Background

Current reservations about the reasonableness and appropriateness of using restorative justice are based on general issues related to ideas about the law as a phenomenon and social phenomenon. However understanding conventional approaches is extremely important in accepting unconventional and non-standard approaches to resolving social conflicts arising as a result of criminal offences.

The implementation of restorative justice in Ukraine with the approval procedure (mediation) as its main mechanism is a result of the existence of alternative legal frameworks in others jurisdictions (for example, USA, Canada, Australia and New Zealand). So we can talk about the existence of multiple regulatory frameworks in other jurisdictions, each of which prevails for various historical, political, cultural and other reasons.

The regulatory framework in itself is defined first of all by a particular approach to the law, distinguished by particular features which are seen as essential or dominant and are understood by different methodological approaches to the law as a phenomenon. There are many ways of studying law but there is no one particular way of understanding it. As far back as the beginning of the 20th century I. Ilyin said,

Legal science more definitely acknowledges the fact that law in itself is an extremely complicated and multifaceted formation that has a number of separate sides and forms of “existence”… The faith in the saving
methodological monism is being
destroyed, giving way to recognition of methodological pluralism.¹

The situation in Ukraine

For various reasons in Ukraine there is a narrow normative and monistic
understanding of the law specifically as a system of norms established (authorized)
by the state, by its legislative or other competent authorities. This is particularly true
if we talk about marginally formalized criminal proceedings. This is one of the main
factors which we believe inhibits recognizing the approval procedure itself as
legitimate and its implementation and inclusion in existing criminal procedures in
order to expand their scope to include other non-formalized methods.

The contribution of Durkheim

In order to understand the fundamental importance of changing the legal
paradigm in order to promote the acceptance and implementation of the principles of
restorative justice, conciliation and mediation, in law enforcement practice we need
to turn to the theories of one of the founders of sociology, Durkheim, and in
particular his views on the correspondence of forms of solidarity with types of legal
system. The legal system is an external visible manifestation of a society's form of
solidarity. Different legal systems, reflecting different views about the essence and
main aims of the law, are associated with different forms of solidarity. Durkheim
distinguishes legal systems associated with “mechanical solidarity” or solidarity
arising from identity, similarity and having things in common and legal systems
associated with “organic solidarity” or solidarity arising from complexity.²

In the first case, social conflict, including that of a criminal nature, is resolved
in the same way as other conflicts; in the second case, when resolving social conflict,
a greater range of features is taken into account – particularly individual features,
characteristics of the situation being resolved, individual peculiarities of the victim
and of the offender, etc.

Two types of legal regulation based on different forms of solidarity and having qualitatively different types of sanctions can be distinguished. A legal system associated with “mechanical solidarity” has sanctions of a repressive nature that injure the person and are aimed primarily at punishing them, depriving them of freedom, property, etc. In contrast, a legal system associated with “organic solidarity” has reparative (i.e. restorative) sanctions that aim to restore rights or property and bring relationships back to normality.¹

Social relationships, especially in our contemporary “postmodern” era, are developing away from mechanical solidarity towards organic solidarity, from the co-existence of repressive and reparative law towards a new dispensation in which the latter prevails. The interaction, including the competition between repressive and reparative law, signals the essential features in the historical development of specific legal systems. Similarly, the organs of a state which “governs less and less” and “administers more and more” as a result of increasing organic solidarity change gradually as reparative law replaces repressive law. Members of society are no longer objects of interference on the part of the state but become equal partners with the state having broad rights related to their participation in establishing legal norms and creating a complex and multifaceted legal environment. A vivid example of this process is the development of procedures for restorative justice and its implementation within formal criminal proceedings.

**Restorative justice**

Restorative justice is based on principles that are not taken account of by legal systems associated with “mechanical solidarity.” In legal systems associated with “organic solidarity,” crime is considered primarily as a conflict between individuals, i.e. as a situation having a negative impact on both the victims and the offenders, as well as on the environments of both parties. In traditional “repressive” justice a crime is a violation of the law, as defined by the state or the courts. As a result, crime is

considered as an act directed primarily against the state and not against any particular person who may have suffered from it. This explains the focus in justice systems associated with “mechanical solidarity” on punishment, the insulation of the offender from the society, as a result of which, in most cases, the interests of the victim of the crime are not met.

However, unlike these approaches to resolving criminal conflicts, the main aim of restorative justice is to achieve justice by repairing the damage caused by the crime. Instead of the court making a decision about the amount of harm caused, restorative justice programmes enable the victim to define in their own way the ways in which their interests have been violated. Thus, even when resolving criminal conflicts, maximum support is provided to victims including ensuring that their needs are met.

The humane paradigm

At the same time, restorative justice programmes are based exclusively on the humane paradigm, namely that, just as victims are people, so too are offenders, members of society and citizens despite everything they have done. They can alter their behaviour for the better by their own efforts and are entitled to be included in society, provided they accept responsibility for repairing the harm caused by the offence.

From a liberal legal point of view, citizens should have as much autonomy as possible with the minimum necessary interference from the state. The interests of the individual and his autonomy and the interests of society must be balanced. Crimes are dangerous for society because they deprive other people of their right to autonomy. So society must react to crime by seeking to restore the autonomy of the victim, even at the expense of compensating for the harm caused to the victim, but without depriving the offender of his autonomy more than is necessary in the interests of the victim. The restoration of autonomy must encourage the reintegration of the victim and the offender into society.
In a conventional repressive system the state takes the lead and this entails a passive role for the parties to the criminal conflict. In contrast, restorative justice processes encourage the active engagement of victims, offenders and others in their environment. Only in this situation does “effective repentance”, reconciliation of the parties, restoration of justice and compensation for the harm caused by the crime become possible.

Mediation is based on giving both the victim (complainant) and the offender an opportunity, with their consent, to take an active part with the help of a neutral third party (mediator) in resolving issues related to their conflict, including compensation for any financial loss arising from, and offering an apology for, the offence that took place.

Where the outcomes of mediation become part of a formal legal process, the basis for accepting the outcomes is no longer legal precedent but the nature of the relationships between the people involved; in other words, the communicative aspect of the law, understanding the law as a result of dialogue between the participants in a social relationship, gains primary importance.

When we take into account the fundamental importance which is given to the internal psychological mechanisms involved in satisfying the interests of the offender and of the victim during mediation and we then make a judgement based on the outcomes of mediation, we may speak about an anthropological understanding of the law, in which the source of the law is the interpersonal communication between and acknowledgement of the status of the parties as subjects of the law and in which the norms that inform the process are formed as a result of the process and take account of the interests of the parties.

In such an account of the participants' interests the existential characteristics or existential aspect of the law is revealed in its turn through “acknowledging the other” and recognizing the intrinsic value and importance of the “existence of the other” and its potential.
Norms of restorative justice

Of course, it is impossible to implement restorative justice without taking moral norms into account, as well as ideals and categories of ethical thought which concern themselves primarily with justice, freedom, dignity and the integrity of the individual. This makes natural-legal approaches to the law of contemporary relevance. It is impossible to reach an agreement as a result of mediation, to have financial loss compensated and an apology made, in other words, to achieve a settlement between two parties, without having the idea of justice or a feeling for justice as the main motivation for reaching an agreement through a process of reconciliation.

Thus, the source of the law in restorative justice is not a legal precedent, statute or guidance but the interpersonal communication that goes on when appropriate norms are created directly by the participants to mediation.

As a result, the agreement reached has and cannot but have the force of a legal norm for all parties to the conflict and, what is most important, for formal authority, i.e. the representatives of official state bodies. These legal norms are produced directly by the participants in a particular situation, in this case the reconciliation process. After this the rights created in such a way are integrated into formal official procedural norms.

Such an attitude to the source of law appears rather unusual to those who have become used to a normative understanding of law, and in many cases encounters active rejection and protest.

For the supporters of a narrow normative understanding of the law it is sometimes difficult to concede the simultaneous existence of different normative orders (legal systems), which, however, very often exist only in day to day interactions without official recognition, i.e. they are not directly considered as norms that might underpin legislation.

Conventional understandings of law, in which many believe there must be a requirement for state compulsion and repression, also hinder the acceptance and recognition of restorative justice. Compulsion is really a necessary element in
conventional repressive justice. But in the case of restorative justice the external compulsion is replaced by an internal compulsion to assume the debt, duty or obligations towards the other party. Such an understanding of compulsion, as based on an internal morality, is also characteristic of a post-modern understanding of law.

Besides, the realization of the existence of an obligation towards the other, the need to fulfil that obligation regardless of external compulsion and and the recognition of the rights and responsibilities of each party in fulfilling such an obligation is what, according to the psychological concept of law, distinguishes this norm from other social and regulatory norms. In this way similar ideas and feelings of a normative and legal nature may arise and exist alongside statutory legal norms.

The situation in the Ukraine

Three fundamental principles, which ought to serve as the basis for law, namely stability, expediency and justice, underpin the norms of constitutional and legislative acts in contemporary civil society. In particular, natural and legal rights underpin for the most part the Criminal and Procedural Code of Ukraine, which defines the protection of the rights and legal interests of the persons taking part in criminal proceedings as the objectives of criminal proceedings. Restorative justice can also achieve the same objective. Indeed, the aforementioned principles may be achieved and implemented by means other than state compulsion and repression, the most obvious example being a reconciliation agreement.

Alternative approaches to the law are based on the understanding that alongside the fundamental principles there are other normative orders and many different forms or manifestations of the law as a social phenomenon.

Existing criminal law in Ukraine permits excusing a person from criminal responsibility under certain circumstances, including reconciliation of the victim and the accused. Moreover, offences against the person, where the interrogation and pre-trial investigation were not carried out at all, are not to be pursued if the victim is reconciled with the accused.
While arrangements for reconciliation and for involving a professional mediator for this purpose in such cases are not envisaged by the legislation, i.e. they are outside the framework of the formal legal system, there is no bar in the legislation to carrying out such a procedure. So there are no grounds for not using, accepting or admitting its outcomes in a formal process. The practice of rejecting reconciliation and of assuming the impossibility of its implementation is a manifestation of a monistic, normative understanding and interpretation of the law which contradicts, first of all, as has already been mentioned, the fundamental principles incorporated in existing legislation, which are aimed at the protection and restoration of the rights and interests of the person violated by the criminal offence.

Indeed, restorative justice can be seen as the realization of existing social “custom and practice” which has been developed as a result of this practice and which solves rather important and critical issues of social regulation related to the resolution of criminal and legal conflicts arising as a result of a criminal offence. Such “custom and practice” encourages the restoration of social relations damaged by a committed offence. That means that in a situation like this there arises a system of rules developed differently from the official legal system, practices or activities that are at a “lower layer”. They are nothing but a manifestation of precedent which exists in any legal system interrelated with formal law with each contributing to the legal system as a whole.

Parallel with this, decisions are made by law enforcement bodies (court, prosecutor’s office) which accept the aforementioned reconciliation agreements as a basis for taking key decisions in a criminal case. In this way practice is being developed, the basis of which is a judicial or administrative – in a broader context – precedent that introduces elements of restorative justice into real legal relationships before they have been envisaged in specific legislation. It is worth bearing in mind that such decisions may be taken by a judge or a prosecutor based solely on existing measures within criminal legislation that define the fundamental principles of criminal proceedings as directed towards ensuring in the first instance the rights and interests of the participants to the process.
Thus, even though there is no specific law in Ukraine concerning mediation and its implementation within the existing legal system, this does not hinder the development of the norms of restorative justice through “spontaneous order” in the form of precedent created by “custom and practice” as a direct result of the interaction of participants in social processes and the development of norms of behaviour in such situations that introduce restorative justice into the existing formal criminal process.

“Spontaneous order”

Hayek believes that, in contrast with official law, such law arises from social systems of “spontaneous order”, i.e. from systems that are self-organizing or self-regulating. As a product of “human activity” such law is formed on the basis of practical needs, without any preliminary plan, but rather the free, spontaneous and independent manifestation of the will of the participants in social relationships. It is formed as a natural development of those relationships. Official law arises from systems of “conscious order” established by the state on the basis of a plan and purposes defined beforehand and implemented in the form of a hierarchy of laws, regulations and guidance.¹

Thus, it is possible to talk about relaxation and informality in legal norms, which define current meaning and significance, except within communicative (anthropological, psychological) and social approaches to the law. Informality arises in the case of mediation when the formal procedures, the content and substance of which are defined by particular legal norms, are relaxed.

In this case the law enforcement agent, whether an investigator, prosecutor or judge, only checks and approves the agreement made by the parties within the framework of mediation. The process of making such a binding agreement between the parties is outside the direct control of any law enforcement agent.

The existing criminal justice system is aimed at a unilateral resolution of a dispute or a conflict based on the application of a norm defined beforehand. It is primarily aimed at establishing the guilt of the offender and setting the punishment for the offence according to standards provided by the law.

As long as neither reconciliation nor mediation have a statutory framework, the legal status of criminal mediation is not guaranteed in the same way as other decisions made within the criminal justice system.

At the same time it is necessary to point out that even if mediation is defined by the special law, it won’t have a legitimate meaning for taking a resolution in the criminal proceedings in the case of violation of its principles such as the autonomy, independence and volunteer participation of the parties.

The criminal justice system guarantees to the parties the carrying out of a procedure, within the framework of which they act as subjects of the law, and establishes appropriate standards through communication. In this case the recognition by the representatives of the criminal justice system (investigating officer, prosecutor or judge) of the parties participating in the reconciliation procedure as subjects of the law automatically carries with it the right by their own actions to define their own interests with the help of a professional mediator, to assume liabilities having binding legal consequences and to accept responsibility for them. What is unusual is that despite the existence of powers defined by the law the representatives of the criminal justice system cannot interfere with or control the mediation process or the outcome of the reconciliation process. The outcome lies outside the formal legal framework; yet, it is binding, i.e. has legal force, for the official law enforcement agents.

**Quality control**

Independence from control of the mediation process and responsibility for the evaluation of its outcomes is granted to the mediator. An independent, non-judicial body must monitor the competence and professional ethics of the mediator, as well as
the quality of his assessment. The competence of the law enforcement agent, particularly of the judge or the prosecutor at the pre-trial investigation, includes checking the legality of the agreement reached as a result of the mediation. It is the judge (prosecutor) and not the mediator who enforces the law.

Providing a legal framework

In the reconciliation process the mediators and the parties are not governed by criminal or administrative law. Naturally, if there is no specific statute on mediation, they cannot be governed by such a law either. At the same time, the mediation parties have a sovereign law at their disposal which acknowledges the binding nature of a decision made. This binding nature is manifested firstly by the possibility of referring to the mediation within the framework of the criminal justice system as a means of resolving conflict between an offender and a victim and secondly by the fact that the procedural decisions made on its basis are binding on other parties to the legal process.

Accordingly even if reconciliation were to be included in existing law or a special law on mediation were to be approved, its principles should be to guarantee the autonomy and independence of special bodies for carrying out mediation and of the mediation itself and to accept any agreement based on this and to prohibit interference in the processes of reconciliation by any third party or institution, including state bodies, who may not always understand or accept this situation.

Moving forward

Changing our approach to understanding the law in the case of restorative justice involves recognizing that law may be developed from different conceptual frameworks from the traditionally accepted ones. The principles that ensure the legitimacy of restorative justice are:

- seeking justice based on dialogue,
- ensuring self-determination for both parties,
- giving a central role in the reconciliation process to the parties to the conflict,
ensuring they are free from pressure,
describing separately their individual needs and social obligations,
repairing the inter-personal and social connections.

Mediation is based on the fundamental legal principle that litigants are equal before the law and therefore that they have equal rights and responsibilities in any dispute.

Taking all the foregoing into account, existing legislation in Ukraine already does not prevent the use of restorative justice processes. They fully comply with the main constitutional principles and objectives of the criminal justice system and the need to protect the legal rights and interests of the parties to a dispute. This allows the use of elements of mediation in the criminal justice system even now.

Restorative justice is one manifestation of a new approach to the law, of the law of a new epoch – the epoch of a “developed” civil society in which there is a genuine human dimension to the law. It enables us to overcome in many cases the artificial division of the law into the private and the public by introducing classic elements of private law directly into relationships that have hitherto been considered part of the public legal domain. Generally speaking, at the current stage in our development such a division seems an anachronism.

In this way a human dimension is brought to the law, not so much by getting rid of judgements that are often intrinsically unjust because they reflect the partial and subjective polarity between “accusing” on one side and “justifying” on the other but, by introducing understanding and mutual consideration of the interests of both the party who has suffered from the crime and the offender, also introducing mutual recognition of their status and position as socially valuable and decent human beings.

Thus, by admitting the possibility of resolving criminal conflicts through informal processes, acknowledging the binding nature of the outcomes of such processes and finally changing the paradigm of justice from the repressive to the reparative we in practice change the law itself as well as relationships and attitudes to the law, its sources, its essence and the ways in which we set about making it.