Centre

UCCG - Ukrainian Centre for Common Ground

UN - United Nations Organization

VOM – Victim-Offender Mediation

Chapter I. INTRODUCTION

*I very seldom envy, almost never.
But I am envious of the countries, where the court
on a compulsory basis prescribes mediation procedure.¹*

Andriy Nedbaylo,
coordinator of the Kherson Mediation Centre (Ukraine)

Restorative justice is a rather new phenomenon in countries of the post-Soviet territory. My decision to do a research on this topic came after I learnt about it a couple of years ago. As a student of Peace Studies at the University of Tromsø I attended several lectures on restorative justice and mediation. For me it was new information and my first attitude towards this phenomenon was rather sceptical. However, while trying to persuade my group-mates that mediation in criminal cases was unreasonable and a waste of time, I became interested in it. Having attended the Conference on Restorative Justice in the University of Tromsø (2008) I got a deeper understanding of its principles and goals and my way of thinking became more flexible as well.

My sceptical attitude towards restorative justice is partly due to my origin from a country that was a part of the Soviet Union, Ukraine. For the last century most of the conflicts, misbehaviours and problems, especially those including criminal activity, have been solved here by punishment or *liquidation of the “soviet people’s enemies”*, where death penalty was a common thing. Further in my thesis I will return to the social and historical factors and will discuss what kind of challenges they bring to the process of restorative justice being implemented into the Ukrainian society and what complications it causes.

Taking my origin into consideration it becomes clear why all the realities and principles of restorative justice were rather new to me and I did not see how a conflict, whether in civil or criminal cases could be solved in a post-Soviet society by means of restorative justice.

Impossibility of acceptance of the restorative justice principles by the people who grew-up in a highly punitive system was my main argument when I decided to discuss my views with the participants of the Restorative Justice Conference. One of the persons I talked to was Ivo

¹ My translation.

Aertsen, a professor of the Leuven Catholic University in Belgium who wrote and edited numerous publications dedicated to restorative justice. From the conversation with him I learnt that in Ukraine this phenomenon was already known, though not for the wide masses yet. Also from him I got to know names of the people and organizations that had been involved in the process of popularization of the ideas of restorative justice and responsible of the pilot project of institutionalizing restorative justice in Ukraine. That was new information for me and I felt awkward of my unfamiliarity of the phenomenon of restorative justice in general and its development in Ukraine in particular. I therefore decided to do research in this field, not on an academic level yet, but just for my own self-education.

Luckily, internet nowadays is a great source of publications and information, so I could find a number of publications done in the field of restorative justice and its promotion in Europe, including Eastern Europe, to give me an idea of the subject. There was not a lot. But there was enough to make me interested in a further study and, thus, of totally changing the initial field of my Master's research and turning it into a research on restorative justice and its way into the Ukrainian legislative system.

Having done my research I found out that mediation, a working tool of restorative justice, in Ukraine has been practiced in criminal, civil, commercial and administrative cases. Besides, there has been an attempt to introduce school mediation in a number of schools.

In this research I am not going into mediation in civil cases as the Civil Code of Ukraine under the term of 'reconciliation' and a proposition of an agreement between the parties already partially covers it. Definitely, there is a gap between offering the parties *reconciliation*, which is usually done by their own means without the presence of a mediator, and *mediation*, when a trained mediator helps parties to meet and negotiate. Neither will I cover administrative, commercial or school mediation as these types of mediation are different and each requires individual research. However, as during my fieldwork I had a chance to meet people working with administrative mediation, I will describe my meeting with them in my Methodology chapter.

I was interested in focusing my research on restorative justice in criminal cases as it is a new phenomenon in Ukraine, still in a pilot project stage. The implementation of it would be the

most challenging due to the nature of criminal justice, necessity to adjust laws and court procedures, and persuade law enforcement agencies to cooperate, and other challenges.

1. 1 Structure of the Thesis

The thesis contains five major chapters: Introduction; Conceptual and Theoretical Orientation; Methodology; Findings and Interpretation; Conclusion and Further Discussion.

The *Introduction* tells the reader about my way to the decision on writing my research on this particular topic, on what I am focusing and informs about hypothesis, research questions and objectives of the thesis.

In the *Conceptual and Theoretical Orientation* I am introducing the reader to the concept of restorative justice, and also on theories, which guided me in my research

The *Methodology* covers the way I was doing the research and methods used.

The *Findings and Interpretation* tells about what I learnt during my research and is structured according the objective of the thesis.

The *Conclusion and Further Discussion* chapter includes summary of the thesis, my final remarks on my study and offers some questions and challenges in this particular research field which are interesting for further studies.

In the end of the thesis the reader may find *Attachments*, which include relevant to my research articles from the Criminal Code of Ukraine and one of the latest drafts of the Law on Mediation in Ukraine.

In structuring my thesis I followed the recommendations by IDRC² and AERA³, which I found reasonable and useful.

² International Development Research Centre

³ American Educational Research Association

1.2 Problem Formulation and Evolution of the Research Questions

My work is a socio-legal research on the implementation of restorative justice in Ukraine and its intertwining with the legislative, law enforcing and criminal justice systems of the country.

In the very beginning of my research my goal was to find if there is a possibility of restorative justice in Ukraine at all. That was my original research question. However, after my first interest in this phenomenon was satisfied and I kept looking for information, new questions appeared, for example, what is known about restorative justice in Ukraine? Who introduced it to this country and where is it practiced? However, all these questions I could answer while reading articles on this topic. Even during my fieldwork I felt, probably like any other researcher, that I was moving deeper and deeper into a rabbit hole. Having answered a question, I faced a new one. And certainly more questions were on their way.

The working name of my research was Institutionalization of Restorative Justice in Ukraine. However, as my research progressed, I realized that despite the work done in direction of importing this phenomenon into Ukrainian reality, there is still a long way to go from being introduced and being institutionalized. It would be too early to make a research and predictions on institutionalization of the phenomenon. A lot of time and work should be done before we start speaking of restorative justice in Ukraine as an *institution*⁴. That is why I decided to use *implementation* as a more relevant term to the state of affairs in the area of my study.

For a comprehensive understanding of the role and development of restorative justice in Ukraine I aimed to go through and study theoretical material, publications, legal documents as well as first-hand experiences of the practitioners of restorative justice to see the way it works (or does not work) in Ukraine; what obstacles have they experienced and what is the prognosis of the restorative justice future in Ukraine.

It is important to notice that before going to the field work I expected that for a successful implementation of mediation, particularly in criminal cases, *it should be supported by law* and not be solely based on volunteers willing to help people negotiate and reconcile. That is why I concluded that it was rather important to consider an legitimization of restorative justice as one

⁴ An institution: customs and behaviour patterns important to a society, particular formal organizations of government and public service (Archive.eu)

of the ways to a successful implementation of this phenomenon into the Ukrainian society, taking bureaucracy into account and also the troubles of passing new laws in the Ukrainian parliament due to political instability⁵ and the inflexibility and mistrust to innovations by the authorities⁶.

These conclusions led me to the hypothesis of my research and to the research questions I needed to follow to complete the study.

1.3 Hypothesis, Research Questions and Objectives

The pre-study of available information on restorative justice in Eastern Europe in general and Ukraine in particular led me to the following *hypothesis*:

Restorative justice can be implemented in Ukraine; however, to achieve positive results there is a need of cooperation between the State (legislation, law enforcement and conventional justice) and non-profit actors, enthusiasts promoting restorative justice in Ukraine.

While my research aims at one overall question: how does restorative justice fit into the Ukrainian society in general and the Ukrainian law enforcing and criminal justice systems in particular, I will investigate several points that will help me to answer the main question.

These *research guiding questions* are as follows:

1. On what stage is the development of restorative justice in Ukraine?
2. What are the problems on the way to successful implementation of restorative justice into the Ukrainian society?
3. How is restorative justice intertwining with the existing legislation, law enforcement and conventional justice systems of Ukraine?

⁵ As R.Koval (the president of the Ukrainian Centre for Common Ground) notices, because of clashes in the Ukrainian Parliament, passing of the laws is complicated. When there is peace and working atmosphere in the Parliament they work on passing the laws considered important for the State and the Law on Mediation is not considered as such (*My interview*).

⁶ I will touch this problem further in the thesis.

Thus, the *objectives* of my research are:

1. To learn about and describe the process of development of restorative justice in the Ukrainian society;
2. To identify and analyze challenges on the way of restorative justice becoming a common practice in Ukraine and consequently, what are the possible ways to overcome them;
3. To make a study of the relative legislation, law enforcement and criminal justice systems of Ukraine and a prospective place for restorative justice practice in it.

1.4 History of Research and Contribution to Knowledge

As I have already mentioned, there has not been much literature on the topic of restorative justice in Ukraine apart from a number of articles touching the question. The Ukrainian Centre for Common Ground publishes a Bulletin ‘Restorative Justice in Ukraine’ and its online editions were helpful in my research. The articles contained in this magazine mainly discussed juvenile crimes, the justice system and restorative justice experiences in other countries; some of them touched Ukrainian experience though. However, most of the articles are written about practical experience, i.e. they describe to the reader a number of stories of success or failure, limited analysis of such mediation outcomes and no follow-up information. These articles provide a reader with pieces of information on the question without making a whole picture.

Browsing internet one can find a number of articles informing the reader of the fact of the introduction of restorative justice to post-Soviet countries, including Ukraine. Some of them take a particular city and tell who is responsible for the pilot project and what it includes. There are no follow-ups and, consequently, no analysis of the process.

Thus, this research puts together all the aspects of the implementation of restorative justice in Ukraine. I am attempting to describe and analyse the state of affairs with restorative justice in Ukraine from different angles, having studied practical experiences of mediators as well as

theoretical approaches of the coordinators of the project, considering an interaction with the legislative system.

Besides, this research may be seen as a follow-up of the pilot project introducing restorative justice in Ukraine with the analysis of the challenges and a prognosis of possibilities to overcome the problems and make restorative justice a common practice in this country.

1.5 A Relation to Peace and Conflict Studies

“Peace by Peaceful Means” is the name of a book written by Johan Galtung⁷ and I think it is the best reflection of the goal of restorative justice and its key principle: to achieve reconciliation and peace on a voluntary basis.

Restorative justice can be used on small and big scale conflicts as have been proven⁸. Mediation, one of the working tools of restorative justice, is used on an everyday basis from small dispute resolutions in families to conflict negotiations on a high level with the help of some States-mediators⁹.

Students who have chosen to qualify in Peace Studies are interested in resolving various conflicts and making this planet a more peaceful place. I think a subject such as restorative justice should be in the curriculum of the Peace Studies programmes on a compulsory basis as it offers the students information on one of the modern ways of non-violent conflict resolution/transformation and provides them with guidelines and practices of mediation, i.e. making peace by *peaceful means*. Ideally, mediation is seen as an attempt to appease conflicting parties and bring back peace and harmony. In cases of large-scale conflicts restorative justice may take a form of an attempt to bring together people despite their differing backgrounds and find a way to stop animosity between them or at least decrease it through finding a common ground and compromise. One of the working tools of restorative justice, together with

⁷ J. Galtung 'Peace by Peaceful Means' Sage, 1996

⁸ E.g: Howley, P, 'Restorative justice in Bougainville', Oxford University Press, 2000

⁹ E.g.: East Africa: High-Level US Mediation Team Arrives in Addis Ababa (AllAfrica.com, Jan.21, 2006)

mediation, sentencing circles and other, is a *peacebuilding circle*¹⁰.

The interdisciplinary nature of the peace studies and the flexibility of educational background requirements for the programme admission collect in one group people with major in social sciences, law, international relations, education, economics and politics. They are from and have been exposed to different cultures and experiences¹¹ due to the nature of their studies and interests. However, no matter which carrier will be proceeded by the peace studies graduates, the knowledge of the basic principles of restorative justice and mediation as a means of non-violent conflict resolution, including how things work, what can be achieved, what challenges to expect and possible solutions of them will be of great help. And vice versa. To work in the area of restorative justice as a mediator or a researcher one has to possess at least basic knowledge in communication and dialogue, law, psychology, human rights etc. Interpersonal skills, ability to empathize and stay neutral are also important, for practicing mediators in particular. Such skills aim to heal the traumas of the parties involved in conflicts of different scales (from interpersonal to international), and have their roots in indigenous practices of peacebuilding or reconciliation¹².

Mediation may be used as a final stage of a conflict resolution: to heal psychological trauma and help parties to find the common ground, thus, preventing possible reoccurrence of the conflict situation, thus, leading from *negative peace* to *positive*¹³. I think that the idea of the interrelationship between Peace Studies and restorative justice practicing is presented best in the phrase: *Being a professional mediator is all about conflict resolution*.¹⁴

¹⁰ Peacebuilding circles ‘are built on the tradition of talking circles, common among indigenous people of North America, a process for bringing people together as equals to talk about very difficult issues and painful experiences in an atmosphere of respect and concern for everyone’ (Minnesota Department of Corrections)

¹¹ For example, MPCT students at University of Tromso are young people coming from different countries, even continents; their age varies between 20 and 40. A lot of them go to do fieldwork in countries other than their own. A number of them have been exposed to violent conflicts.

¹² Howard Zehr: *Doing Justice, Healing Trauma – The Role of Restorative Justice in Peacebuilding*. Peace Prints: South Asian Journal of Peacebuilding, Vol. 1, No. 1: Spring 2008

¹³ *Negative peace*: absence of violence, “passive coexistence”. *Positive peace*: the capacity to deal with conflict non-violently and creatively, “active coexistence” (J. Galtung: 2001).

¹⁴ The Princeton Review. *A Day in the life of a Mediator*.

Chapter II. CONCEPTUAL AND THEORETICAL ORIENTATION

In this part I will cover such points as concepts of restorative justice, its main principles and also argue that as a practice it may be easier to implement in a democratic society than in an authoritarian one. As this research concerns restorative justice implementation in a country that has been under authoritarian regime for seventy years and only recently came to democracy with still a long way to go, I consider it a key to understanding the challenges that restorative justice practitioners face. Though Ukraine has achieved a status of a democratic state, there are still many challenges to overcome.

This chapter also includes theories on the process of implementation of restorative justice in a society, possible challenges and problems to overcome.

My main references of the theory on restorative justice belong to McAuley (2008) and Fellegi (2003): both of them did major researches on Criminal Justice System in post-Soviet countries.

2.1. Restorative Justice as a New Concept in a Criminal Justice System

‘Restorative Justice is a theory of criminal justice which views crime as an act committed against people, rather than against the State or against society. Thus, restorative justice seeks to repair the harm done by crime: ‘making things right’, rather than enacting a revenge-like penalty, as in modern retributive justice’¹⁵. It sees a crime, first of all, as a social conflict between two sides, where not only both of them suffer, but also those who surround them.

“Restorative process means any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party. Examples of restorative processes include mediation, conferencing and sentencing circles.” (UN Basic Principles, 2002b)

¹⁵ The definition I took from a Facebook group dedicated to restorative justice (Restorative Justice). I have seen numerous definitions of restorative justice and think that this one gives the best snapshot of the phenomenon.

The traditional criminal justice system accentuates its attention on the offender. The case is seen as the relationship between an Offender and the State. The victim appears to be out of the circle of the judgement interests and eventually forgotten. A punitive reaction and rehabilitation, if applicable, are fully concentrated on the offender, leaving the victim alone to cope with his or her psychological wounds.

Restorative justice begins with a presumption that a reaction to the crime should be not punishment of the offender but a creation of the environment for the maximum harm repair. And “harm” here means not only physical or material, but also psychological damage (Walgrave: 2004).

Restorative justice increases the attention to the harm done to the victim, a person or a community. It aims to achieve compensation for the victim and make the offender evaluate the damage done.

The most common working tool of restorative justice is a *victim – offender mediation (VOM)*¹⁶, that aim to gather together the victim, offender and others influenced by the offence. Under the guidance of a trained *mediator* the group is invited to discuss the circumstances of the offence, the harm done and how it influenced the lives of the people involved. During the procedure of mediation the parties are trying to come to a certain consensus; and victims to recover from the disabling effects of the offence. The parts are to participate on a *voluntary* basis, that is, there should be no pressure neither to make the sides participate in the conference nor on the agreement made as the result of the conference.

The four key values of restorative justice¹⁷, are:

Encounter: Creation of an opportunity for parties to meet and discuss the crime and its consequences;

Amends: Offender is expected to repair the harm s/he has done.

Reintegration: Turning victim and offender back into valuable contributing members of the society.

¹⁶ Besides that, there are: family group conferences, restorative conferences, community restorative boards, restorative circles, sentencing circles etc.

¹⁷ According to the Canadian Resource Centre for Victims of Crime.

Inclusion: Including people who have been influenced by the crime in any way into the conflict resolution.

Having met the victims and seen the effects of crime on them, offenders are less inclined to commit another offence. Thus, restorative justice plays a crucial role in decreasing recidivism rate (McAuley: 2008, Daly: 2000). For supporters of restorative justice the offender's comprehension of the damage done, regret, compensation and reintegration into society is crucial.

McAuley (2008) mentions Winston Churchill who argued that the first rule to be followed by a good law-maker, whose goal is to create a good penitentiary system, is to take measures on preventing the majority from going to prison. Every time someone gets into prison, both suffer, and the imprisoned and the state. That is why it is so important to decrease the number of people getting into prisons. In certain cases restorative justice saves an offender from the prison. (It depends on the countries legislation where the case is investigated and mediated).

Restorative justice is a relatively new phenomenon for a majority of modern European countries (though if we go back in history, some prerequisites could be traced), but in some countries of the world it has deep roots.

According to Carpentieri (2009), restorative justice developed in countries with colonization in their past, such as Australia, New Zealand, the USA, and Canada. There the sense of community was born and developed during centuries. Community was crucial for surviving. At the same time traditions of the indigenous population, including those of conflict resolution, integrated into the colonies and eventually found its place there. Strong community ties as can be seen in many countries, like the USA, Norway New Zealand and other help promoting in-community conflict regulations. Good examples are family group conferences in New Zealand that have their roots in Maori traditions of conflict management¹⁸. This led to a conclusion that restorative justice is better implemented in those societies that have some background of peaceful conflict resolution (McAuley: 2008, Geselev: 2010).

¹⁸ For more information: Family Court of New Zealand : <http://www.justice.govt.nz/courts/family-court>

For the last decade restorative justice has got a lot of followers and supporters. More and more people get interested in mediation as a way which leads to a peaceful conflict resolution.

2.2 Principles of Restorative Justice. Restorative Justice as a Democratic Society Phenomenon

Having analyzed the principles of restorative justice and mechanism of its working it becomes obvious that this method of conflict resolution can be practically applied in a democratic society rather than in a society with an authoritarian regime.

First, I will turn to the *principles of restorative justice*.

The key principle of restorative justice is its *voluntary nature*, i.e. you cannot make people unwillingly participate in it (Umbreit, Coates: 2000; Latimer, Dowden: 2005). It is very important that both sides, and the victim and the offender want to meet each other and try to understand each other. The reason for that is simple: you cannot make a person *feel* sorry or understand his guilt or, in a victim's case, be willing to understand his offender and his motives for committing a crime and hurting someone, intentionally or not. People involved in the case should want this meeting; otherwise it will not work.

A second rather significant feature of restorative justice is that the mediation process should be conducted *considering peculiarities* of each of the participating parties, for example, the cultural background of the parties. It should be remembered, mainly by the mediator, that 'people from different cultures have different ways of speaking and behaving, world view and perception of justice' (Umbreit, Coates 2000: 1). These details should be realized and understood (or attempted to understand) by the participants when speaking (not to hurt other participants' feelings) and making decisions.

Third, during the mediation process the participants 'must be allowed to *speak frankly and fully*' (ibid) One of the most important things in preparing for the process of mediation is 'the creation of a situation in which all participants can take part without constraint or

oppression', i.e. without being afraid of "pay off" after the conference from the opposite party (Hudson 2003: 444).

The *main principles of a democratic society* are:

- the active participation of the people, as citizens, in politics and civic life;
- protection of the human rights of all citizens;
- the laws and procedures apply equally to all citizens.
- it covers different groups that may be called democratic: families, voluntary organizations etc.
- it concerns collective decision making: decisions are made for groups and are binding on all the members of the groups (Diamond L. 2004; Stanford Dictionary of Philosophy).

In a democratic state the government as well as local authorities take into account the interests, rights and opinions of the majority of people in society.

"More people are taken into account than under other forms of government. Democracy tends to make people stand up for themselves because it makes collective decisions depend on them. Hence, in democratic societies individuals are encouraged to be more autonomous" (Hudson 2003: 444).

The connection between the principles of restorative justice and those of a democratic society are obvious. As it can be obviously seen, all these tenets, like voluntarism, independence in making decisions that you are responsible for and seeing a person as an individual with his or her particularities and being able to understand and tolerate them, can be fully followed mainly in democratic societies, where a person has a right of voice and human rights are valued and supported. And the other way around: an authoritarian system would not welcome any kind of self-determination of its population.

2.3 Restorative Justice As a Novelty in the Conventional Justice System

Robert E. Mackey (2006) argues that criminal justice systems of the world have been developing during centuries. Though they are not perfect and have their faults, each of them is prepared to deal with issues special to every particular society. Any change in such

evolution may lead to ‘altering the balances of the existing system in such a way that it is damaged’. He notices that ‘the development of principles to guide the development of restorative justice must in term be guided by a clear set of legal and ethical theory justifications and accounts’, which would aim to influence the people of power (lawyers and politicians) (Mackey 2006: 197).

Vlasova (2010) argues that there should be a transition period from de facto court monopoly to other ways of conflict resolution. People are used to the “common way”: if there is a conflict, one should address the court. And they will distrust those who appear in front of them trying to persuade to try a new, *unheard-of*, way. That is why various pilot projects are rather helpful here. An important reason for developing principles and codes is to ensure that assumptions about the meaning and purpose of restorative justice are brought out into the open and acknowledged not only by those who support the concept, but also by those who have to work with it, like police officers and judges (Mackey 2006: 198). This opinion coincides with the argument of Walgrave (2004) that the ‘*technicité* of restorative justice must not be isolated from its theoretical and socio-ethical foundations’.

Any reform of a legislative system is a rather complex process and should go through a long process of bureaucracy and approvals. Thus, legitimization of a new phenomenon, such as restorative justice, as a part of criminal system change should be worked at all the levels of legislative and executive powers.

Stability, Sensibility and Justice are the three key elements of Law that aims to protect rights and interests of individuals. The same can be said about restorative justice. Because of the positive experience of its benefits for the community, the community would accept it and restorative justice would work together with conventional law and fill its gaps. Eventually it would make its way up to institutionalization (Geselev: 2010).

Restorative justice can *theoretically* be used in all sorts of crimes, as long as there are a *victim* and an *offender*. Some countries have already legitimized it by producing a *law on mediation*. For example, under a Belgian law enacted 22 June 2005, ‘mediation in criminal cases can be initiated at the request of persons with a direct interest in the criminal

procedure. This request can be made at any time during the criminal justice process, including after trial and during execution of the sentence' (restorativejustice.org).

2.4 Restorative Justice and Juvenile Crimes

Nowadays restorative justice practices have been widely applied to crime response systems, aiming juvenile cases in particular: children's behaviour is easier to correct than behaviour of an already formed mature person. Work with adults demands much more time and motivation. The results there are more ambiguous. That is why to start practicing restorative justice is much more rewarding with the juvenile offenders.

The idea of the creation of organizations dealing with juvenile offenders and their deeds that may not be classified as crimes and thus would not lead a person to court was first discussed on in the beginning of 20th century (McAuley: 2008). There was an idea that juvenile crime management should operate on a different basis. There should be alternative measures where imprisonment would be a last resource.

Eventually, in the end of 1990s, a number of non-governmental organisations appeared, that argued for a reform of the criminal system, human rights and the rights of the child. Special attention was paid to the prisoners and especially imprisoned minors. The punitive system towards minors have been highly criticized with special attention paid to the big amounts of people staying in PTDC¹⁹, in horrible conditions for a long term, up to several month, or even years. Absence of a specialized system for minor offenders, lack of alternatives to imprisonment measures, severity and long-term of imprisonments and intolerable conditions in colonies were only a part of challenges to be dealt with (ibid).

In the end of 1990s a new concept to decrease crimes committed by youth was developed. The accent was made on international conventions and treaties on rights of a child. It was underlined that young people are a vulnerable group whose interests should be protected by state as well as by non-governmental organizations. The financing of such reforms should be seen as an investment into the future of a state. Research in this field offered a number of

¹⁹ Pre-Trial Detention Centre

measures to be taken for a step-by-step creation of a new complex system of law enforcement for juvenile offenders. It should prioritize prophylactic measures and protection of the rights of the child. Limitation of freedom and imprisonment before during and after the trial should be considered as the last resource (ibid).

A point of interest was an observation that in a majority of countries it is the society that takes care of the juvenile offenders. However, in the countries of the post-Soviet territory, where society has been suppressed for many years and is not used to take initiative, it is the state that is supposed to take all the responsibility for the means of dealing with juvenile cases (ibid).

The system has not changed much by today. The way in which adults committing crimes are treated is also applied to juvenile offenders. Formal intrusion in the deviant behaviour of young people makes it more difficult to help the young offenders to return to or develop socially adequate behaviour. That is why punishment in all its forms is not the optimal strategies in such cases. Non-formal sanctions, including activities in school, family and community, will be of more use and play an important role in making young people valuable members of the society.

The judge is to accentuate his attention not on the very crime and sentencing, but on the circumstances that led the child to the crime and the prevention of future crimes. What caused the crime and how to deal with these circumstances, the well-being of a child should be of first priority. The first trial of this kind happened in 1899 in Chicago. The aim was to rehabilitate and re-educate young people who had committed offences and theoretically return them to the society as its equal members. At different periods of time such attempts were made and even during the highly punitive soviet system there were so-called “comrade courts”²⁰ that aimed to re-educate people and make them a “useful cell of the society”. Discussions about the usefulness of such approaches have been going on until today. In the end of the 20th century a new form of dealing with juvenile crime has been introduced. (McAuley: 2008)

²⁰ At work places/industrial sites and for adult workers.

There are numerous supporters of treaties and conventions on the children's rights that give significance to the rights and well-being of a child. For example, the UN Convention on the Rights of the Child²¹ demands from the governments that

“The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time” (Article 37).

There are states around the world, including Ukraine, which in their turn support numerous pilot projects and development of innovations in the field of juvenile justice and practice minimal imprisonment sentences for the juveniles.

Together with that there is a number of liberal western governments who introduced a more punitive policy towards juveniles, though continuing experimenting with new reconciliation procedures. (McAuley: 2008)

2.5 Implementation Of Restorative Justice Into A Society: Factors And Challenges

Having analyzed works of several researchers (McAuley: 2008, Pen: 2009, Fellegi: 2003) I summarized my findings in the following theory of restorative justice implementation. There are two groups of factors influencing an implementation of restorative justice into society (Pen: 2009):

1. Socio – evolutionary factors: historical pre-requisites; level of politico-legislative development of the state; level of integration into the international community and legislation; priorities in development and their direction.

2. Socio – subjective factors: the mentality of the population majority; level of active participation in the legislation and ways of thinking in this field; the level of education; individual reactions on social changes.

The intertwining of restorative justice and conventional justice makes it obvious that to understand the possibilities for restorative justice to take place in a particular society there is

²¹ Adopted in 1989 and ratified by 193 countries, including Ukraine (in1991).

a need to analyze in depth the following factors that are reflected in objectives of my research:

1. How do the country's legislative system and criminal law work and what factors influence them?
2. What attitudes towards crime exist in the society and what is the role of the politicians in an eventual support of the new procedure of restorative justice?

The problems on the way for the implementation of restorative justice can be generalized into the following groups (Fellegi 2003: 73):

- 1) legislation,
- 2) fundraising,
- 3) awareness of governments and practitioners of the criminal justice system as well as of the general public and
- 4) training and organisational matters in the field of restorative justice.

It becomes obvious that most researchers focus on the stage of legitimation as the most important one and share my view that the phase of legitimizing can be the most complicated and take time to work. I will turn to this further in the chapter.

Restorative justice has its supporters as well as critics. Among most common points of concern are possible lack of 'independent legal advice', pressure to admit offence that may give a chance to avoid trial, 'imbalance of power' between participants due to different age, gender, educational or social backgrounds etc (Cunnin: 2003).

Mediation in criminal cases as part of a restorative justice process can be used in conflicts of different scales and with participants of different ages, although at the moment it is practiced mostly in juvenile cases. More and more countries are trying this new approach.

Chapter III. METHODOLOGY

This chapter is dedicated to the *sources of evidence*²² of my research. It includes specification of the data that were collected, data sources, and the processes of its collection. I will also describe relevant characteristics of the sites where the data were collected and the participants of my interviews and why I selected them.

I collected data in three phases: before, during and after fieldwork. This chapter covers the process of data collection and methods I found most suitable for my research.

Due to the absence of sufficient information on restorative justice in Ukraine, I considered it difficult to prepare a database for my field work at first. However, it was possible to find information about restorative justice practice in the world in general and in countries of post-Soviet territory in particular. I considered this information particularly useful as most of the post-Soviet countries have similar historical background and policy, including legislation and particularly crime policy, for the last century, which has resulted in similar legislative system and similar mentalities.

This gave me a detailed picture of what information to look for during my research.

Thus, while my initial research covered the question of the possibility of introducing restorative justice in Ukraine, I moved on to the next stage and considered it interesting to look for the possibilities of institutionalizing restorative justice in Ukraine.

I started my research by collecting relevant information in the Internet. This led me to the site developed by the Ukrainian Centre for Common Ground, situated in Kiev. This agency started its activity in 1994 and has been a leading organisation in promoting restorative justice practice in Ukraine. On their site I could find electronic version of the Bulletin “Restorative Justice in Ukraine”, a magazine, published and distributed by the organisation two - three times a year. These editions have been a primary source during my research. On this site there is also a list of all the publications on the topic of restorative justice in Ukraine. Unfortunately, many of them were not available in an electronic version and, as I

²² The term is taken from “Standards for Reporting on Empirical Social Science” (AERA)

found out later, were published in limited editions for distribution between relevant organisations. Thus, it is not possible to buy them in a bookstore or even online.

Having read all the articles found, I put together a blueprint of the state of affairs in the field. Besides, I made a list of the active mediators who practiced restorative justice in Ukraine. Even though the web site gave a good overview, there were gaps in the information provided.

Therefore, I planned to travel to Ukraine, go to the UCCG to clarify and get up to date information. And then I would meet mediators to learn about their view of the process going. I expected to get a more central, official, theoretical, perhaps more politically correct information from the UCCG. And I definitely wanted to hear how the mediations were going in practice. This information I would be able to get from mediators. I decided to contact mediators from Simferopol simply because I knew this city and felt more comfortable going there than to some unknown place.

I decided to contact my future interviewees via e-mail although I had some doubts on how regularly e-mail was checked by my recipients. However, I did not have to wait long. All of my recipients answered almost immediately, except one of the mediators. As I learnt later, my e-mail, which I wrote in Russian, using a Russian keyboard, came coded to her. As she did not know how to deal with such a problem, she considered it as spam and deleted it.

This pre-field research helped me to clarify which questions I would like to focus on. Thus, my research centred on the following problems: how is the process of promoting restorative justice going; what are the problems on the way for the mediators and would the solving of these problems help to institutionalize restorative justice in Ukraine.

To answer these questions I had to learn about the process of introducing restorative justice to the Ukrainian people, to learn about their reactions on this new way of handling criminal and civil cases, to learn if mediation went along with the Criminal and Civil Codes of Ukraine.

Besides, when conducting my research there were a number of new questions appearing all the time and I needed to turn from the main line of the planned research to learn about things

without which my understanding as well as my work of the phenomenon under investigation would not be complete.

Initially in my study I planned to refer to the findings I got from the UCCG and mediators from Simferopol as those using mediation in criminal cases. However, I should not omit my other source that was also rather helpful: the Kherson Mediation Centre.

Later, when I was already working in the field, I read an article in a local newspaper of the city of Kherson about a local Mediation Centre, which had been practicing mediation in administrative cases. Although I was not planning to visit them from the beginning, I decided not to miss this opportunity and to learn about their experiences.

Besides, when asking for an interview with the mediators from Simferopol, I happily agreed to their offer to invite a mediator from the town of Krasnogvardeyskoe. She would come especially to meet me and tell about her experience.

3.1 Survey Areas and Ethical Considerations

During my fieldwork I was able to interview seven people who directly dealt with the promotion of restorative justice in Ukraine. The information obtained covers activities and experience of the following places: the Ukrainian Centre for Common Ground (the UCCG) in Kiev, Kherson Mediation Centre in Kherson and a branch of the UCCG in Simferopol.

Besides, I was talking to random people on an occasional basis to ask for their points of view on restorative justice and its possibilities. This way, without a special intent I had an unplanned short conversation with a representative of the Ukrainian law enforcement who gave me his view on the subject I researched²³.

When doing research we have to think about possible consequences of its publication. Although all my informants were excited, willing to help and felt comfortable about me interviewing them and did not mind any of the information to be put in my thesis, I made a decision not to refer names of the mediators I interviewed.

²³ The conversation confirmed and completed the information I got from my scheduled interviews.

I did not leave unnamed the UCCG representatives as much of the information they provided me with may be found in publications of the UCCG. I found the information I got from the interviews with Simferopol mediators more useful for my research as it was less official and more sincere.

3.2 Interviews at the Ukrainian Centre for Common Ground

I started my fieldwork by visiting the UCCG. I assumed that it would be right to start with the organisation that was the first to begin to work with restorative justice and attempted to implement it in the Ukrainian society. Later I realised that it should have been planned not only to start my research with interviewing them, but also finish my fieldwork with visiting the UCCG and asking the questions that appeared after my interviewing the mediators.

When planning my interview with the UCCG representatives, I chose two persons whom I considered able to provide me with necessary information. The first was president of the UCCG, Roman Koval, and also the coordinator of the project on implementing restorative justice in Ukraine Nadezhda Prokopenko. I e-mailed to both of them and got a positive reply and agreement to meet me for the interview.

On my arrival to the UCCG I was met by Nadezhda. She was one of the people I was planning to interview I decided to start with her. When planning my interview in the UCCG I did not mind whether I would interview both of them simultaneously or one after another. Actually, I thought that interviewing both of them simultaneously would provide me with more detailed information, as while one speaker is telling the story the other one may remember some details and add them to fill the picture. I considered group interview much more informative than a tête-à-tête one. As Roman was not there when I came and Nadezhda offered us to start conversation, I began my interview with her.

Roman came after 10 minutes of our conversation. And he and Nadezhda were following the same pattern of the story. They were supporting each other and I did not get any additional details. I made a conclusion for future researches and interviews that it is more useful to

interview representatives of an organisation one by one. Then there is a chance to hear stories, which add and not reflect one another.

However, I got much information, which helped me to summarize the readings I had done in the beginning of my research and supported my choice of mediators that I was planning to interview later on. What I found rather interesting was that Roman and Nadezhda were acquainted with or knew of mediators from different cities as most of them had gone to the courses for mediators organized by the UCCG.

After our conversation, Roman offered me access to their library with all the publications that had been published by the UCCG or which they got from other institutions dealing with restorative justice and mediation not only in Ukraine but from abroad as well. This was very useful as not all of these publications can be found online or bought from bookstores. Neither were they available in an electronic version. I found out that most of the books I read were published in rather small quantities, sometimes not more than 200. So, it would be impossible to get copies of them at a library. I used a week to browse from their library, reading articles and taking numerous notes. As I was new in this field I had to read a lot to complete the whole picture. I found it rather useful reading articles not only about restorative justice in Ukraine, but also how it was institutionalized in other countries. Especially I was interested in those countries, which had been a part of the Soviet Union as I presumed that due to the similar course of historical events and rather close social and cultural heritage the process of introducing restorative justice to society would be the same.

After a week of working with these sources I got a detailed picture on the course of events and felt I was prepared to move further with my research.

3.3 Meeting with Mediators in Simferopol.

My next step was to interview the mediators from Simferopol. When exchanging e-mails, I explained who I was and the aim of my research. The woman I contacted was interested in my research and invited me to her place for an interview. Besides, she offered to invite two

other mediators, her friends, one of whom was a mediator from Krasnogvardeyskoe²⁴ (the one I did not get a reply from). Before my actual meeting with the mediators, on the UCCG web site I found some information on their activities.

My expectation was to have an interview in an official environment. However, she invited me and other mediators for a meal²⁵ at her place, during which we could have a conversation on restorative justice and anything connected with it. This was unexpected for me and I had doubts about how fruitful such an interview would be, but found out later that actually such an environment provides a good ground for a group interview. At some point I worried that the participants would change the topic to their private issues. However, it did not happen. I spent more than three hours with my hosts and all this time we were talking on restorative justice in general and mediation in particular. They were telling me about their experience, achievements and problems. In my turn I told them about the Norwegian approach to this way of conflict management, and also told them about a new activity of street mediation that had started in Norway. All this information was rather interesting for them. My stories kept the conversation alive and helped them to recollect new details and stories. There were moments, when it seemed that they forgot about my presence in the room and were talking to each other remembering stories and details. I tried not to interrupt them and just kept listening. If I had a question and wanted to get more details on a particular case, I waited for a natural pause and then inserted my question.

In the end of our meeting I was told to contact them if I had any additional questions. It was a rather educational experience; I really enjoyed this interview and got a lot of information for my thesis.

This interview led to a number of questions that would be good to discuss with the UCCG. That is when I considered it would be rather useful to meet the UCCG representatives again. However, as I had not planned this meeting in advance it did not fit my fieldwork schedule and I had to look for an answer in other sources. While working on obtained information and

²⁴ A small town not far from Simferopol.

²⁵ It is rather common in Eastern Europe to invite guests for a meal, which usually consists of several dishes and a desert.

putting it together in my research paper, I might contact the UCCG for additional information.

3.4 Visit to the Kherson Mediation Centre

I learnt about Kherson Mediation Centre from a local newspaper. There was an introduction of the Centre and a couple of successful stories about administrative mediation. Though my plans did not include making a research on administrative mediation, simply because I had not known it existed, I decided to go to that Centre as it seemed to be another opportunity to get information that might fill the gaps in my research. Even if I did not consider the information suitable for this particular thesis I welcomed any accessible information on the topic of restorative justice. Besides, when I contacted them, they showed genuine interest in my project and welcomed me to the Centre.

When I came I was offered a cup of coffee and then had a conversation with the project coordinator, who told me the story of their organisation, its projects and problems. I found it interesting and got useful information. The topic of administrative mediation is rather big and I decided I would not cover the peculiar problems of administrative mediation in my thesis as it would turn it into different direction. But a number of issues the Centre deals with are similar to those dealt by the mediators from Simferopol and Krasnogvardeyskoe. Thus, this provided me with a more detailed view of the problems.

3.5 Methods Used

In my study I used a qualitative methodological approach as the most suitable to answer my research questions and achieve the objectives of the work.

I used a **method of dialectic research** as well as **non-interactive and interactive methods of qualitative research**, such as: mass media analyses, analyses of specialized literature, historical analysis and interviews: semi-structured, unstructured and triad interview.

3.5.1 The method of dialectic research

The method of dialectic research is a form of qualitative research based on unity of cognitive, rational and practical activity. It aims to explore a phenomenon through analysis of different, often competing arguments (Buzgalin: 2009).

The basic principles of the method of dialectic research are:

- Society and its phenomena can be studied using a systematic approach only;
- Any social system should be studied as constantly developing with some non-changing elements and some elements that can be changed by individuals;
- Objective reality is not just a group of phenomena, but social practicum as well: attempts of individuals to access their goals (ibid).

Due to the nature of this research my choice of approach is to explore in detail the process of restorative justice being implemented. I had to analyze information that gave totally different views on the object of my research (e.g.: distrust of people to innovations Vs use mediation which is a totally new phenomenon that can influence people's lives). To fully understand it I had to investigate not only the current situation, but also look at it from a historical perspective and analyze the processes that have been happening in society for the last decades.

3.5.2 Non-interactive methods of qualitative research: mass-media and specialized literature analysis; method of historical analysis

Among non-interactive methods I used *mass media analyses* on the topic of restorative justice and *analyses of specialized literature*, which included articles on restorative justice, papers on criminal procedures and systems of justice in the world and Ukraine; relative legislative act; the Criminal Code of Ukraine. Elements of *historical analysis* were used to explain the influence of historical background of the country on the modern problems experienced by the restorative justice practitioners.

For the pre-fieldwork stage it was crucial to find sources on the topic ‘restorative justice’ in general and ‘restorative justice in Ukraine’ in particular to build my own database. The quantity of sources available in the library was rather small and insufficient. The internet provided a bigger amount of information. Some of the articles I read gave me a hint to necessity to browse certain legislation, and later on, having conducted the interviews I began to *study specialized literature* including such documents as Draft of the Law on Mediation, the Criminal Code of Ukraine, the Code of Criminal Procedure of Ukraine etc.

The analysis of specialized literature was the most complicated part of my research, as I had to read additionally about different aspects of Ukrainian law, including studying this special terminology. However, it was inevitable because it gave me a better understanding of the possibilities of implementing restorative justice into the legislative system of Ukraine.

3.5.3 Interviews: semi-structured, unstructured; triad interview. Factors of successful interviews.

I took notes during my interviews with the UCCG representatives. During other interviews I did not put down anything as the atmosphere was informal (drinking tea or coffee and eating some snacks) and I considered notes taking inappropriate in given situations. After the interviews I immediately put down all the information I learnt not to forget it.

For interviews in the UCCG I considered **semi-structured and unstructured interviews** most appropriate. These interviews created an informal atmosphere and helped people to feel comfortable and eager to speak. It totally confirmed an idea that good interviews are those in which ‘the subjects are at ease and talk freely’ about their points of view (Bogdan, Biklen 1992: 97). Besides, in my conversations with random people this was the appropriate way to hold a conversation.

Without being guided by specific questions interviewees went through the key points of the whole process of restorative justice in Ukraine and also the process of its development. Then, by the means of semi-structured interviews I got a more detailed overview on several particular aspects concerning problems and challenges and possible ways to overcome them.

After my meeting with the representatives of the UCCG I had information on the whole process of introducing restorative justice to Ukraine from the year 2003 (when it was introduced to Ukraine) up to nowadays, i.e. 2010. Also interviewees shared their concerns about the process and spoke about difficulties experienced.

Besides, the interviews met my expectations to provide a more detailed picture of the processes happening in the society connected to the implementation of restorative justice (such as influence of the political situation, legislative aspects etc).

Triad interview was used for interviewing the mediators from Simferopol. I found, that this kind of interview was rather useful for interviewing people who are friends as they feel comfortable sharing their thoughts and discussing the issues all together. It creates informal atmosphere and encourages people to speak up. Such interviews ‘provide an opportunity for individual depth of focus but also allow participants to reflect on, and draw comparison with, what they hear from others’ (Ritchie 2003: 37)

Bogdewic (1999) argues that being **self-revealing** leads to a better relationship with the interviewees which results in obtaining detailed information. I found that self-revealing is an additional factor for a successful triad interview, especially when one is invited to interviewee’s home and shares a meal with them. My interviewees were interested in who I was and asked me a lot of questions about my studies, my research and me. I was happy to satisfy their curiosity. Telling the participants about my background, my studies and my project, talking on different topics, created a homely and relaxed atmosphere. Eventually our conversation naturally turned to mediation issues.

My interviewees and I come from the same country, same social level and have almost the same cultural and historical background. **The sharing same background** was suggested by Lewis (2003) as one of the factors of a successful interview. They argued that such factors as sharing different aspects of background and experience ‘may be helpful in enriching researcher’s understanding of participants’ accounts, ... nuances and subtexts’ (Lewis 2003: 65). I found that having the same cultural and historical background as my interviewees, speaking the same languages I could easily understand situations they described and realities they referred to. Besides, knowledge of the etiquette of the country and particular situations

(e.g. ways one should act if invited to people's home etc) played an important role in prepossessing my interviewees to an active participation in the interviewing process.

There was no need for me to keep up the conversation. On the contrary, I did not interrupt them not to distract them from the topic. I asked questions only in cases of natural pauses which did not occur often. '**Tranquility**' communicates interest and attention and is accompanied by a feeling of being comfortable with the interviewee and situation. And this is an important element of creating a good rapport (Legard et al 2003: 143).

Very important here was to stay objective and **not to make false assumptions** (Lewis 2003: 66) based on my own experience and attitude to particular issues of our discussions.

Chapter IV. FINDINGS AND INTERPRETATION

This research is a combination of information taken from a variety of sources.

Being a citizen of the country where I conducted my research brought up a challenge: how to separate ‘findings’ from the ‘common knowledge’ I had grown up with, such as high level of corruption, poor work of the law enforcement etc. Then I decided to find relevant articles to back up my own knowledge.

The findings on the criminal procedure and those covering legislative and law enforcement aspects are mainly based on publications in the law magazines and analysis of the Criminal Code and the Criminal Procedure Code of Ukraine. Besides, my interviewees also taken into provided me with necessary information as due to their occupation they have to deal with lawyers on an everyday basis and could advice what I should pay attention to; they also explained how things work and what is needed for a successful passing of a law. The parts covering the challenges of the restorative justice practitioners in their everyday routine are based on the interviews with the mediators, reflecting their perceptions and perspectives.

The chapter is structured according to the objectives of my research.

4.1 Development of Restorative Justice in Ukraine. Where is it now?

To begin with I should say that my initial expectations were ambiguous. From one side, when I started my research I thought I would find very few places where restorative justice was practiced. From the other, having done pre-fieldwork research I changed my mind as the Bulletin ‘Restorative Justice in Ukraine’ gave a pretty bright picture and named a number of places in different parts of Ukraine where restorative justice had been *introduced*. That is why I was eager to sort things out and make a clear picture of the state of affairs in this field.

Mediation in criminal cases is a new phenomenon, even though a similar option to resolve a conflict can be found in the Criminal as well as the Civil Code of Ukraine: both offer *reconciliation* of the parties as one of the possibilities to resolve the conflict or commute a

sentence. But, as I have mentioned in my Introduction chapter, there is a difference between offering the parties to reconcile (by their own means) and offering them a mediation procedure. The Criminal Code of Ukraine includes a number of Articles²⁶; according to which if parties reconcile in certain cases (those considered non-grave), if this is a first-time offence, the criminal case may be closed or punishment may be mitigated. The decision is made by court.

The project on implementation of restorative justice practice in Ukraine started in 2003. The pilot programme was run in Kiev by the UCCG. It succeeded in ‘establishing a working partnership with the judicial system, developing a mechanism for cooperation with the courts and training the cadre of specialists in victim-offender mediation’ (Fellegi 2005: 140; Koval: 2008)

The principle results of the project as for today are as follows:

1. There are several branches of the UCCG established in a number of cities where mediation has been practiced for several years.
2. Some educational establishments (e.g. National Academy of Procuracy) added for law students a number of overview lectures on restorative justice. A test handbook on Restorative Justice has been developed²⁷.
3. A number of seminars, training sessions and presentations, in particular for law enforcement agencies and social workers on restorative justice have been conducted. Such seminars aim to inform about the possibilities of restorative justice and the methods of its implementation into community (Koval: 2008)

Thus, it is obvious that a lot of work has been done since restorative justice made its first steps into the Ukrainian society. However, in most of the places it is still on the pilot stage, i.e. practiced on an occasional basis and fighting numerous problems that I will discuss

²⁶ The Criminal Code of Ukraine: Articles 45, 46, 66, 75, 82, 97. Also, Articles 103-105, 107 include certain prerequisites for mediation possibility (See Attachment 1).

²⁷ Zemlyanska V. Restorative Justice in the Criminal Procedure of Ukraine. A Handbook. Kiev: Zaharenko V.O., 2008 (In Ukrainian: Землянська В. Відновне правосуддя в кримінальному процесі України. Посібник. – К.: Видавець Захаренко В.О., 2008).

further in my thesis. Some of the centers have finished their activities due to the challenges and inability to solve them. There are numerous reasons for that. During my research I summarized the challenges on the way of implementing restorative justice.

4.2 Major challenges on the way to implementation of restorative justice

4.2.1 Lack of financing as a key problem of mediation implementation

One of the basic problems named by the Simferopol mediators was the **lack of sufficient financing**.

In the initial stage of the project the mediators who had been working under the UCCG were provided with an office and got a symbolic²⁸ refund in case of *successful* cases of mediation. If the parties did not come to an agreement, mediators' expenses were not reimbursed.

However, during the financial crisis of 2007 – 2010 the UCCG could not afford renting an office and the mediators lost the office that was mainly used to meet with people interested in mediation and willing to try it. Absence of an office led mediators to nearly stopping their activity. However, they proceeded despite of the difficulties. They started visiting people in their homes, sometimes travelling rather significant distances. Very often the pre-mediation as well as mediation meetings were conducted in the building of the local court. The mediators had to prepare the rooms for mediation (i.e. moving the tables and benches, cleaning if necessary) by their own means or together with the participants.

Absence of a meeting place led to decrease of people eager to try mediation. Together with a suspicious attitude towards restorative justice, a phenomenon never heard of by a majority of Ukrainians, people did not trust an organization which did not have an office and was targeting its potential parties in the street at the entrance to the court.

Some special brochures that could be distributed would have been of great help, but, again, that would need financing.

²⁸ Appr. \$10 per case.

One of my Simferopol interviewees said on this situation:

'We have literally to beg people to stop and talk to us. They think we have something in common with Jehovah's Witnesses and try to get rid of us without even listening. And if they get interested and want to meet, they ask where they could come to meet us and talk; we have nowhere to invite them. You should see their faces when we say that we don't have an office and this bench is the place to talk'.

Besides, even if people were willing to proceed it was unclear where the meeting should be conducted.

To organise a conference is a time and labour consuming process. Mediators are not only to find the perspective parties for a mediation procedure, but also talk to each of them explaining what restorative justice is, what are the benefits in taking part in it and what can be achieved. Not everyone can be reached by phone and mediators sometimes have to do several trips to meet people at home. Not everyone understands the benefits of restorative justice and some people may react rather aggressively, thinking that they are being involved in some untrustworthy affair. Especially this idea is very often present when people learn that they don't have to pay for it. The victim party is rather concerned about mediators having been bribed by the offender party.

Having heard about these problems, I would say that as the whole mediation system works primarily on a voluntary basis, a higher refund that at least would cover travelling expenses would be helpful. The general level of salaries in Ukraine is rather low and even paying for bus tickets to go to places where parties live (and very often they don't live in the very city of Simferopol but in nearby villages) would make a difference. A regular salary or allowance that would at least cover expenses would help.

Besides, all of the system of mediators in Ukraine would profit if there were a possibility of financing regular upgrading courses not only for newcomers in the field but also for experienced mediators who express a necessity to share experience and get support from others.

4.2.2 The problem of unchanged post-Soviet mentality and its influence on the process of implementation of restorative justice in Ukraine

*Today there remains a definite spiritual disfigurement
from Soviet radiation.*

(Borys Gudziak²⁹ for Kyiv Post: 2:12:10)

In a social research, historical and cultural backgrounds play an important role for understanding why events develop this and not the other way (IDRC). The social environment leaves its imprint on the way people think and act. And it is hard to bring changes into a society without changing the social context. That is why the historical and social backgrounds of Ukraine are the reasons for my preliminary concern about the possibilities of restorative justice practice in this country: though it is considered a democratic country, there is still much work to do. As I have mentioned in the theoretical part, restorative justice is a phenomenon which, due to its basic principles, can be successfully implemented in a *democratic society*.

Ukraine was part of the USSR from 1922 until 1991. The USSR was a country with a totalitarian regime, where such a phenomenon as restorative justice could not possibly take place within the legislative system, which was highly punitive.

‘Death solves all the problems. No man no problem’ – are the famous words by Joseph Stalin, who used terror as a pragmatic means to resolve social and economic problems. (Zarakhovich: 2008) This all-solving policy was usual 60 – 50 year ago. Also one of the ‘favourites’ of the epoch was a “Caucasian approach” to human mistakes: Problems and human mistakes were washed off with blood here and there, hundreds disappeared in vain, and no one dared to demand a fair trial. The majority of the population got used to obey commands without trying to analyze what and why was happening. All the rules and laws came from the top and were not to be discussed. There was a monologue of the leader. And there could be no chance for a dialogue. After the end of **the epoch of red terror and purges**, although some changes have started taking place, the system still stays highly punitive.

²⁹ Rector of the Ukrainian Catholic University in Lviv.

Fellegi (2003: 67) argues that because **the punitive ‘Gulag-mentality’** in the post-Soviet countries is still very strong, people see the ‘adequate’ response to rule-breaking in locking up the rule-breakers for as long as possible and increasing the capacity of the prison system. This and a number of other reasons made it extremely difficult for citizens to adapt to the new conditions of the democratic system and the possibilities it brings to people.

Besides that Fellegi notices that the **lost sense of a community** resulted in the ‘passivity of the civil society in which people accepted the status of a subordinate rather than a citizen’. (ibid: 71). I made the same observation during my fieldwork: I have noticed no sense of community, which often is regarded as needed for a successful implementation of restorative justice principles.³⁰ An exception is the small villages where people know each other. I believe that restorative justice would faster find its way there. Judging from the examples of successful mediation told me by mediators and published in the Bulletin ‘Restorative Justice in Ukraine’, the majority of successful³¹ mediation conferences took place in small villages.

Together with a highly punitive system the Ukrainian society has been exposed to the challenges of corrupted authorities and inflexibility of the authoritarian system. Today, together with the **old-school approach, discriminative attitude** of the legislative and executive systems to people of different levels of income exists on the everyday basis. Geselev (2010) argues that how people comprehend their country’s legislative and executive systems, i.e. their role in life of the society, plays an important role in the success of any innovations implemented into it. As restorative justice is an innovation that can be directly connected to the both systems, it gets the same attitude.

Besides, a huge number of swindlers appeared after the collapse of the USSR and made money on people’s grief, trust and naivety. They are still there and people suspect and distrust anyone offering them to try new things, especially ‘for no cost’. Mediation is designed as a non-profit procedure. For people it is hard to acknowledge that someone is willing to help them without any profit for him/herself. And disbelief comes not only from a common audience, but from law enforcement agencies as well.

³⁰ According to Carpentieri, see CONCEPTUAL AND THEORETICAL ORIENTATION.

³¹ When parties came to an agreement. Due to the lack of follow-up practice, it is unfortunately hard to learn if the agreement was fulfilled.

'We took part in a seminar on mediation with law enforcement workers. After having attentively listened to a mediator's speech on mediation and all its benefits, most employees of law enforcing agencies ask one and the same question: what is your profit from the case? And having heard that there is none, they don't believe, truly suspecting mediators for hiding some material benefits from mediation' (A mediator from Simferopol).

The mediators experience that people meet that the phenomenon of mediation with negative attitude and a lack of desire to try it. I talked to random groups of people to learn what they thought about restorative justice and mediation as a part of conflict resolution. After I explained what restorative justice and mediation were, people expressed disbelief in the possibility of a positive outcome in such situations³². Some of them were rather firm in their negative attitude to any outcome but **punishment for a criminal offence**. However, when I started giving examples of certain situations, like teenage burglary, some of the people change their mind. Nevertheless, even then they were sure that this approach could be useful in cases with first-time young offenders only.

It is 'the post-Soviet mentality that stands on the way of personal responsibility for problem solution and ways out of complicated life situations, without looking back to the State or somebody's opinion' (Kanevskaya: 2010).³³ Now, in democratic Ukraine a typical transformation of the social thought is based on a hope for a strong criminal repression with overvaluation of its inevitability, justice and timeliness. Also, there can be seen an overestimation of the role and possibilities of the criminal law in the regulation of social relations and adjustment to the presence in everyday life some amount of criminal activity (especially on higher official and administrative levels). There is also a certain level of ignorance of those crimes committed by officials (exception may be for dangerous and persistent criminals) (Bogatyryov: 2004).

At the time being the possibility of mediation is considered possible only in cases with juvenile offenders to give them a possibility to escape imprisonment. And the basic

³² I have been talking to various people around me, including friends and relatives, who were interested in my project.

³³ My translation

argument for that is often not a desire to understand and possibly forgive an offender, but that people know of the negative experience a person goes through while in prison and it is a common knowledge in Ukraine that once one has been to prison, ‘a school for criminals’, there’s no way back to normal life as a member of a community and society. ‘*The prison does not cure but mutilates*’ has been a rather known proverb in the USSR and, now, Ukraine. That is why people are eager to try and give a second chance to juveniles: it may reduce a number of ‘professional criminals’ in the society.

Thus, **the highly punitive system, authoritarian regime**, and after the USSR collapse **the corruption of the legislative system, post-Soviet mentality** led to **a disrespect of the legislation and the justice that it promises**. At the same time **the distrust to innovations** leads people to address conventional law enforcement agencies rather than try anything new.

The next problem is closely related to the one I have just discussed.

4.2.3 Absence of adequate response from the law enforcement agents and lawyers

In those countries where restorative justice is being practiced on a regular basis, it is usually the police who refer appropriate cases to mediators. That is why finding a common ground with militia³⁴ and persuade them to cooperate is so important for mediators.

However, among the most significant obstacles on the way to a successful introduction of restorative justice principles to the population mediators name inflexibility and unwillingness to cooperate of the law enforcement agents and lawyers.

Disbelief in new methods and means in general is not the only obstacle, which hinders them to proceed with mediation. To the mind of a criminal investigator, mediators are those who are able to ruin all his work from the aim of which is to prove the offender guilty and put him behind the bars. An appropriate punishment is the only right way after one has committed a crime. The mediation centre, in its turn, is seen as an organization open for corruption.

³⁴ Ukrainian police.

“When we come to the militia and ask them if there is any case possible for mediation they meet us rather aggressively. Once an officer yelled at us, saying that he spent weeks to ‘dig out’ evidences to prove that an offender was guilty, and when he finally got the evidence he needed the offender was let go because he was a relative of some politician. They [militia officers] hate the offenders and anyone who wants to help them for whatever reason. It happens because of the long history of corruption in law enforcement agencies and the impunity. Very few get interested in the possibilities of mediation.” (A mediator from Simferopol).

Such an attitude may be explained by the long experience of bribes and impunity of those who offer and accept them. Besides, in cases of successful mediation it happens that the victim party recalls the report on the offender; thus, the case is not going to court. This results in decrease of numbers of cases, which an investigator brought to court. This does not give him a credit. An investigator is considered successful if the suspect goes to court and then to prison.

As there is almost no information on mediation and the majority of the law enforcement agencies do not work with mediation, there is no information available for the population. The only way of spreading knowledge on restorative justice mediators see in personal appearance at the offices and in explaining to people what restorative justice and mediation is and trying to persuade them to try it.

The mediators find it rather difficult and stressful to work directly with the militia. The attitude towards them is negative and it is not concealed. Their experience includes long hours of waiting for someone to listen to them, negative attitude to mediation and disbelief in the usefulness of restorative justice. The same happens in the court:

“It is very seldom when lawyers are willing to listen to us and actually get interested in restorative justice concepts. More often we are met like someone who is ‘standing in the way’ and does not let people do their work. Lawyers think we are trying to get their jobs”.

As possible solutions to this problem the mediators see arrangements of relevant lectures and seminars for the law enforcement agents and lawyers and the presence and support of a known and respected person, e.g. a judge, who would himself believe in mediation and restorative justice and reassure people to try it and experience its value.

“It is rather important for this kind of innovation seminars that there were a respectful person among the key speakers who supports the idea of mediation and has already practiced it. To be perfect, it ought to be a well-known judge. As soon as you find a judge who is open to restorative justice principles, you may consider the problem of finding cases for mediation solved. If you have succeeded in mediation and have achieved good results, cases begin being handed to the mediation service on a regular basis.”

The mediators say that such support often leads to change of position of the militiamen³⁵ and other professionals dealing with criminal justice and encourages them to try new practice.

The problem with the militia that is experienced by the mediators has deep roots. The law enforcement lost people’s trust and respect and experiences numerous problems. One of the key problems of the Ministry of Internal Affairs of Ukraine is the absence of adequate law enforcement: very often militiamen do not possess any knowledge neither on people’s rights and freedoms nor on their own responsibilities. Sometimes they even don’t know that a detainee has a right for an attorney, argues attorney Tatyana Montyan³⁶. Vladimir Stretovich³⁷, sees the main difficulty in the unchanged edifice left from the Soviet times. A usual person is seen as a potential criminal who must be revealed and punished. The militia has not started seeing a citizen as a free person whoever s/he can be and **presumption of guilt prevails over anything**. Besides, activity of militia is not controlled properly by the society; that is why corruption and human rights violation are common here. According to Transparency International, **the most corrupted in Ukraine are judges, militia, politicians and civil servants**³⁸.

³⁵ *Militia* is the common term for Ukrainian police.

³⁶ “Uniform Horror” by Christina Berdinskiih in “Korrespondent” #1 (438), 2011.

³⁷ Substitute of the head of the Committee on Legislative Support for Law Enforcement; *ibid*

³⁸ Korrespondent, #49, 2010, p.32

According to the human rights advocates³⁹, the militia has turned into a punitive agency that is not trusted by the majority of the Ukrainian population. In the end of 2010 45.7% of respondents put the militia on the first place among human rights violators. That is why the words of Dmitry Grosman⁴⁰ are of no surprise: “In our country, if a person says ‘I want to serve in the militia’, it equals ‘I want to kill or beat someone, steal something’.

I would also like to point out that to Ukrainians Ukrainian penitentiary system makes an impression of being much softer comparing to e.g. the USA⁴¹, where the incarceration rate is among the highest in the world⁴² and death penalty still may be applied. Besides, corruption and the low level of crime detection rate (1.8%)⁴³ complete the picture of impunity in Ukraine.

Because of the major changes in the whole structure of the country, including collapse of the Soviet Union, economical instability and other problems following a country after it gained its sovereignty, the law enforcement system reform, though discussed, was not prioritized and still is being developed.

Thus, in Ukraine the law enforcement is seen by the population as a solely punitive organization with corrupted, bad-educated employees who not only fail to provide protection to the population, but they are human rights violators themselves. The militia as a law enforcing organization is barely controlled by society and sometimes is called a State within a State⁴⁴. Because of distrust to them there is absence of any kind of collaboration possible between the society and the militia that can be rather important for successful implementation of mediation.

There are countries (e.g. the USA and Canada) where ‘police not only divert cases to restorative justice programmes, in some they actually facilitate the restorative

³⁹ Ibid.

⁴⁰ The mentor of the Human Rights Activists group, *ibid*.

⁴¹ Because of sufficient amount of information about the US justice system coming from the news and movies Ukrainian people know some facts.

⁴² ^ "New Incarceration Figures: Thirty-Three Consecutive Years of Growth" (PDF). Sentencing Project. December 2006. http://www.sentencingproject.org/doc/publications/inc_newfigures.pdf.

⁴³ Gennadiy Moskal, ex-deputy of the Head of the Ministry of Internal Affairs (Korrespondent, #1 (438), 2011, p.20).

⁴⁴ *Ibid*, p.19

encounters⁴⁵(restorativejustice.org). The police are respected and their activity is highly appreciated by the citizens. In Ukraine where the situation is so complicated and in some aspects totally opposite, such collaboration of law enforcement with mediation services is hard to imagine.

In Ukraine there was number of lectures conducted for militia officers about the new means of conflict resolution, but there was no follow-up of the lectures and they still think that Ukraine is not the country where implementation of the mediation procedure in criminal cases will succeed:

“There were lectures conducted on the topic of restorative justice a couple of years ago, but that was it. Who is going to work with it? It is a time consuming process. Perhaps, it works in other [developed] countries, but I don’t think it will work in Ukraine .Our people are used to solve their problems by bribing: fast and fruitful.” (A militia officer).

Mediators see the prospective law on mediation as a door-opener which will make these obstacles if not disappear but decrease the intensity of counter standing.

4.3 Law on Mediation: The Key to the Door?

From the experiences of the mediators I interviewed it became obvious that the law enforcement system as well as criminal justice system were not ready or willing to accommodate the new phenomenon of restorative justice easily. That is why mediators consider a corresponding law that would make mediation “written” and, thus, *existing and legal*, to work as a door-opener and make the work of mediators much easier.

The question of the Law on Mediation also was discussed at the UCCG. They have developed a draft of the Law on Mediation which would make mediation official and it would be offered to proper⁴⁶ cases as a part of the legislative procedure. This would also solve the problem of breaking the rule of the ‘secrecy of investigation’. Besides, mediators

⁴⁵ Should be noticed, though, that *police-facilitated conferences* have supporters as well as foes.

⁴⁶ Considered as such by the judge: according to the obstacles, cases of little or medium gravity (crimes punished by up to five year imprisonment, according to the Criminal Law of Ukraine, e.g.: burglary, infliction of bodily injury or harm etc).

would not work on a voluntary basis as the state would make this position official and there would be salary paid from a municipality or state budget.

In December, 2006, the first part of the project ‘Support of the Reform of Criminal Law of Ukraine: Introduction of Mediation to the Prosecutors’ Department’ began, that for the first time introduced prosecutors to the mediation process in criminal cases. According to the information provided by the Bulletin of Restorative Justice in Ukraine (2008) there was much interest of law enforcement agents, particularly prosecutors, in the possibility of mediation in criminal cases. The second part of the project ‘Support of the Reform of Criminal Law of Ukraine: Introduction of Mediation’ aimed at development of a solid base for introduction and popularization of the pre-court mediation in criminal cases within the criminal law.

Mediators consider that the best way to promote mediation into the Ukrainian society is through its legislation: it will open doors, give financial support and make restorative justice trustworthy in the eyes of potential mediation participants. The law on mediation, however, would bring up a number of problems which are currently not taken into consideration.

For example, at the moment nobody pays attention to the educational background of mediators. The draft of the law first was developed by the UCCG in 2007 and made this position limited to people of 25 year old or older, who have complete higher education and who have minimum two years of working experience in the field of social science, education, psychology or law⁴⁷. This project law got its supporters as well as foes. Main points for disagreement and discussion were the minimum age of the mediator and his/her education background. In 2010 the UCCG developed a new project Law on Mediation⁴⁸ which takes into account all the propositions offered by mediators and restorative justice supporters.

At the moment, there are minimum four drafts of the law on mediation, developed by the mediation centers and the Ministry of Justice of Ukraine. They aim to include all the

⁴⁷ Draft of the Law on Mediation of 2007: Chapter III, Article 18. (Bulletin “Restorative Justice in Ukraine”, 2007, No.1).

⁴⁸ See Attachment 2.

possible details and questions that may appear before, during and after mediation in various spheres, including criminal, civil, economic etc. (Kanevskaya: 2010) It has already been coordinated with the other ministries, the Higher Court of Ukraine and the General Prosecutor of Ukraine.

There is a major concern that the state will not be willing to let go the control over the mediation procedures. It is very important to evaluate and minimize all the risks of implementing mediation. Some lawyers predict abuse of the legal procedure and prolonging of the terms of case trials in courts (ibid).

Also, there is a number of law firms that see mediation as a possibility of increasing the number of services provided. Some of their employees have already taken necessary courses in Ukraine and abroad. However, there's no big demand on mediation services in Ukraine at the moment. Some of the lawyers use some elements of mediation when working with their clients. It is a part of the service they provide. The main difficulty here lies in the business processes of the legal process and who profits from it. It means that the possibility of the case being passed from an attorney to a mediator is very low. That is why the existence of independent organizations as the Ukrainian Centre for Common Ground is so important: then lawyers will be able to refer to mediators' services from a neutral organization (NGO) (ibid).

At the moment of my research none of the drafts of the Law on Mediation has been presented to the Parliament for consideration. However, I would suggest a rather positive prognosis especially considering that the very word "mediation" has already been used in other legislative acts, plans of work in the legislation of different state structures and on the reform of the criminal justice system of Ukraine.

4.3.1 Secrecy of investigation

Speaking about importance of legislative support, it is important to remind about the principle of *secrecy of investigation*. I am making an accent on this issue as it is a very important and sometimes crucial factor in the willingness of law enforcement agents to collaborate with mediators.

By default, nobody should get information on a criminal case except those who are directly dealing with it, i.e. militia, investigators and court employees (advocate and prosecutor). Giving any information to mediators would be breaking of this rule which may lead to serious consequences for those who did it.

As mediators say, usually they have to fish out people in front of the court and inform them about mediation. A more easy and productive way is to find a judge who is open to new ideas and try to persuade him to try mediation. Collaboration with a judge who supports restorative justice principles and is willing to collaborate with mediators facilitates the process. In this case the judge is the one who takes the responsibility and provides mediators with cases and information, such as phone number or address of the offender and the victim, so mediators may contact them. Or even he contacts the offenders himself and tells them about the mediation possibility. There is no need to say that this is a big responsibility both for mediators and the judge, while the last one may jeopardize his position in case of a complain.

The mediators have experienced the following situation: If investigators consider a case of a low importance, also committed by minors and they know it will probably be closed in the court they just do not start the criminal action. These are the cases where a mediator would achieve great results. However, knowledge about having been let go by the police and the investigator usually do not encourage the offender to take part in mediation.

The Law on Mediation is expected to solve this problem by making it legal to open necessary information for mediators and/or organizations that facilitate mediation procedures.

4.4 Restorative justice: on the way to legitimization

There is an opinion that restorative justice may make its way from a low level (practice by non-governmental organizations) up to being legitimized and institutionalized. The system would reform itself and allow space for restorative justice, particularly, because the Criminal

Code already does allow reconciliation that would influence the trial in certain (Geselev: 2010).

On the other side, judging from the experience of practitioners of restorative justice in Ukraine, it is hard to popularize mediation only by the means of mass media and PR. If mediation will not get State support, it will be hard to expect its proliferation.

Vlasova (2010) considers a possibility of applying the Belarusian⁴⁹ experience in Ukraine which proved to be working: it is the court that should advise people to mediation. There is a need of a trusted medium between common people and the new phenomenon. The role of this medium is taken by the very court. Court mediation may be helpful to introduce mediation both to the society and lawyers.

In 2004 under the Ministry of Justice the interdepartmental working group was founded. The aim of the group was to form a governmental Conception of legal regulation of the application of the restorative justice programmes to the criminal justice of Ukraine. The need for a plan that would display the possibilities of application of restorative justice was clear. As any change of the legislative system in Ukraine is a rather complex process, the legitimizing of restorative justice as a part of criminal system reform should be worked on all the levels of legislative and executive powers: President – Cabinet of Ministers – Ministry of Justice – State Department of Ukraine for the Execution of Punishment – Ministry of Family, Youth and Sports Affairs – Ministry of Internal Affairs and National Academy of Internal Affairs – Parliament – Supreme Court – Academy of Courts of Ukraine – General Prosecutor Office (Kanevskaya: 2008).

In the ‘Ukraine – EU plan’ there are two very important projects ‘On Mediation (Reconciliation)’ and ‘On Changes of Some Legislative Acts of Ukraine Regarding Mediation Procedure (Reconciliation)’. These projects and their fulfillment are on a priority list of the Ministry of Justice’s activities (ibid).

⁴⁹ When discussing possibilities of institutionalizing restorative justice in Ukraine it is common to look at the experience of neighboring Belarus or Russia due to the similarities in legislation and law enforcing procedures. In Belarus restorative justice is on the same stage as in Ukraine.

A number of presidential decrees⁵⁰ can be named as far-reaching factors in this process. The President designates the Ministry of Justice to develop reform projects of the juvenile justice and confirms the conception of Reforming the Criminal Justice System of Ukraine. The conception points out the necessity of spreading restorative justice procedure and the development of a special procedure of juvenile justice which would take into consideration rights and interests of minors. With these the Conception of Reforming of the Criminal Justice of Ukraine was confirmed. A significant point of the Conception is the necessity of spreading restorative justice procedure and development of a special procedure of juvenile justice which would take in to consideration rights and interests of minors. In the *Decree on Conception of Development of Jurisdiction for Maintenance of Fair Trial in Ukraine According to European Standards* alternative forms of jurisdiction, such as mediation, are encouraged (ibid).

In 2006 A Complex Programme of Law Breaking Preventative Measures for the years 2007 – 2008 was passed, which aimed at preventing conditions influencing recidivism rates, such as providing human rights protection, and the creation of conditions for legislative and educational work among the population. Also, the programme takes into account work with juvenile offenders. In Regulation of January 16th 2008 #14 of Confirmation of the Programme of Cabinet of Ministers of Ukraine ‘Ukrainian Breakthrough: for People, not for Politicians’ in Chapter 2.3 the Ukrainian Government affirms the necessity of creating and institutionalizing the juvenile justice system as one of the necessities of a perfect legislative system in Ukraine (ibid).

The Prosecutor General notices that one of the main problems in the use of restorative justice procedures is a conservative attitude of prosecutors: they are not oriented towards an alternative solution of such cases, and do not initiate it. As a result, the reconciliation before trial does not happen, and if it happens, it is only due to the initiative of the parties. And this only does not help the crime prevention in general. A study of various criminal cases in ten

⁵⁰ *Decree on Means of Providing Protection of Children Rights and Lawful Interests of May 5th, 2008. #411/2008; Decree on Decision of Council of National Security and Defense of Ukraine of April 8th, 2008. #311/2008 ‘On the Process of Reform of the Criminal Justice System and Law Enforcing Agencies’ of February 15th, 2008; Decree on Conception of Development of Jurisdiction for Maintenance of Fair Court in Ukraine According to European Standards (#361/2006 of May 10th, 2006).*

regions of Ukraine showed a big number of cases where the prosecutors ignored the change of attitude between the victim and offender: though there were data about restoration of relationships between the parties, the cases were sent to trial not for closing, but for further processing and passing of a sentence (ibid).

Thus, the process of legitimation is a very long process involving a lot of bureaucracy and relying on willingness to cooperate of authorities responsible for passing laws, starting with the Ministry of Justice and ending with the President. The open question is: how long time will pass before the Draft of the Law is brought up for discussion in the Parliament; and how much time will it take to start practicing it on a regular basis.

4.5 Summary and analysis of the findings

Having analyzed the information I obtained during my research I came to the following conclusions:

1. Restorative justice in Ukraine is developing slowly and has not come a long way since the UCCG introduced it as a pilot project in 2003. A number of activities have been conducted to promote restorative justice and mediation as a means of conflict resolution, such as conferences, seminars and publishing a hand-book on restorative justice. A few mediation centers have been established in different places in Ukraine. However, all these actions are **not systematic and are accompanied by numerous problems**. The adoption of the Law on mediation should be seen as a part of a general reform of the legislative system of Ukraine. Any reform is a long way between signing an appropriate document and its practical implementation. Such a reform also implies changes, often rather significant. These may need a change in the way of thinking and comprehending of the legislative system. Thus, **the Law on mediation will insist on practicing restorative justice. However, it does not guarantee the necessary cooperation of the responsible institutions.**

Among problems named the most accentuated were as follows: **lack/absence of financing, absence of follow-up training sessions** for practicing mediators, a **post-Soviet mentality** of the population which results in distrust in mediators and an **absence of support from the**

law enforcing agencies. I see the main reason why mediation has not been legitimized by today in the political instability of the country and constant process of the sharing of power and money of the ‘civil servants’⁵¹. Ukraine has become famous due to regular fights and blockades of the Parliament. The restorative justice implementers are looking forward to the Law on Mediation that has already been introduced to the Parliament. Making mediation ‘legal’ may help to overcome a number of obstacles and increase mediation practices. However, while there is no proper working condition in the Parliament, this Law has a low chance to be passed as ‘it is not considered of first importance’, compared with, for example, budget plans, gas price regulations etc, which are of immediate importance (R. Koval: 2009).

2. Mediators think that passing the Law on mediation will open the doors and make law enforcement agents more cooperative. I share this opinion. Together with that, however, the **law on mediation may bring up a number of issues** which are not considered important at the moment (for example, educational background of mediators).

3. Though the Ukrainian Criminal Process is not victim oriented and is far from international standards of legal procedures there are **good prerequisites** in the legislative system of Ukraine, such as a possibility of reconciliation in the corresponding Articles in the Criminal Code of Ukraine. There would be not much of significant changes in the Code. I would suggest adding a paragraph to the Articles that would suggest the same options “on the basis of the results of the mediation procedure/ the agreement on the results of the mediation”.

4. There should be more educational programmes, such as well-structured and systematic lectures and seminars, for militia and lawyers where those professionals who have already tried and liked or disliked it will tell about benefits and restrictions of restorative justice in a neutral manner. Still, such problems as a high level of corruption and a low qualification of the Ukrainian militia will not disappear by themselves and will cause further problems.

Judging from experiences of other countries, for example, Canada, a high level of cooperation between the population and law enforcing agents is possible. Among various

⁵¹ In Ukraine the term ‘civil servants’ is usually used in a sarcastic manner (my observation).

types of restorative justice programmes practiced there, there are *sentencing circles* that gather the victim, offender, family, and community members with a **judge, lawyers, police,** and others to recommend to the judge what type of sentence an offender should receive⁵². I see such partnership and positive attitude as an important factor in introducing new means of justice. Ukraine has a long way to go to come to such a level of cooperativeness.

There is a number of research papers written and articles published on the cooperation between law enforcing agencies and restorative justice centers and mediators. However, judging from the interview with the mediators, this cooperation is minimal and I have heard more complains than stories of successful cooperation. Everything solely depends on flexibility and openness to the new methods and a desire to help by separate individuals.

5. Mediation is not widely used as the majority of **people are not aware of its existence** and law enforcement agents do not inform them about it due to either their own ignorance or negative attitude to the phenomenon. I would expect positive results and higher awareness from mass education of people, by means of mass media and information in educational establishments, about restorative justice and its benefits. There is a need of lectures that would aim common people. Lectures in schools and universities would be of help. It may be useful to name mediation by a Ukrainian word, which will make sense for the consumers⁵³ (Vaschenko: 2010).

6. There is **no practice of the follow-up** of the lives of the participants of mediation. Thus, we do not have all the necessary data for a precise estimation of the results of restorative justice use in Ukraine.

7. One of the essential tasks on the way of popularizing restorative justice **is attracting the attention of the local authorities**. As soon as some of the local power holders get interested in mediation, it receives a strong push and starts developing in this or that region. This statement is strongly supported by the mediators from the Crimea. There should be a strong non-stop work on providing restorative justice into the society. There are measures that could help to ensure the positive results. For example, preparing text books for the

⁵² The Canadian Resource Centre for Victims of Crime

⁵³ Now, the term “mediation” is translated as “*mediatsiya*”.

students of the Law Faculties; introducing school mediation.

8. The role played by non-governmental organizations and restorative justice enthusiasts in the proliferation of restorative justice cannot be underestimated and is an important pre-requisite for its further implementation and legitimization.

9. In Ukraine, if not supported by law, this kind of action as restorative justice will sooner or later come to a dead end. Thus, in this particular case legitimization plays a key role in the restorative justice promotion as people with a post-Soviet mentality tend to trust and start practicing a phenomenon fixed by Law rather than the one offered by a non-profit NGO without legislative background.

10. Being a way of expressing democracy powers, which the society is entitled to, mediation in Ukraine can take a big part of court cases and make the social protection of the citizens better (Kanevskaya V.: 2010). Besides, restorative justice can be an efficient tool for democracy building in Ukraine, where democracy is still on the developing stage: it encourages community strengthening, creative thinking, active voluntary participation of population in social life, tolerance of diversity of cultures and backgrounds. The more people get acquainted with restorative justice and its principles, the more will benefit democracy. Even making a decision to participate or not in mediation, having analyzed its benefits, is already a big step away from a usual obedience to whatever is told by authorities.

11. Restorative justice in Ukraine is setting a goal to apply mediation to all kinds of courts (not only Criminal, but Administrative, Civil etc). It should be noticed that despite theoretical research, which implies to use mediation for people at different ages in Ukraine the process of restorative justice at the moment is considered applicable solely to juvenile offenders. Possibilities of practicing restorative justice for adults is still on a theoretical level in Ukraine but there are mediators who are willing to try reconciliation for adult offenders and their victims and this initiative should be fully supported.

12. Despite optimistic articles published in the Bulletin 'Restorative Justice in Ukraine' I have got an impression that the development of restorative justice has slowed down. Though there are a lot of places all over Ukraine that have started practicing restorative justice, very

few of them keep doing so for a long period of time. I have been following the publications of the UCCG and have noticed that the Bulletin ‘Restorative Justice in Ukraine’ has been limited to only one edition per annum (in 2010), though they started from four editions a year (2005) which in 2009 was reduced to two editions⁵⁴. The information published has not changed much during the time I have been working on my project⁵⁵. The information provided by some publications is more optimistic than the impression I got from my fieldwork. I have come to the conclusion that for a better view of the process it would be great not to rely on the information provided by the articles, but to go to all the places where restorative justice is practiced to be able to talk to the people directly working in the restorative justice field while the articles give a theoretical view on the state of affairs.

The research fully confirmed my concerns about possible difficulties in the restorative justice implementation. Besides, there was one more problem they experience that I did not expect when just starting my research: lack or absence of financing. I expected that sufficient amount of financing would come from the UCCG. However, these people are so dedicated and so willing to help others that they work despite all the challenges, for free and the only thing they ask is a minimal non-material support, such as a system of follow-up trainings for mediators and presence of an experienced supervisor who would support and answer numerous questions which appear during or after the conferences. There is a lot to do in the field of restorative justice in Ukraine but there are many people who are interested in it and are going to continue working in the direction of restorative justice legitimization and institutionalization.

⁵⁴ The number of pages was unchanged.

⁵⁵ For two years.

Chapter V. CONCLUSION AND FURTHER DISCUSSION

The aim of this research was to explore the process of implementing of restorative justice in Ukraine and see how this process intertwines with the legislative, law enforcing and conventional justice systems of the country.

The objectives of the research were as follows: 1. To learn about and describe the process of development of restorative justice in the Ukrainian society; 2. To identify and analyze challenges on the way of restorative justice becoming a common practice in Ukraine and consequently, what are the possible ways to overcome them; 3. To make a study of the relative legislation, law enforcement and criminal justice systems of Ukraine and a prospective place for restorative justice practice in it.

To achieve the objectives of my study I conducted a number of interviews, analyzed the influence of history driven peculiarities of the Ukrainian society on the process of the restorative justice implementation and studied specialized literature, including articles on restorative justice, the Criminal Code of Ukraine and articles on legislation and law enforcement in Ukraine.

The findings showed that the process of implementing restorative justice into the Ukrainian society has passed its initial stage and there has been conducted a number of activities that promote mediation, such as lectures and seminars on possibilities of mediation, courses for mediators, created web-sites and publication of articles, published limited editions of books and brochures on the topic of restorative justice, prepared drafts of the Law on Mediation. However, these activities have a sporadic nature and lack system and consistency.

The socio-evolutional and socio-subjective factors (Pen: 2009) among which there are an absence of sufficient financing, low cooperation of militia and lawyers, hard to change mentality of the people of a post-Soviet country, extended the process of restorative justice implementation. The four main groups of problems that may arise on the way of implementing restorative justice (Fellegi: 2003), i.e. legislation, funds, insufficient awareness, organizing and training of professionals, are clearly seen in Ukraine. However, the last two group of problems, ‘awareness of governments and practitioners of the criminal justice system as well as of the general public’ and ‘training and organizational matters in

the field of restorative justice' (ibid), are the easiest to overcome as there are enthusiastic people willing to do this job voluntary and who need minimal support. When the first two groups of problems are solved, it will lead to a jump in the implementation of restorative justice in Ukraine. Yet, taking into consideration the current political instability in the country it makes it difficult to predict the further development of the process as State support is needed to legitimize and institutionalize the phenomenon.

Thus, the hypothesis of my research **Restorative justice can be implemented in Ukraine, however, to achieve positive results there is a need of cooperation between the State (legislation, law enforcement and conventional justice) and non-profit actors, enthusiasts promoting the pilot project of restorative justice** has been proved and the objectives have been achieved.

5.1 Final remarks

When working on my research my view of the possible development of restorative justice in Ukraine was changing all the time: depending on the information I was working with. It went from skeptical to optimistic and vice versa. Now, having done my research, I still cannot give an unambiguous prediction on the way restorative justice will develop in Ukraine.

When I was in the middle of writing my thesis, the image of Ukraine as a democratic country was stable and positive. Analysts noticed that Ukrainians had become more aware of their political rights. The notion of the term “freedom of speech” has more sense in Ukraine than, for example, in the neighbouring Russia and Belarus: *People arriving in Ukraine from other parts of former Soviet Union often remark that the country feels more free and democratic than some other countries in the region*⁵⁶.

However, at the moment the Ukrainian society goes through a number of challenges including consequences of the economic crisis and inflation, which in their turn lead to rising criminal activity and inability of the law enforcement to handle the situation.

⁵⁶ Leigh Turner for Kyiv Post: 9.12.10.

There are concerns that the democracy in the country is under threat. The current President⁵⁷ of the country is considered to be ‘systematically eroding human rights and democracy in Ukraine and reverting to a familiar pattern of post-Soviet autocracy’⁵⁸. Among the facts of the biggest concern are as follows⁵⁹: strong pressure on opposition and mass media; change of the Constitution of Ukraine which gave the President independence from the Parliament majority⁶⁰; failure to adopt the already prepared legislative anti-corruption package; unknown sources of a huge fortune of the President’ family and the key leaders of the government while common Ukrainians get low salaries, etc. This increases distrust of the population with the authorities and innovations offered and challenges all the achievements and makes it hard to predict further democratic development in the country.

This way developing restorative justice, being a practice of a democratic society and exercising democracy principles, may even be seen as a challenge to the state policy and its authority.

Thus, even if the Law on Mediation is finally adopted, while democracy in Ukraine is under threat the problems of distrust of the population to the authorities, in particular to the legislative and executive powers, as well as judicial one, will eventually become even more acute than they are at the moment. And this will make the work of restorative justice implementers harder.

5. 2 New Challenges And Proposals For Further Research

A number of questions and ideas appeared in the process of doing my research. They would be interesting to investigate and need an individual in-depth research.

1. Is restorative justice possible with homeless / [young] people coming from underprivileged families?

There is statistical data that now there are 30 thousand stray children only in the city of Kyiv. One must not be Nostradamus in order to predict that in five years they will become 30 thousand

⁵⁷ Victor Yanukovich, the President of Ukraine since February, 2010.

⁵⁸ Alexander Feldman, ‘Don’t be quick to judge the new Ukraine’. OpenDemocracy.net 28.10.2010

⁵⁹ ‘30 Reasons That Make It Hard to Trust the Current Government’. Korrespondent, #5, 2011.

⁶⁰ Now he can himself form the Cabinet of Ministers and dissolve the Parliament, etc.

criminals. We must now build prisons to accommodate these candidates (G. Radov⁶¹).

According to McAuley(2008) and to my personal experience from Ukraine, the main reasons for juvenile crime are poverty and social reasons, such as dysfunctional family and indifference of the State to such children. The necessity to survive is a trigger for the children to commit a crime. One of the major challenges (at least in post-Soviet countries) for the practicing of restorative justice is those crimes (starting from stealing and finishing with murdering) which are committed by **homeless people/children. Is mediation in such cases possible at all?**

Criminal justice is based on the principle that everyone is responsible for his or her own behaviour and deeds. There is a visible lack of rules that would deal with children, committing crimes, especially under such circumstances as hunger, homelessness, abused by adults etc. There is no way other than a criminal way for most of these people to survive as the country does not provide necessary social protection and support for them.

When we speak of juvenile crimes in Ukraine, people first think of all the homeless and children from the underprivileged families. The way out of this situation can be found only with state support which would give an option for the underprivileged to survive. And to attempt to practice restorative justice in these cases may well be considered an illusion.

2. Developing school mediation

Important places for breaking laws are schools and most of them are not reported to the law enforcing agencies as the misdemeanors are committed by minors and are not considered of great importance. Specialists from the UCCG notice that principles of restorative justice have a better reflection in young minds. An encouraging sign is that children are very interested in restorative justice and voluntarily take part in special training sessions of school mediation arranged for them by the UCCG.

⁶¹ First vice-rector of Kyiv Institute of Interior.

The importance of tracking minor offences, committed both by minors and adults, and hand them over to mediators should not be underestimated either. The youth who grows up in the system where a lot of cases are left without attention get an impression that impunity will continue until they are adults.

Modern people do not fully understand the idea of restorative justice. Effective participation requires a degree of moral maturity and empathetic concern that many people, especially young people, may not possess. Most people do not have a mental map of what this justice form looks like, how they are to act in it, nor what the optimal result is. (Daly K. : 2002)

The importance of developing restorative justice practices in schools is obvious. To my mind, a safe community may well take its origin from the safe school community as children learn non-violent management of conflict situations. And it is a great advantage that children show response to the restorative justice approach. It gives hope that new generations who grow up familiar with restorative justice principles will be more responsive to this innovation and support it.

3. Institutionalization of restorative justice in Ukraine

Daniel W. Surry argues that implementation should lead into institutionalization, also called "routinization" or "continuation." The ultimate criterion for a successful innovation is that it is routinely used in settings for which it was designed (Surry: 2002).

Indicators of Institutionalization (Eiseman, Fleming and Roody: 1990),

1. Acceptance by relevant participants--a perception that the innovation legitimately belongs;
2. The innovation is stable and routinized;
3. Widespread use of the innovation throughout the institution or organization;
4. Firm expectation that use of the practice and/or product will continue within the institution or organization;
5. Continuation does not depend upon the actions of specific individuals but upon the organizational culture, structure or procedures;

6. Routine allocations of time and money.

John Blad, in his turn argues that institutionalization includes ‘a number of dynamic components: externalization, habitualization, legitimation and internalization’ (Blad, 2006:94). I would disagree with Blad’s institutionalization phases as non applicable to a Ukrainian reality. Here I would put legitimation before habitualization, as the legitimation would make the door opener and would encourage habitualization of the phenomenon. How long will it take to institutionalize restorative justice in Ukraine and what steps will the process follow?

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ATTACHMENTS

ATTACHEMENT 1

Criminal Code of Ukraine⁶²

(This Code enters into force on September 1, 2001)

Chapter IX. DISCHARGE FROM CRIMINAL LIABILITY

Article 45. Discharge from criminal liability in view of effective repentance

A person who has committed a minor criminal offense or medium grave reckless offense for the first time shall be discharged from criminal liability if, upon committing that offense, he/she sincerely repented, actively facilitates the detection of the offense, and fully compensates the losses or repairs the damage inflicted.

(Article 45 as amended by Law No 270-VI (270-17) of 15.04.2008)

Article 46. Discharge from criminal liability in view of reconciliation of the offender and the victim

A person who has committed a minor criminal offense or medium grave reckless offense for the first time shall be exempt from criminal liability if he/she reconciled with the victim and compensated the losses or repaired the damage inflicted.

(Article 46 as amended by Law No 270-VI (270-17) of 15.04.2008)

Chapter XI. IMPOSITION OF PUNISHMENT

Article 66. Circumstances mitigating punishment

1. For the purposes of imposing a punishment, the following circumstances shall be deemed to be mitigating:

⁶² Articles that are relevant to my research. The English translation by Legislation Online: <http://www.legislationonline.org/documents/action/popup/id/16257/preview>

- 1) surrender, sincere repentance or actively assistance in detecting the offense;
 - 2) voluntary compensation of losses or repairing of damages;
 - 2-1) providing medical aid of other aid to the injured person after committing the offense;
 - 3) the commission of an offense by a minor;
 - 4) the commission of an offense by a pregnant woman;
 - 5) the commission of an offense in consequence of a concurrence of adverse personal, family or other circumstances;
 - 6) the commission of an offense under influence of threats, coercion or financial, official or other dependence;
 - 7) the commission of an offense under influence of strong excitement raised by improper or immoral actions of the victim;
 - 8) the commission of an offense in excess of necessary defense;
 - 9) undertaking a special mission to prevent or uncover criminal activities of an organized group or criminal organization, where this has involved committing an offense in any such case as provided for by this Code;
2. When imposing a punishment, a court may find circumstances, other than those specified in paragraph 1 of this Article, to be mitigating.
 3. If any of the mitigating circumstances is specified in an article of the Special Part of this Code as an element of an offense, that affects its treatment, a court shall not take it into consideration again as a mitigating circumstance when imposing a punishment.

(Article 66 as amended by Law No 270-VI (270-17) of 15.04.2008)

Chapter XII. DISCHARGE FROM PUNISHMENT AND FROM SERVING IT

Article 75. Discharge on probation

1. Where, in imposing a punishment of correctional labor, service restriction for military servants, restraint of liberty, or imprisonment for a term not exceeding five years, a court, having regard to the gravity of an offense, the character of the culprit and other circumstances

of the crime, finds that the convicted may be reformed without serving the punishment, it may order a discharge on probation.

2. In this case, the court shall order to discharge the convicted person from serving the sentenced imposed on the condition that, during the probation period, this person commits no further criminal offenses and complies with the obligations imposed on him or her.

3. A probation period shall be from one to three years.

Article 82. Commutation of the remaining part of a sentence

1. A court may commute the remaining part of a sentence of restraint of liberty or imprisonment. In this case, a more lenient punishment shall be imposed within the terms provided for by the General Part of this Code with regard to a given type of punishment and may not exceed the remaining part of the original sentence.

2. Where the remaining part of a primary sentence is commuted, the sentenced person may also be discharged from the additional punishment of deprivation of the right to occupy certain positions or engage in certain activities.

3. Commutation of the remaining part of a sentence may be applied if the sentenced person displays signs of rehabilitation.

4. The remaining part of a sentence may be commuted after a sentenced person has actually served:

1) not less than one-third of the term imposed by a court for a minor or medium grave offense, and also for a reckless grave offense;

2) not less than one-half of the term imposed by a court for an intended grave offense or reckless special grave offense, and also where that person had previously served a sentence of imprisonment imposed for an intended offense but committed another intended offense before the criminal record was canceled or revoked and had been sentenced for that offense to imprisonment;

3) not less than two-thirds of the term imposed by a court for an intended special grave offense, or of the term imposed on a person who had been previously paroled but committed another intended offense before the expiry of the remaining part of his/her sentence;

5. Persons, whose sentence was commuted, may be paroled under rules provided for by Article 81 of this Code.

6. If a person commits another offense while serving a commuted sentence, a court shall add the remaining part of the commuted sentence to the punishment imposed for any new offense according to the rules provided by Articles 71 and 72 of this Code.

Chapter XV. SPECIFIC FEATURES OF CRIMINAL LIABILITY AND PUNISHMENT OF MINORS

Article 97. Discharge from criminal liability with imposition of compulsory reformation measures

1. A minor who committed a minor offense or a medium grave reckless offense for the first time, may be discharged from criminal liability, provided that his reformation is possible without punishment. In such cases, a court shall impose compulsory reformation measures provided for by paragraph 2 of Article 105 of this Code upon the minor.

2. A court shall also apply compulsory reformation measures provided for by paragraph 2 of Article 105 of this Code to a person, who committed a socially dangerous act that classifies as an act provided for by the Special Part of this Code, before he/she attained the age of criminal liability.

3. Where a minor, who committed a criminal offense, evades compulsory reformation measures, such measures shall be canceled and he/she shall be criminally prosecuted.

(Article 97 as amended by Law No 270-VI (270-17) of 15.04.2008)

Article 103. Imposition of punishment

1. When imposing a punishment on a minor, a court shall consider, in addition to the circumstances provided for by Articles 65 to 67 of this Code, the conditions of the person's

living and upbringing, the influence of adults, level of his/her development and other specific features of his personality.

2. The final punishment of imprisonment imposed on a minor by cumulation of offenses or punishments may not exceed fifteen years.

Article 104. Discharge from punishment on probation

1. Discharge from punishment on probation shall be applied to minors pursuant to Articles 75 to 78 of this Code and subject to the provisions of this Article.

2. Discharge on probation may only be applied to minors sentenced to arrest or imprisonment.

3. Probation shall be fixed for a period of one to two years.

4. When discharging a minor on probation, a court may place this minor under care and supervision of another person, upon consent of the latter to undertake such obligation.

(Article 104 as amended by Law No 270-VI (270-17) of 15.04.2008)

Article 105. Discharge from punishment subject to compulsory correctional measures

1. A minor, who has committed a minor or medium grave offense, may be discharged from punishment by a court, if it is found that the punishment may be discontinued due to the minor's genuine repentance and further irreproachable conduct.

2. In this case, the court shall impose the following correctional measures on a minor:

1) warning;

2) restriction of leisure time and special requirements to a minor's conduct;

3) placing a minor under supervision of his/her parents or foster parents, or school teachers or colleagues upon their consent, or other individuals at their request;

4) obliging a minor, who has attained 15 years of age and possesses any property, money or has any earnings, to compensate any pecuniary damages;

5) placing a minor in a special educational and correctional institution for children and teenagers until the minor's complete correction but for a term not exceeding three years. Conditions of stay in and procedure of discharge from these institutions shall be provided for by law.

3. A minor may be subjected to several compulsory correctional measures provided for by paragraph 2 of this Article. The duration of compulsory correctional measures provided for by subparagraphs 2 and 3 of paragraph 2 of this Article shall be determined by a sentencing court.

4. A court may also find it necessary to appoint a tutor for a minor pursuant to the procedures provided for by the law.

Article 107. Parole

1. Parole may be applied to persons who serve their sentence of imprisonment imposed for an offense crime committed at the age under 18, regardless of the gravity of the offense.

2. Parole may be applied, if a person displays decent behavior and diligence in work and studies as a proof of his/her reformation.

3. Parole may be applied to persons, who committed an offense at the age under 18, after they have actually served:

1) not less than one-third of the term of imprisonment imposed by a court for a minor or medium grave offense, and also for a reckless grave offense;

2) not less than one-half of the term of imprisonment imposed by a court for an intended grave offense or reckless special grave offense, and also where that person had previously served a sentence of imprisonment imposed for an intended offense but committed another intended offense at the age under 18 before the conviction was canceled or revoked and had been sentenced for that offense to imprisonment;

3) not less than two-thirds of the term of imprisonment imposed by a court for an intended special grave offense, and also where that person had previously served a sentence of

imprisonment and had been paroled but committed another intended offense at the age under 18 before the end of sentence and had been sentenced for that offense to imprisonment;

4. Commutation of the unserved part of the sentence shall not be applied in respect of minors.

5. Where a paroled person commits another offense during the remaining part of the sentence, a court shall impose a punishment under the rules provided for by Articles 71 and 72 of this Code.

ATTACHEMENT 2

The Law of Ukraine “On Mediation” (Project)⁶³

This Law is based on the acknowledgement of usefulness of mediation as an alternative means of out-of-court dispute settlement, of necessity of a complex regulation of mediation by legislative action and regulates the common rules of practicing mediation in Ukraine.

Chapter I. General Provisions

Article 1. Definition of the main terms

In this Law the following terms are used in the following meaning:

The agreement on the conduction of the mediation is an agreement between the parties of the conflict (dispute) and the mediator and/or an organization, that provides mediation, that clarifies the organizational issues of the mediation procedure;

A competent authority is an authority that according to law is authorized to dispose a conflict and make an obligatory for the parties decision on the subject of the conflict;

⁶³ Developed by the UCCG, as on July 1, 2010. My translation.

A conflict is a real or that that seems real disagreement between two or more subjects (individuals or legal entities);

A mediator is a natural person who is a neutral agent in a conflict (dispute) and facilitates out-of-court conflict (dispute) resolution by the parties by means and according to this Law, and other laws and subordinate legislations of Ukraine;

Mediation is a procedure of out-of-law conflict (dispute) resolution by the parties on the basis of voluntarism, sides equality, confidentiality independence and objectiveness with involvement of a third party, mediator, which aims the independent parties' decision making on out-of-court conflict (dispute) regulation.

Mediation agreement/ mediation notice is an independent parties' agreement or notice on forwarding to mediation all/ certain conflicts (disputes), that appeared or may appear between them in connection with any certain legal relations, regardless of if they are of contractual nature or not;

The organization that facilitates mediation is a legal entity that is registered according to the established order, and provides services of out-of-court conflict (dispute) resolution;

A dispute is a conflict forwarded for assessment to a competent authority;

Mediation parties are individuals and/or legal entities who have been involved in a conflict (dispute) and who have agreed to resolve it by mediation;

Agreement on the results of the mediation is an agreement of the mediation parties that can be done according to the results of mediation and includes summary of the mutual decisions on out-of-court conflict (dispute) resolution.

Article 2. Legislation on mediation

Relations in the sphere of mediation are regulated by the Constitution of Ukraine, this Law, and other laws and subordinate legislations of Ukraine.

If according to an international treaty, which is mandatory by Verkhovna Rada⁶⁴ agreement, other conditions than those stated in this Law are applicable, the conditions of the international treaty are applied.

Article 3. Mediation principles

Mediation is conducted on a basis of voluntarism, self-determination of the parties, confidentiality, equality of the parties, independency and objectiveness.

Nobody may be forced to a conflict (dispute) resolution through mediation. Parties of the conflict (dispute) participate in mediation by mutual agreement and may withdraw on any stage of it before making an agreement on results of the mediation and turn to other means of conflict resolution.

During the mediation procedure the parties of the conflict (dispute) are free to search for a common decision on conflict (dispute) resolution and make a decision on possibilities of its regulation themselves.

If the parties have not agreed on other, mediation is conducted on confidentiality basis. A party's proposition to turn to mediation procedure, expression of agreement on participation in the procedure, concerns and propositions of the parties on conflict (dispute) regulation, the parties' statements made during mediation, the mediator's propositions, a party's expression of commitment to accept a proposition on conflict (dispute) regulation, also other information obtained by the mediator and/or staff of the organization that facilitates mediation, including notes, cannot be used by the parties, the mediator, the organization that facilitates mediation, and any third party as an evidence on any other, including court or adjudicatory, procedures.

The parties have equal rights during the mediation procedure. It is prohibited to provide any privileges or restrictions to any party according to the race, skin colour, political, religious or other convictions, sex, ethnical or social origin, level of income, place of living, language etc.

Mediation participants must respect honor and dignity of other mediation participants.

⁶⁴ Ukrainian Parliament

An individual's participation in mediation cannot be considered as the individual's admittance of his guilt or demands of the lawsuit, as well as rejection his demands or the lawsuit demands.

Statements on safekeeping of the secret information obtained during the mediation procedure do not cover the cases when the mediator learns of the parties' commitment of heavy and especially grave crimes.

Article 5. Language of the mediation procedure

Mediation parties in the mediation agreement and/or agreement on the conduction of the mediation decide what language(s) will be used during mediation. If the mediation agreement and/or agreement on the conduction of the mediation do not have a reference on the language of the mediation procedure, the mediation is conducted in Ukrainian.

All the agreement, contracts, statements and other documents created in the process of mediation or according to its results, are documented on the language(s) that have been chosen by the parties for the mediation procedure. If the mediation agreement and/or agreement on the conduction of the mediation do not have a reference to the language used for mediation, all the agreements, contracts, statements and other documents, created in the process of mediation or according to its results, are written in Ukrainian.

Chapter II. Status of the mediator

Article 6. Demands to the mediator

A mediator may be any individual who has taken a special training in Ukraine or abroad and who has turned 18 year old at the moment of signing a mediation agreement.

A mediator may not be an individual who has a criminal record that has not been expunged or cancelled according the law, incapacitated or proclaimed so by court.

Article 7. Rights of the mediator

During the mediation procedure a mediator has the following rights:

- independently define the conduct of the mediation procedure;
- conduct meetings and consultations with every party individually or with several or with all the parties simultaneously, pursuant to the procedures that guarantee confidentiality;
- offer the parties to suspend mediation to make preparations or engage necessary professionals for this or that party;
- help the parties to formulate the content of the agreement on results of the mediation procedure according to the conclusion on conflict (dispute) regulation made by the parties;
- stop the mediation procedure;
- use other rights guaranteed to the mediator by this Law, other laws and subordinate legislations of Ukraine, also by the agreement on the conduction of the mediation.

The mediator has no right to give the parties any legal advice on conflict (dispute) regulation.

Article 8. Duties of the mediator

The mediator must follow the Constitution of Ukraine, this Law, other laws and subordinate legislations of Ukraine, also the agreement on the conduction of the mediation.

During the mediation procedure the mediator must:

- provide the parties with explanation of the mediation procedure;
- inform the parties on presence of the conflict of interests according to the requirements of this Law;
- use all the prescribed by this Law, other laws and subordinate legislations of Ukraine means for parties to achieve the decision on the out-of-court conflict (dispute) regulation during established time;
- conduct the mediation procedure without any delays;

- withhold from making any promises or guarantees on concrete results of the mediation.

Article 9. Independence and objectiveness of the mediator

The mediator is independent and acts according the Constitution of Ukraine, this Law, other laws and subordinate legislations of Ukraine.

The mediator has no right to participate in a conflict (dispute) regulation, if he has a personal interest, including personal or pecuniary interest, in the results of such conflicts (disputes) resolutions, or if he has family or business ties with one or several parties, or if there are other conditions, that challenge the objectiveness of the mediator. If any of the listed conditions is present, the mediator must inform the parties about the conflict of interests before he is appointed as a mediator in the conflict (dispute); in case if these conditions came to knowledge during the mediation procedure, - as soon as they came to the notice.

In case the mediator has a conflict of interests with at least one party, the final decision on appointing him a mediator is made by the parties. Specifically, the party, that knew about the conflict of interests but did not stop participation in the mediation procedure, is considered the one that agreed the mediator appointment.

The mediator, who conducted the conflict (dispute) mediation, cannot be a representative or an advisor of a mediation party during the very conflict (dispute) investigation by a competent authority.

Article 10. Responsibility of the mediator

The mediator is responsible for violation of the requirements of this Law, other laws and subordinate legislations of Ukraine, norms of professional courtesy of mediators, also the agreement on conduction of the mediation.

The mediation party that finds that illegal actions or omission of the mediator caused material or psychological harm and/or loses has a right to turn to the court to protect own rights and

interests. The court protects rights and legal interests of the mediation party according to the civil procedure.

Article 11. The mediator's responsibility insurance

Civil responsibility of the mediator falls under freewill insurance according to the terms of the applicable legislation of Ukraine.

Article 12. Certification of the mediator

A mediator must be certified and/or accredited by any enterprise, establishment or organization that are engaged in training of mediators in Ukraine or abroad following the programme that consists of no less than 40 academic hours, including practical training.

A document that proves undergone training may be a certificate or other document, where the following is stated:

- surname, name, middle name of the person who underwent training;
- name of the subject that provided training;
- surnames, names, middle names of the trainers;
- quantity of the study hours, including quantity of hours for practical training.

Chapter III. Procedures of the mediation

Article 13. The form of the mediation agreement

The mediation agreement can be made by individuals and legal entities.

The mediation agreement may be made as a mediation notice in a contract or as a separate agreement.

The mediation agreement is made in a written form. The mediation agreement is considered made in a written form if it is placed in a document, signed by the parties, or made through exchange of letters or statements by teletype, telegraph or other means of telecommunication

that provide registration of the agreement, or through exchange of the statement of claim and the statement of defense, where one of the parties acknowledges existence of the agreement, and the other does not challenge it.

Article 14. Agreement on the conduction of the mediation

The mediation is conducted on the basis of the agreement that is made by the parties of the conflict (dispute) with a mediator or the organization that facilitates the mediation procedure. The agreement on the conduction of the mediation is made in a simple written form and signed by all the parties of the conflict (dispute) and the mediator or the organization that facilitates the mediation procedure.

The agreement on the conduction of the mediation must respond common principles of the civil jurisdiction that concerns the content of the agreement. Besides, the agreement on the conduction of the mediation should contain:

- abridged description of the subject of the conflict (dispute);
- statement of acceptance by the conflict (dispute) parties of the mediation principles stated in this Law;
- designation of the place where the mediation procedure will be conducted;
- the order of payment of expenses on conduction of the mediation procedure, size and method of payment of the charge fees to the mediator or the organization that provides conduction of the mediation procedure.

The parties and the mediator have a right to define other conditions of the mediation procedure that do not challenge this Law, other laws or subordinate legislations of Ukraine.

The agreement on the conduction of the mediation is made in several copies according to the quantity of the conflict (dispute) parties, one copy for each party, and one copy for the mediator or the organization that facilitates conduction of the mediation procedure. The agreement on the conduction of the mediation comes into force on the day of signing it by the parties and the mediator.

Article 15. The participants of the mediation procedure

The participants of the mediation procedure are the parties of the mediation, their representatives and the mediator.

The parties of the conflict (dispute) get the status of the mediation parties as soon as the agreement on the conduction of the mediation comes into force.

Article 16. Rights and obligations of the parties of the mediation

The parties of the mediation have the following rights:

- to be informed about the concept of mediation and its consequences;
- offer a mediator if the agreement on the conduction of the mediation is made with the organization that provides the conduction of the mediation;
- engage other individuals to participation in the mediation on condition of prior consent from all the parties of the mediation.
- engage experts, specialist, professionals to the mediation on condition of their compliance with the principle of confidentiality of the mediation, unless otherwise agreed by the parties;
- to use an interpreter service;
- refuse to participate in the mediation at any stage before making the agreement on the results of the mediation, and appeal to other methods of conflict (dispute) resolution;
- exercise other rights granted to the mediation parties by this Law, other laws and subordinate legislations of Ukraine and the agreement on the conduction of the mediation.

The mediation parties are obliged:

- cooperate with the mediator during the mediation procedure and not to obstruct the mediation procedure in terms and in the manner stated in this law and the agreement on the conduction of the mediation;

- voluntarily fulfill the agreement on results of the mediation, made by the results of the mediation procedure;
- fulfill other obligations taken by the agreement on the conduction of the mediation.

Article 17. Mediation procedures

If the agreement on the conduction of the mediation was made with the organization that facilitates conduction of the mediation, the parties approve the candidate mediator. The approval of the candidate mediator may be done by any means considered suitable by the parties and the organization that facilitates the conduction of the mediation.

If nothing different is prescribed by the agreement on the conduction of the mediation, after it has been made, the mediator and/or the organization that provides the conduction of the mediation:

- has a preliminary discussion with the mediation parties by any form according to the request, informs the mediation parties on aim of the mediation, procedures; explains to the parties their rights and obligations during the mediation procedure; also about the mediator's role in mediation;
- appoints the date, time and place of meeting with every party individually or with several or with all the parties according to the agreement of the parties, and informs about it all the parties of the mediation procedure;
- holds separate meetings and consultations with each party individually or with several or with all the parties at a time;
- helps the parties to reach an agreement on contentious issues and formulate the content of the agreement on the results of the mediation.

In case of impossibility to organize a joint meeting of the mediation parties, the mediator may conduct the mediation indirectly through individual meetings with the conflict (dispute) parties.

Article 18. Appointment and replacement of the mediator

The mediation parties choose a mediator by mutual agreement on an independent basis.

The mediation parties have a right to replace a mediator at any time and at any stage of the mediation procedure before making the agreement on the results of the mediation. In this case calculation between the parties and the mediator are made according to the agreement on the conduction of the mediation.

Article 19. Replacement of an improper mediation party, engagement of a new mediation party, withdrawal of a party from the mediation

During the mediation process it is possible to replace an improper party, engage a new party or withdraw a party from the mediation.

Procedure for the replacement of the improper party and/or engagement of a new party is determined according to the agreement.

Withdrawal of a party from the mediation is performed entirely according to the will of the party that desires to terminate their participation in the mediation according to the procedure prescribed by this Law.

Article 20. Participation of the third parties in mediation

Together with the mediation participants, other individuals may be present on the mediation procedure under condition that none of the mediation parties objects their presence. Any other individual present during the mediation procedure must provide a written agreement to follow the principles and procedures of the mediation stated in this Law and in the agreement on the conduction of the mediation.

Article 21. Termination of the mediation procedure

Mediation is terminated:

- a) by the parties signing the agreement on the results of the mediation, on the day when the agreement comes into force; or
- b) by the mediator's statement, made after conduction of a consultation with the parties concerning the fact that the further actions of the mediation procedure will not lead to the agreement on the results of the mediation, on the day of submission of such a statement by the parties of the conflict (dispute);
- c) by an application on termination of the mediation procedure by all the mediation parties, on the day of submission of such an application to the mediator.

Article 22. Agreement on the results of the mediation

According to the results of mediation the parties have a right to make the agreement on the results of the mediation and/or take any legal actions to achieve fulfillment of the agreement.

The agreement on the results of the mediation is made by the parties of the conflict (dispute) in a simple written form according to the basic principles of the civil law principles of the mediation procedure. It includes summary of the common decisions on the out-of court conflict (dispute) resolution achieved by the parties in the process of mediation and is signed by all the parties.

The agreement on the results of the mediation includes:

- the date and place of making the agreement on the results of the mediation;
- name (for legal entities) or surname, first name and middle name, if applicable, (for individuals) of the mediation parties, their location (for legal entities) or residence (for individuals), identification codes of business entities, if applicable, (for legal entities and individuals registered as entrepreneurs) and individual identification numbers, if available (for individuals);
- the subject of the conflict (dispute);
- summary of the decision made by the parties according to the out-of-court conflict (dispute) resolution.

In the agreement on the results of the mediation the mediation parties have a right to state other conditions and agreements.

There are as many copies of the agreement on the results of the mediation is made as there are parties of the mediation procedure, every party gets one copy. One copy goes to the competent authority that is in charge for the case. The agreement comes into force on the day of its signing by the mediation parties, unless other is agreed by the parties.

The mediation parties are obliged during three calendar days after signing the agreement on the results of the mediation to hand one copy of the agreement to the competent authority that is in charge for the case.

The agreement on the results of the mediation comes into force on the day of its approval by the competent authority unless otherwise required by law.

The agreement on the results of the mediation can be certified by any means that are not prohibited by law.

Article 23. Execution of the agreement on the results of the mediation

The agreement on the results of the mediation is compulsory for the parties.

In case of violation of their obligations by a mediation party, other party has a right to turn to the court with a complaint.

Article 24. Duration of the mediation procedure

The duration of the mediation of a conflict (dispute) is determined by the parties in the mediation agreement and/or the agreement on the conduction of the mediation.

Chapter IV. Final provisions

(The chapter is being developed and will include points that have not been included in the previous chapters)