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Forensic Examination as a Mediation Tool: Genesis and Prospects for Development in the Context of Martial Law and Post-War Revival of Ukraine

Badania kryminalistyczne jako narzędzie w mediacji. Geneza i perspektywy rozwoju w kontekście stanu wojennego i powojennej odbudowy Ukrainy

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ABSTRACT

The study explores justice, forensic examination and mediation from the time of their genesis to the present day. The article analyzes historical examples of the application of forensic examination within the mediation process from the Ancient East and Antiquity to the 20th century, as well as the processes of establishing the legitimization of forensic examination (from the end of the 19th century) and mediation (from the end of the 20th century) in Ukraine and abroad. Attention is paid to the prototypes of forensic examination in the times of Kievan Rus, the Principality of Galicia-Volhynia, the Grand Duchy of Lithuania, the Cossack State and the entry of Ukrainian lands into the Austro-Hungarian and Russian empires, as well as the emergence of forensic examination before the First World War and during the Ukrainian Revolution and the expansion of the Bolsheviks and the establishment of Soviet power. The formation of regional offices (1923) and later institutes of scientific and forensic expertise (1925) in Kyiv, Odesa and Kharkiv is studied. The article reveals the peculiarities of the development of forensic examination within the establishment and legitimization of the mediation procedure in independent Ukraine. The provisions of the current legislation on forensic examination and mediation are analyzed. The authors substantiate the prospects of using the results of forensic expert activity for the application of mediation procedures in the settlement of disputes through negotiations between the parties using the conclusions of forensic experts. The authors identify the most promising types of forensic expertise for the mediation procedure (economic, commodity, construction, intellectual property, etc.). The authors determine the prospects for mediators to use expert opinions not only in family, labor, civil, commercial and administrative disputes, but also in criminal cases during martial law and post-war revival of Ukraine.

Keywords: forensic examination; forensic expert activity; forensic expert opinion; mediation; mediator; mediation procedure

INTRODUCTION

Justice, forensics and mediation are of a similar nature. They have a mission to objectively and fairly resolve disputes that have been inherent in humanity since the dawn of the first civilizations. However, courts and judges have been making decisions about lawful and unlawful acts since ancient times, whereas forensic experts have been establishing the circumstances of the case that are essential for courts and parties since the late 19th century, and mediators have been determining methods and forms of dispute resolution out of court since the late 20th century. The 21st century is a triumph of experts as 'scientific judges' who form the evidence base for both court proceedings and mediation procedures.

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The prototypes of forensic examination can be found in the history of the Ancient East and Antiquity when scribes and doctors were specialists whose knowledge helped to prove or disprove crimes. At the same time, in ancient Greece, we find an analogy of the modern institution of mediation, known as proxenia, or 'public hospitality'. Similar prototypes of forensic examination and mediation can be found in the times of Kyivan Rus, the Grand Duchy of Lithuania, the Cossack state and the incorporation of Ukrainian lands into the Austro-Hungarian and Russian empires. However, only after the status of state forensic institutions of Ukraine was regulated on the eve of the First World War and the institution of mediation was established following the results of the R. Pound Conference on "Causes of Dissatisfaction with the Administration of the Justice System in the United States" held in 1976, we can speak of their legitimization and institutionalization.

The development of forensic expertise in the 21st century was determined by the trend of expanding the subjects of forensic expertise: from state forensic institutions to private experts and specialists who, by virtue of their special knowledge and/or skills in science, art, technology or craft, are able to provide an objective, complete and impartial expert opinion both in court proceedings and in out-of-court disputes. Including those expert opinions may also serve as evidence and arguments in the mediation process.

With the beginning of Russia's military aggression against Ukraine on 24 February 2022, the question of the inevitability of punishment for Russia's war crimes in Ukraine, as well as compensation for losses and damage caused by the occupiers to citizens, legal entities, territorial communities and the Ukrainian state as a whole, has become acute. Obviously, war crimes committed by the Russian Federation and the perpetrators must be punished by the International Criminal Court and national courts. It does not seem possible to apply the mediation procedure to war crimes. Instead, mediation, with the inclusion of forensic expertise, can be an effective legal tool to ensure full compensation for the damage and losses caused by the occupiers to Ukraine.

The purpose of the article is to develop knowledge about the common and distinctive features in the genesis of justice, forensic examination and mediation, and to reveal the potential of modern forensic expert activity for the development of the mediation institute during martial law and post-war revival of Ukraine for the settlement of conflicts (disputes) through negotiations with the use of forensic expert opinions.

MATERIALS AND METHODS

To study the issues, the authors used historical and retrospective, systemic and functional, comparative legal and other scientific methods, including methods of formal logic (induction and deduction, analysis and synthesis, abstraction and spec-

ification, etc.) The application of these methods is of an interdisciplinary scientific nature and is determined by the purpose and subject of the study.

RESULTS

1. The genesis of justice, forensic science and mediation in Ukraine and abroad: next to each other, but not together

Forensic examination and mediation are relatively new types of legal activities. However, both of them have ancient origins and are closely related to disputes, justice and courts in the civilized history of mankind. Before forensic examination (in the late 19th century to the middle of the 20th century) and mediation (in the 1980s) were regulated by law and institutionalized, they had a difficult historical path.

The first references to judges, courts and justice date back to the despots of the Ancient East and Antiquity. At the same time, legendary rulers of ancient times, such as the biblical King Solomon, were also judges. We find references to them in the papyri of Ancient Egypt of the 17th and 16th centuries BC, in the Book of Judges of the Old Testament, in the Laws of Manu, in the Arthashastra, and in other historical sources. For example, the Book of Judges (2:18) states that God supports judges: "And when the LORD appointed judges for them, the LORD was with the judge, and delivered them out of the hand of their enemies all the days of that judge (…)".

According to the Arthashastra, or Science of Politics, the sources of justice in ancient times were: laws, judicial practice, customs, and governmental orders.[1] The judicial practice and customs of the time allowed for reconciliation between the parties to a dispute. That is, kings, priests, and military leaders, in order to establish law and justice, could, at their discretion, perform the functions of both judicial proceedings and mediation, i.e. out-of-court conflict resolution.

At this time, the prehistory of forensic science was also being formed. The first written sources on the involvement of people with special knowledge, skills and abilities in the investigation of cases are found. Thus, in the despotic states of the Ancient East, special officials were obliged to "investigate and solve certain types of crimes, to establish the truth (for example, in ancient Egypt – officials and scribes, […] in Babylon – scribes and judges)".[2] The Manu Laws refer to the involvement of "those who know sea voyages and understand places, terms and goods" in disputes over legitimate payment.[3]

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[1] *Artkhashastra ili nauka politiki*, Moscow 1991, pp. 160–161.

[2] L.M. Golovchenko, A.I. Lozoviy, E.B. Simakova-Efremyan et al., *Osnovi sudovoyi ekspertizi: navch. posibn.*, Harkiv 2016, p. 11.

[3] *Zakony Manu*, perevod. S.D. Elmanovich, prover. i isprav. G.F. Ilinyim, Moskva 1992, p. 160.

Courts were an important institution in ancient civilization as well. Aristotle and other Greek philosophers considered the participation of citizens in the administration of justice to be no less important a sign of their political capacity and maturity than participation in public assemblies. Obviously, the administration of justice in the Greek polises involved, if necessary, the involvement of the inhabitants of the polis, who were doctors, scribes, etc., as experts. It was in Ancient Greece that the prototype of the institution of mediation, known as proxenia (Greek: προξενία 'public hospitality'), appeared in the 6th century BC.

Initially, the institution of proxenia provided for the voluntary guardianship of a resident of the polis (proxenos) over a stranger who entered the Greek polis and did not have the rights of citizens.[4] The proxenos, like modern consuls, acted as a guarantor of the stranger, negotiated on his behalf and entered into relations with the public authorities of the polis in the interests of the stranger. At the same time, the proxenus also acted as a mediator, making efforts to protect his foreign guest without conflict.

The historical prototypes of mediation in ancient Greece can also be considered the *diaetesia* procedure, which included *diallage* (dialogue or reconciliation procedure) and, if necessary, *krisis* (emergence of a solution). R. Karpenko characterizes this procedure as 'mediation-arbitration'.[5] In this context, we can agree on the historical affinity of mediation and arbitration.

At the time of Rome's founding, its power was shared by the king, the senate and the people. At the same time, "the king was the supreme ruler and judge".[6] It was in Rome that the Law of the Twelve Tables first provided for the possibility of concluding a settlement agreement (*fransactio*) in a pre-trial procedure (in jure), which was aimed at terminating obligations under disputed agreements. At the same time, Roman law remains the source of the institute of 'composition', the essence of which was the payment of a fine by the offender to the victim.[7] In our opinion, this institution was one of the first methods and forms of mediation regulated by law. Its effectiveness and relevance are confirmed by the reception of this institution in the medieval 'truths' of Germanic and Slavic peoples.

As for the establishment of mediation values in Roman times, they were also embodied in the early Gospel teachings. Already in the Sermon on the Mount, in the New Testament, Jesus Christ rejects the principle of *talio* ("bruise for bruise, eye for eye, tooth for tooth, whatever injustice a man does to another, it will be done to

[4] I.G. Yasinovskiy, *Istorichniy aspekt rozvitku Institutu mediatsiyi ta suchasni tendentsiyi yogo rozvitku*, "Nauk. vIsn. MIzhnarodnogo guman. universitetu. Ser. Yurisprudentsiya" 2014, vol. 10-2(1), p. 31.

[5] R. Karpenko, *Istorichni peredumovi vprovadzhennya mediatsiyi v Ukrayini ta inshih derzhavah*, "Pidpriemnitstvo, gospodarstvo i pravo" 2020, vol. 4, p. 30.

[6] L. Tsvetaev, *Kratkaya istoriya Rimskogo prava, izdannaya v polzu uchaschihsya*, Moskva 1818, p. 5.

[7] R. Karpenko, *op. cit.*, p. 30.

him" – Leviticus 24:11)[8] and calls not to resist evil and "turn the other cheek". This was a natural reaction to the counterproductive institution of blood revenge after the decline of the tribal community and the formation of statehood. At the same time, the Sermon on the Mount, in fact, formulated the fundamental principle of mediation: conflict resolution through forgiveness of the offender and reconciliation.

In Rome, we also find examples of the use of expert knowledge in pre-trial investigations. Thus, doctors, poison experts, scribes, and other specialists were involved in the investigation of crimes. In particular, doctors were involved in examining the body and determining the cause of death of Caesar, who in 44 BC was stabbed 23 times by rebels during a meeting in the Senate.

The decline of the *Pax Romana* against the background of the establishment and flourishing of Christianity under Constantine the Great, the division of the Roman Empire into Western and Eastern, the subsequent destruction of Western and eventually Eastern Rome during the era of migration of the so-called 'barbarian peoples' who were free and had never known slavery, led to the formation of the beginnings of statehood and the establishment of courts. Over time, numerous Germanic tribes (Ostrogoths, Visigoths, Lombards, Vandals, Anglo-Saxons, Franks, etc.) partially adopted Roman law into the so-called 'barbarian truths' based on customary law (*Lex Burgundiorum*, *Lex Salica et Ripuariorum*, *Formulae*, *Capitularia*, *Assises de Jerusalem*, *Ordonances*, *Arrets Repertoires*, etc.). Their distinctive features were: simplicity, accessibility, embodiment of folk traditions, consolidation of the values of freedom and equality of the parties, as well as the absence of procedural law – decisions on cases were determined and announced not by judges, but by the people's assembly in public, mostly orally.

Forensic experts and examinations are not mentioned in the 'barbaric truths', with the exception of the Germanic judicial system "Caroline", which provided for the joint examination of dead bodies by the courts and doctors who were invited to the Germanic trials as officials. In these cases, the doctors, who essentially acted as forensic experts, were tasked with: 1) to provide the court with a report on the signs they found during the examination or examination of bodies; 2) to present their conclusion or opinion on the causes of a person's death.[9]

At the same time, in the *Lex Salica* (424), when considering cases of death or injury, such a sanction as the death penalty is rarely mentioned. Instead, the institute of so-called 'compositions' (from Latin *compositio* 'reconciliation'), which provided for reconciliation through the payment of ransoms to victims or their relatives for the crime, was used. Such a combination of criminal and civil liability for crimes was aimed at reconciliation of the parties and, in our opinion, can be conditionally considered as one of the first established mediation practices in medieval Europe.

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[8] *Bibliya*, per. I. Ogienka, 1962.

[9] I.Ya. Foynitskiy, *Kurs ugolovnogo sudoprizvodstva*, vol. 2, S. Peterburg 1899, p. 310.

The search for and use of reconciliation procedures in disputes was further encouraged by the Christian Church, which at that time was just beginning to establish its power in Europe. Keeping in mind the brutal persecution of Christians in Rome in the 1st to 3rd centuries, the church "severely condemned the 'pagan' taking of the life of a 'neighbor'."[10] For this reason, from the fall of Rome to the establishment of Charlemagne's Empire, mediation practices, in particular the above-mentioned compositions, were popular in the consideration of various categories of disputes, including criminal ones.

Similar examples of prototypes of forensic examination and mediation existed in the jurisprudence and judicial practice of the peoples of Eastern Europe, which were influenced by Byzantine law, as well as the law of Germanic and Norman peoples. The "era of Rus' Truth" (11th–13th centuries) was important for the development of the judicial practice of Kievan Rus'. Without going into an in-depth analysis of this source, we note that the texts of Rus' Truth, like *Lex Salica*, also establish the institute of private composition (reconciliation) for 'dinners',[11] which provides for monetary compensation to the victim or his family members for damage to life and health.

In addition, according to R. Karpenko, in the Slavic principalities in the 11th century there were historical cases of reconciliation of princes at the political and legal level. An example of such reconciliation was the 'congress' of princes Yaroslav and Mstislav near Horodets in 1026, where they divided the Rus' land and began to live in brotherhood.[12] Obviously, this example of public mediation was not the rule but the exception for Slavic princes, as evidenced by the history of numerous princely internecine wars, which eventually weakened princely power and led to the expansion of the Golden Horde troops into Slavic lands in the 13th century.

In the 13th–18th centuries in Ukraine and in Europe as a whole, there was a further intertwining and interpenetration of criminal and civil jurisdictions, which affected the judicial process and the nature of legal liability. The Rector of Kharkiv University O. Palyumbetskiy once wrote about this: "A distinctive characteristic of the earliest laws of almost every nation was the identification of private law with criminal law, according to which all regulations regarding private relations between individuals were essentially criminal law, threatening criminal liability for their violation".[13]

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[10] P.G. Vinogradov, M.F. Vladimirski-Budanov (eds.), *Lex Salica. Sbornik Zakonodatelnyih Pamyatnikov drevnego zapadno-evropeyskogo prava*, Kiev 1906, p. 194.

[11] *Ruska Pravda. Sobranie vazhneyshih pamyatnikov po istorii drevnego Russkogo prava*, S. Peterburg 1859, p. 47–96.

[12] R. Karpenko, *op. cit.*, p. 32.

[13] A. Palyumbetskiy, *O sisteme sudebnyih dokazatelstv drevnego germanskogo prava stravnitelno s Russkoy pravdoyu i pozdneyshimi russkimi zakonami, nahodyaschimisya s nimi v blizhayshem sootnoshenii: Rassuzhd. dlya poluch. stepeni Doktora Prava*, Harkov 1844, p. 8.

The means of proof in the trials of that time were witnesses' testimony, oaths, trials of the parties through the courts of God (*ordalia*), duel and lot (random selection).[14] However, the institutions of forensic examination and mediation, in their modern sense, were not regulated and formalized as established legal practices at that time. However, the multiplicity and, at the same time, the blurring of jurisdictions and the absence of a complete state monopoly on justice created conditions for resolving disputes through mediation.

In the early modern era, about ten different systems of customary law (Kopne, Carpathian, Cossack, Magdeburg, etc.) were simultaneously in effect in the Ukrainian lands, and in the city of Kamianets-Podilskyi alone, which at that time had about 10,000 inhabitants, three different jurisdictions were in effect. In turn, justice in the Ukrainian lands was administered by different judges and under customary law. Starting in the 15th century, legal proceedings in Ukraine were developed in the law of the Grand Duchy of Lithuania, in particular in the Judicial Code of King Casimir IV of 1468, the Statutes of the Grand Duchy of Lithuania of 1529, 1566, and 1588, as well as in the Judgments of Grand Duke John III and Tsar and Grand Duke John IV, summarized in the Council Statutes of Tsar Alexei Mikhailovich in 1649. Also in the Ukrainian lands, the texts of the Nomocanon (Greek: 'law', 'rule'), formed in Byzantium in the 5th–7th centuries, were used, and widespread among the Slavic peoples as "lawgivers", and even the Latin text of the Armenian judge Mikitar Gosh,[15] which was used by the Armenian community in Lviv and others.

The above-mentioned judicial sources also provided for pre-trial reconciliation procedures. In particular, the Lithuanian statutes and other sources provided for the procedure of 'unification' (reconciliation), the content of which included the resolution of land, property, commercial and even criminal cases with elements of mediation. In this regard, the procedures of 'amicable reconciliation' with the participation of a super-arbitrator, were widespread in the Ukrainian lands. Such procedures were used for the out-of-court settlement of conflicts between the nobility. Enforcement of decisions of amicable courts was controlled by zemstvo courts.

Mediation methods and techniques were also often used in administrative and judicial disputes in the Cossack State. In particular, in the Zaporozhian Sich, disputes were considered by the so-called 'circle', i.e. members of the Cossack assembly, and continued until a consensus was reached on the subject matter of the dispute.[16]

Elements of mediation were also inherent in other jurisdictions. In particular, in the cities of Ukraine (Zhytomyr, Kamianets-Podilskyi, Kyiv, Kremenets, Lokhvytsia, Lviv, Lubny, Lutsk, Mukachevo, Novhorod-Siverskyi, Pyriatyn, Poltava,

[14] Ya. Padoh, *Davne Ukrayinske sudove pravo: konspekt vikladIv*, Na pravah rukopisu, Myunhen–Parizh 1949, p. 12.

[15] See *Mhitar Gosh's Armyanskiy sudebnik*, Erevan 1954.

[16] I.G. Yasinovskiy, *Istorichniy aspekt…*, p. 32.

Pryluky, etc.), which were governed by Magdeburg law in the 14th–18th centuries, there were professional guilds and corporations. These corporate organizations had bodies authorized to arbitrate disputes between members of the shop or corporation. In addition, conflict mediation was widespread in Magdeburg cities for civil, financial, and criminal disputes.

In the 18th century, the procedure for amicable dispute resolution was regulated in the "Rights by which the Little Russian people are judged" (1743).[17] In particular, the parties who agreed to an amicable settlement of a dispute by a 'conciliator' undertook in writing not to prosecute the conciliator because they disagreed with his decision. It was not allowed to conclude an agreement on reconciliation in case of an intentional crime, the responsibility for which provided for the death penalty or imprisonment.

As for the forensic examination, its prototype was first regulated in para. 1 of Article 8 of the aforementioned "Rights by which the Little Russian people are judged", which mentioned 'people of the examination' who provided 'reliable certificates.'[18] These certificates were prepared by *wozni*, who simultaneously served as an inquirer, investigator, judge's assistant, clerk, and educated (expert) at the same time.

At the same time, until the 19th century, forensic expert activity was not regulated in the judicial legislation of Ukraine and other European countries. In the 19th century, the existing system of evidence was revised and reformed. Such archaic types of evidence as oaths, trials, lots and fights were excluded from it, and the main evidence became the testimony of witnesses and the conclusions of knowledgeable 'people' (experts). In this regard, the statutes of the Russian Empire on criminal and civil proceedings of 1832 and 1864, which also applied to a large part of the Ukrainian lands, separated the functions of forensic examination (the so-called 'examination by knowledgeable people') from the functions of judges. After the status of 'knowledgeable persons' was regulated in the court statutes, they were also called 'experts.' The very word 'expert' (*expertus*) is, in fact, a translation of the Latin word and means 'knowledgeable person.'

The Statute of Criminal Procedure of the Russian Empire of 1864 in Articles 112, 325–356, 690, 691, 692, 698, etc. improved the legal regulation of the appointment and procedural status of knowledgeable persons in criminal proceedings. In particular, Article 112 of this Statute states: "In cases where special testimony or experience in science, art, craft, industry or any occupation is required for an accurate understanding of the circumstances of the case, knowledgeable people shall be invited".[19]

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[17] See *Prava za yakimi suditsya malorosiyskiy narod, Ukrayinskiy Kodeks 1743 r.*, Kiyiv 1997.

[18] *Ibidem*, p. 91.

[19] *Sudebnyie ustavyi 20 noyabrya 1864 g. S razyasneniem ih po resheniyam kasatsionnyih departamentov Pravitelstvuyuschego Senata 1866–1871 i prilozheniyami: Dopoln. uzakoneniy i Gorodovogo polozheniya*, S.-Peterburg, Moskva 1871, p. 39.

Regarding the essence of the procedural status of forensic experts, Ukrainian forensic scientist L. Vladimirov clearly defined that forensic experts are "not witnesses, but people of science called to solve special issues", and called forensic examination itself "an independent type of criminal evidence".[20] At the same time, by the beginning of the 20th century, professional forensic experts were almost never seen either in Ukraine or abroad. There are only a few examples when particularly talented European experts (Dr. Ezerich from Berlin – photography expertise; Hein from Leipzig – handwriting expertise; Fleury from Paris – accounting expertise) gave up other jobs and became professionally engaged in forensic science.[21]

Over time, the activities of A. Bertillon in France, G. Fulds in Japan, F. Galton and E. Henry in England, and other forensic scientists contributed to the emergence of the first forensic offices – identification bureaus – in England, Germany, France, Argentina, Brazil, and Japan at the turn of the 19th and 20th centuries and contributed to the establishment of forensic science in the world. In Ukraine, the first fingerprinting room was established in 1904 in Kyiv.[22]

On the eve of the First World War, according to the Law of 4 July 1913 "On the Establishment of Scientific and Forensic Expertise Offices in the Cities of Moscow, Kyiv, and Odesa" approved by the State Duma and the State Council of the Russian Empire, the first state specialized expert institutions were established in Ukraine: the Scientific and Forensic Expertise (SFE) offices under the prosecutors of the Kyiv and Odesa judicial chambers. In early 1914, these two offices began their work and continued to work during the First World War, as well as after the February Revolution of 1917, during the Ukrainian People's Republic, Hetmanate, Directory, and after the Bolshevik expansion in Ukraine.[23]

After Ukraine became a part of the former Union of Soviet Socialist Republics (USSR) in 1922, the development of the system of regional offices (since 1923) and later institutes (since 1925) of scientific and forensic expertise and the formation of the Soviet system of forensic examination began. It was in 1923, a hundred years ago, that the network of forensic institutions, in addition to the offices in Kyiv and Odesa, was expanded by the office in Kharkiv, which was headed by the famous Ukrainian forensic physician and criminologist M. Bokarius.

The development of the SFE institutions from 1922 to 1929 was marked, on the one hand, by Ukraine's accession to the former USSR and the introduction of

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[20] L. Vladimirov, *Uchenie ob ugolovnyih dokazatelstvah. Osobennaya chast. Kniga pervaya. Lichnyiy sudeyskiy osmotr i zaklyucheniya ekspertov*, Harkov 1886, p. 53.

[21] A. Leventsim, *Ekspertiza na sud i zhelatelnyie uluchsheniya v etoy oblasti*, "Zhurnal Ministerstva yustitsii" 1899, vol. 4, pp. 207–210.

[22] L.M. Golovchenko, A.I. Lozoviy, E.B. Simakova-Efremyan et al., *op. cit.*, p. 13.

[23] V.L. Fedorenko, V.V. Kovalenko, V.M. Kravchuk, *Genezis i rozvitok sudovoyi ekspertizi v Ukrayini: vid Ruskoyi Pravdi – do viyskovoyi agresiyi RF*, "Ekspert: paradigmi yuridichnih nauk i derzhavnogo upravlinnya" 2022, vol. 3(21), p. 39.

the Soviet legislation system, and on the other hand, by a certain liberalization of economic and economic relations during the implementation of the New Economic Policy (NEP), which generally had a positive impact on the development of the theory and practice of forensic examination, and the attraction of the best foreign experience in the field of criminology and forensic examination.

Regarding the tasks of the SFE institutions, Article 19 of the Order of the People's Commissariat of Justice of the Ukrainian SSR of 2 June 1927 "On Institutes of Scientific and Forensic Expertise" assigned them the main task "to assist the court, prosecutor's office and judicial authorities and inquiries in establishing a crime and exposing the perpetrator by conducting scientific examinations and giving opinions on certain issues that require the adaptation of scientific research methods or special technical expertise".[24]

Thus, during the Soviet era, the activities of the SFE institutions were prioritized not so much as conducting independent and objective forensic examinations, but rather 'assisting' courts and pre-trial investigation bodies in "establishing the crime and exposing the guilty". Thus, from the very beginning of their activities, the SFE institutions established themselves as non-independent and auxiliary subjects of the giant Soviet punitive and repressive system. Many of the talented Ukrainian expert scientists and practicing forensic experts became innocent victims of this system in the 1930s.

At the same time, in the 1930s, mediation methods began to be used in the United States to resolve family conflicts and labor disputes during the Great Depression. Thanks to the use of conciliation procedures, large-scale strikes were stopped. However, the relevant procedures have not been regulated by law, and the role of a mediator, unlike the work of a forensic expert, has not been transformed into a professional activity.

During the Second World War, scientific and forensic examination institutes changed their organizational and managerial status. Since 1944, they have been transformed into research institutes of forensic expertise,[25] but the purpose of forensic expertise in the former USSR remained unchanged. Its main task was to assist the repressive and punitive authorities and courts in the USSR in proving crimes, and after the death of J. Stalin, this was supplemented by assistance to the Committee for State Security (Komitet gosudarstvennoy bezopasnosti, KGB) in the fight against dissident movements.

At the same time, during the Soviet era, forensic examination in Ukraine received further scientific, methodological, regulatory and institutional support. Fundamental theoretical and methodological developments in the field of forensic

[24] Institutam naukovo-sudovoyi ekspertizi. Nakaz Narodnogo Komisariatu Yustitsiyi Ukrayinskoyi RSR of 2 June 1927 (Byuleten Narodnogo Komisariyatu Yustitsiyi USRR 1927, vol. 25–26, Art. 97).

[25] *Sudovi ekspertizi v protsesualnomu pravi Ukrayini*, Kiyiv 2019, pp. 10–11.

examination appeared (L. Arotsker, V. Bakhin, R. Belkin, O. Vasyliev, H. Granovskyi, V. Konovalova, M. Kostytskyi, V. Lychchenko, M. Saltevskyi, M. Sehai, O. Shliakhov, etc.), which became a scientific school for the further development of forensic science in independent Ukraine. Despite the orientation of forensic activities in the former USSR mainly on forensic types of forensic examinations, in the 1970s and 1980s, expert research began to be actively used in civil proceedings.[26]

In the 1970s and 1980s, forensic expert opinions remained an important type of evidence in criminal proceedings in the USSR, but their appearance in civil proceedings created conditions for settlement agreements in civil law disputes, in particular on family and marriage issues, based on the results of the examination. For example, this could be the conclusions of a construction and appraisal examination in the case of housing division during divorce, in the absence of minor children, when a court decision was binding.

It should be noted that the development of forensic science in Western Europe and the United States was characterized by other features in the second half of the 20th century. On the one hand, the police departments of most European and American countries formed forensic services, the subject of research of which was primarily criminal cases. On the other hand, experts in civil, family, commercial, labor and other disputes abroad were appointed by courts *ad hoc*, from among recognized experts in science, technology and art, with the consent of both parties.

In the common law legal system, an expert had a status similar to that of a witness and had some peculiarities, as he or she provided testimony based on his or her own expert opinion. Most often, it was the parties who were authorized to engage experts, so the court's task was to determine the most convincing expert opinion and take it into account when making a decision. In the common law system, the purpose of such an expert witness is to assist the court in achieving the material truth by expressing an unbiased and objective opinion on certain facts. Most common law countries, such as the United States, the United Kingdom, and Australia, do not maintain special registers of forensic experts (which may be either public or private), and the criterion for their qualification is a sufficient level of specialized knowledge and experience.

In the countries of continental law, the practice of maintaining a relevant register of forensic experts was introduced, in particular in the Netherlands, France, Latvia, Austria, and Ukraine. Often, forensic experts were recognized as civil servants (or police officers) and were subordinated to law enforcement institutions such as the Ministry of Justice (Poland, Lithuania, Czech Republic, Spain), the Ministry of Internal Affairs (Germany, Spain), the Ministry of Defense (France) or the Ministry of Health (Ukraine). At the same time, in the countries of continental law, the predominant role in the involvement of a forensic expert in the process was given to

[26] V.L. Fedorenko, V.V. Kovalenko, V.M. Kravchuk, *op. cit.*, p. 39.

the police or the court (Finland, the Netherlands, Italy, Germany), and the forensic expert himself is considered a participant in the trial.

The 1980s were also favorable for the legalization of mediation, first in the United States and later in other countries. The establishment of the institution of mediation in its modern form is primarily associated with the results of the R. Pound Conference on "Causes of Dissatisfaction with the Administration of the Justice System in the United States" held in the United States in 1976. In his speech at the Pound Conference, Supreme Court Justice W. Berger pointed out the shortcomings of the US judicial system (high expenditures from federal and local budgets on courts, long terms of consideration of cases, excessive legalization and formalization of procedures, high cost of litigation for ordinary citizens, etc.). According to W. Berger, the key to solving this problem is informal alternatives to pre-trial search for ways to reconcile the parties to the dispute. At the same conference, Prof. F. Sander presented his concept of 'justice with many doors'. The idea was that the US court should become an office with many doors. At the beginning, a consultant (manager) would consider the circumstances of the dispute and recommend to the parties the 'next door'. One of these 'doors' could be a conciliation agreement.[27]

The Pound Conference laid the conceptual foundations of mediation, which has developed rapidly from the establishment of mediation procedures, arbitration and arbitration courts to the adoption of the Mediation Act in 2001. Positive practices of using mediation procedures for alternative dispute resolution in the United States were vigorously recopied first to states with the Anglo-Saxon system of law (Australia, the United Kingdom, Canada, New Zealand, etc.), and later to other countries of the world, including EU member states (Italy, Poland, etc.), as well as post-Soviet republics, including Ukraine.

2. The rise of forensic expertise and mediation in Ukraine and abroad in the 21st century: first approaches

As is well known, the legal status of forensic experts and forensic research institutions in Ukraine was enshrined at the time of Ukraine's independence in a special Law "On Forensic Examination" of 25 February 1994,[28] which is still in force today. Article 1 of this Law regulates the content of the definition of 'forensic examination': "Forensic examination is a study, based on special knowledge in the field of science, technology, art, craft, etc., of objects, phenomena and processes

[27] T. Kiselova, *Pravove regulyuvannya vidnosin iz nadannya poslug mediatsiyi u zarubizhnih krayinah*, "Pravo Ukrayini" 2011, vol. 11–12, pp. 227–228.

[28] Law of Ukraine of 25 February 1994 "On Forensic Examination" (Vidomosti Verkhovnoi Rady Ukrainy 1994, no. 28, item 232).

in order to provide an opinion on issues that are or will be the subject of court proceedings".

Thus, the legislator was not categorical about the use of forensic expert opinions exclusively in court. The provision of Article 1 of the Law of Ukraine "On Forensic Examination" allows for the possibility of using forensic expert opinions out of court. For example, such conclusions may be used for expert support of negotiation procedures in public procurement.[29] Obviously, the conclusions of forensic experts can also be used in mediation procedures, as discussed below.

Today, the system of forensic examination in Ukraine, in accordance with Article 7 of the Law of Ukraine "On Forensic Examination", is represented in the organizational sense by: 1) state research institutions of forensic examination of the Ministry of Justice of Ukraine, the Ministry of Health of Ukraine and expert services of the Ministry of Internal Affairs of Ukraine, the Ministry of Defense of Ukraine (not yet established), the Security Service of Ukraine and the State Border Guard Service of Ukraine; 2) expert institutions of municipal ownership (forensic bureaus that have the status of municipalities). As for the latter type of forensic entities, there are discussions in Ukraine. However, in our opinion, a wide range of forensic entities creates healthy competition in this area and has a positive impact on the availability of expert research and the quality of expert opinions.

It should be noted that state forensic institutions are not a purely post-Soviet practice. Some EU member states have specialized forensic institutions that are not subordinated to the police. For example, in Estonia, Latvia, Lithuania, the Netherlands, Poland, Slovakia, Montenegro, and others, scientific and expert institutions operate under the ministries of justice. For example, in the Netherlands, one of the world's most famous forensic institutions, the Netherlands Forensic Institute (NFI, The Hague), has been operating since 1999, subordinated to the Ministry of Security and Justice. The NFI employs about 600 experts who conduct more than 40 types of forensic examinations.[30] The conclusions of the NFI have repeatedly supported the activities and decisions of the International Criminal Tribunal for the former Yugoslavia. This court was established in 1991 and began operating in 1993. Today, the NFI provides expert support to the International Criminal Court in The Hague, which began operating in 2002.[31]

Thus, we can conclude that the trend towards the expansion of forensic experts' activities from state forensic institutions to private experts and specialists who, by virtue of their special knowledge and/or skills in science, art, technology or craft, are able to provide an objective, complete and impartial expert opinion both in court

[29] V. Fedorenko, O. Sobin, S. Zazimko, *Advisory Message on the Results of Expert Research: Concept, Content, Scope*, "Pravo Ukrainy" 2019, vol. 5, pp. 164–177.

[30] Netherlands Forensic Institute, Ministry of Security and Justice.

[31] V.L. Fedorenko, V.V. Kovalenko, V.M. Kravchuk, *op. cit.*, p. 40.

proceedings and in out-of-court disputes is crucial for the development of forensic expertise in the 21st century. This includes those that may be used as arguments in the mediation process.

The 21st century was also favorable for the flourishing of the mediation institution and its international recognition. Thus, in 2002, the United Nations Commission on International Trade Law (UNCITRAL) adopted the UNCITRAL Model Law on International Commercial Conciliation, in 2004 the European Commission adopted the European Code of Mediators, and in 2008 the European Commission issued Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.[32]

The latter Directive gave rise to the development of national laws on mediation in EU member states and other European countries, as well as the establishment of various models of pre-trial conflict resolution. In particular, I.G. Yasinovskiy identified the following models of mediation abroad: 1) judicial; 2) lawyer; 3) notary; and 4) professional mediation.[33] At the same time, different models of mediation may coexist in one state.

We would also like to draw attention to the fact that the phenomenon of mediation is also characterized by its successful and widespread use today in a number of countries that do not have 'westernized' models of democracy. We are talking about traditional models of mediation that are still popular in the countries of the East, South Asia, and other regions. Their peculiarity lies in the fact that they do not involve professional mediators, but rather leaders authoritative in the religious or local community who act in accordance with the provisions of customary law. For example, in China, the People's Mediation Committee resolves more than 7.2 million disputes annually. In Pakistan, the institute of jirga is widely used, which involves the application of a mediator (khan or malik) who forms a council with the parties to the dispute to make a decision acceptable to all parties to resolve the conflict.[34]

However, for the EU member states and many other democratic countries, the legitimization of the mediation institution is primarily determined by its regulatory certainty. That is, a clear regulation of the values and principles of mediation, the subject-object composition and stages of the mediation procedure, legal instruments of mediation, guarantees of the parties' compliance with the decision made by the mediator, etc.

[32] See T. Kiselova, *op. cit.*, p. 228; R. Karpenko, *op. cit.*, pp. 32–34.

[33] I.G. Yasinovskiy, *Harakteristika modeley mediatsiyi v rozvinutih krayinah*, "Yuridichniy visnik" 2014, vol. 4(33), pp. 95–96.

[34] T. Kiselova, *op. cit.*, p. 226.

3. Forensic expert opinions as a legal instrument of mediation in Ukraine

The international community's attention to the positive practices of implementing the mediation institute, as well as the adoption of relevant international documents on mediation, the nomenclature of which is constantly growing (Guidelines No. 14 for better implementation of the existing Committee of Ministers' Recommendations on Mediation in Family Matters and on Mediation in Civil Matters, adopted by the European Commission on the Efficiency of Justice on 7 December 2007, etc.),[35] have drawn attention to the potential of this type of legal activity in Ukraine. One of the first campaigns to popularize the potential of mediation for the public, parties to disputes and the professional community (judges, prosecutors, attorneys, mediators) on the topic "You have the right to mediation" was conducted by the Ministry of Justice of Ukraine in October 2010.[36]

The experience of Poland, which in 2005 adopted the Act of 28 July 2005 amending the Civil Procedure Code and Certain other Acts, had a positive impact on the development of the mediation institution in Ukraine. In particular, according to the modernized provisions of the Polish Civil Procedure Code, the basis for the mediation procedure is a mediation agreement or a relevant court order that may refer the plaintiff and the defendant to mediation.

The Polish experience of introducing mediation was also interesting for Ukraine. Especially since Ukraine has been taking decisive steps to legitimize mediation in various spheres of public and state life. In particular, the Cabinet of Ministers of Ukraine, by its Order No. 330-p of 13 April 2011, approved the Action Plan for the implementation in 2011 of the National Program "National Action Plan for the Implementation of the UN Convention on the Rights of the Child" for the period up to 2016, and Section II para. 1 "Education" provided for the introduction of the course "School Mediation". In 2010–2012, several draft laws on mediation were registered in the Verkhovna Rada of Ukraine, but none of them received the support of parliamentarians.[37] Subsequently, numerous draft laws on mediation were developed and submitted to the Parliament.

NGOs also played a significant role in advocating for the legitimization of the mediation institution in Ukraine. Thus, in 2014, the National Association of Mediators of Ukraine (NAMU) was established, which still performs a number of

[35] Natsionalna asotsiatsiya mediatoriv Ukrainy, *Mediatsiya ta sudova sistema. Scho? Yak? Navischo?*, [Broshura], USAID: Prekt "Spravedlive pravosuddya".

[36] R. Karpenko, *op. cit.*, p. 34.

[37] B. Mendyk, *Mediacja na Ukrainie: rzeczywistość i perspektywy – wywiad z prof. Władysławem Fedorenko*, "Arbitraż i Mediacja (ADR)" 2013, vol. 1(21), p. 58.

important functions related to the training of mediators, relevant methods, providing information and methodological assistance to mediators, etc.

Finally, the attention of lawyers, legal scholars, judges, legislators and NGO representatives contributed to the intensification of lawmaking work aimed at regulating the mediation procedure in a special law. Thus, in 2015, four draft laws on mediation were registered in the Verkhovna Rada of Ukraine, and on 17 May 2016, the Verkhovna Rada Committee on Legal Policy and Justice decided to recommend that Draft Law No. 3665 be adopted as a basis and take into account all the relevant provisions of Draft Law No. 3665-1. Both draft laws envisaged the introduction of mediation into the legal framework as a separate institution that could be used to resolve any type of dispute.[38]

Only on 17 November 2021, the Verkhovna Rada of Ukraine of the IX convocation adopted the Law of Ukraine "On Mediation",[39] the final and transitional provisions of which amended the Labor Code of Ukraine (Article 222-1 "Settlement of Labor Disputes through Mediation"), the Land Code of Ukraine (Article 158-1 "Settlement of Land Disputes through Mediation"), the Commercial Procedure Code, the Civil Procedure Code, the Code of Administrative Procedure, the Law of Ukraine "On Notaries" (Article 16-1 "Mediation in Notaries"), the Law of Ukraine "On Social Work with Families, Children and Youth", and the Law of Ukraine "On Social Services". Thus, the Verkhovna Rada of Ukraine has defined the main sphere of social relations that is the subject of mediation.

Article 1 of this Law defines mediation as "an out-of-court voluntary, confidential, structured procedure in which the parties, with the help of a mediator (mediators), try to prevent or resolve a conflict (dispute) through negotiations".

At the same time, the legislator has defined a broad scope of application of the mediation procedure in different jurisdictions and at different stages of court proceedings. According to Article 2 of the Law of Ukraine "On Mediation", "mediation may be conducted before applying to a court, arbitration court, international commercial arbitration or during pre-trial investigation, court, arbitration, arbitration proceedings, or during the execution of a court, arbitration court or international commercial arbitration decision".

In general, as practicing lawyers testify, today, even during martial law in Ukraine, mediation is used to resolve any dispute, including commercial, civil, family, labor, and others. According to experts, the mediation procedure can also be effective in criminal cases.[40] In this case, mediation is possible at any stage of

[38] Natsionalna asotsiatsiya mediatoriv Ukrainy, *op. cit*.

[39] Law of Ukraine of 16 November 2021 "On Mediation" (Journal of Law 2022, no. 7, item 51).

[40] B. Maan, R. van Ri, A. Sergeeva, S. Sergeeva, L. Romanadze, V. Rodchenko, *Gap-Analiz vprovadzhennya Institutu mediatsiyi v Ukraini*, Kiyiv 2020, p. 30.

the conflict – "before going to court, instead of or during a trial, and even at the stage of execution of a court decision".[41]

At the same time, the current Ukrainian legislation on mediation does not contain an exhaustive list of legal tools that a mediator can use when considering and objectively assessing a conflict for its further resolution. It seems that the main task of a mediator is to comprehensively familiarize himself or herself with the essence, content, and actual circumstances of the conflict in order to find a peaceful way to resolve the dispute. Achieving this task is impossible without forming and studying the evidence base of the dispute.

It should be emphasized that mediators do not have access to most of the methods and means of forming an evidence base available to pre-trial investigation bodies or courts, except for expert research or forensic examination at the request of a party to the case (if the case is already pending in court). The desire of a mediator to replace a forensic expert, as noted by some scholars,[42] is unlikely to contribute to a quick, conflict-free and constructive reconciliation of the parties. Therefore, in our opinion, the parties to the mediation procedure should apply for a forensic expert opinion on issues that are essential to the resolution of the dispute, as an effective tool for the effectiveness of the mediation procedure.

We can agree with I.V. Starodubov that forensic examination of intellectual property issues can be an effective tool for mediation in commercial, civil, corporate disputes and labor relations, when, for example, intellectual property rights are registered to a top manager of a company, etc. At the same time, the use of mediation in the field of intellectual property has its advantages, as it allows preserving the relationship between the parties to the conflict. In contrast, litigation does not contribute to the formation of partnerships; mediation stops the offense due to the quick resolution of the conflict and prevents illegal alienation, including copying, distribution, and reproduction of intellectual property, etc.[43]

A compromise solution to such a dispute may be based on the conclusions of a forensic expert who examines trademarks, industrial designs, inventions (utility models). There are cases when foreign firms represented in Ukraine conduct expert studies of their own trademark in comparison with trademarks that are confusingly similar and may be misleading. This allows the management to determine the development strategy in Ukraine, in particular with regard to the judicial prospects for protecting its trademark.

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[41] Yu. Babenko, *Yak mediatsiya dopomagae porozumitisya iz kontragentami pid chas viyni*, "Ekonomichna pravda", 20.12.2022.

[42] D.O. Davidenko, *Perspektivi rozvitku mediatsiyi v administrativnomu protsesi Ukraini ta yiyi vpliv na sudovo-ekspertnu diyalnist*, "Teoriya ta praktika sudovoyi ekspertizi i kriminalistiki" 2020, vol. 22, p. 253.

[43] I.V. Starodubov, *Perevagi zastosuvannya mediatsiyi u sferi intelektualnoyi vlasnosti*, Tsentr sudovoyi ekspertizi ta ekspertnih doslidzhen.

Obviously, forensic examination on intellectual property issues is the most illustrative example of the value of a forensic expert's opinion for the application of the procedure. As already noted, mediation is an effective procedure for resolving disputes and relieving the workload of courts not only in family, labor, civil, commercial and administrative disputes, but also in criminal cases. First of all, we are talking about the possibility of applying the mediation procedure in disputes involving criminal offenses and minor crimes.

Therefore, the conclusions of forensic experts in various specialties may be important for the formation of the evidence base that should be taken into account in the mediation process for all possible types of disputes: economic; transport and commodity science; weapons examination; engineering and transport; molecular genetic research (DNA); fire and technical; computer and technical; telecommunications; construction and technical; construction evaluation; land and technical; land evaluation; land management; psychological; life safety; handwriting and linguistic, art history, etc. It is through the relevant expert studies that the issues of objectivity of the price of purchase and sale of a car, the signature of a particular person under a promissory note, the originality and price of a work of art, the psychological state of a person during the commission of certain acts, land boundaries between neighbors, etc. are resolved, including out of court.

CONCLUSIONS

Summarizing, we can conclude that justice, forensic examination and mediation are of a related nature, as they are designed to objectively and fairly resolve disputes that have been inherent in humanity since ancient times and protect the rights and legitimate interests of the parties. However, courts and judges have been making decisions about lawful and unlawful acts since ancient times, forensic experts have been establishing the circumstances of the case that are essential for courts and parties since the late 19th century, and mediators have been determining methods and forms of dispute resolution out of court since the late 20th century. The 21st century is a triumph of experts as 'scientific judges' who form the evidence base for both court proceedings and mediation procedures.

At the same time, since 24 February 2022, when the Russian Federation committed military aggression against Ukraine, the issue of the inevitability of punishment for war crimes in Ukraine, as well as compensation for losses and damage caused by the occupiers to citizens, legal entities, territorial communities and the Ukrainian state as a whole, has been acute.[44] Obviously, war crimes committed by

[44] V. Fedorenko, M. Fedorenko, *Russia's Military Invasion of Ukraine in 2022: Aim, Reasons, and Implications*, "Krytyka Prawa. Niezależne Studia nad Prawem" 2022, vol. 14(1), pp. 38–39.

the Russian Federation and the perpetrators must be punished by the International Criminal Court and national courts. And also by a special military tribunal for criminals from Russia, which Ukraine insists on establishing. Today, the state forensic institutions of Ukraine, together with their colleagues from Spain, Poland, France and others, are forming a proper evidence base for the prosecution of war criminals.

However, is there a place for mediation during the military aggression of the Russian Federation against Ukraine and during the period of post-war revival of Ukraine? And how can the potential of forensic expertise be used by mediators? It is believed that the main mission of the institution of mediation in modern Ukraine is to:

- relieve the courts during martial law from simple administrative, labor, civil, family, commercial and criminal disputes that can be resolved through mediation, including the use of forensic experts' opinions (if necessary);
- form optimal international mechanisms for fair and timely compensation by the aggressor state for losses and damage caused to individuals and legal entities, territorial communities and the Ukrainian state, using mediation procedures and the conclusions of comprehensive examinations (military, ballistic, construction, engineering and environmental, commodity, transport and economic, etc.);
- develop the best national and European practices of applying the mediation procedure using the potential of forensic expertise in the context of Ukraine's post-war revival and implementation of the foreign policy course aimed at Ukraine's EU membership.

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ABSTRAKT

Opracowanie zawiera analizę wymiaru sprawiedliwości, badań kryminalistycznych i mediacji od czasu ich powstania do współczesności. W artykule przeanalizowano historyczne przykłady zastosowania badań kryminalistycznych w ramach procesu mediacji, począwszy od czasów Wschodu Starożytnego i Antyku aż do XX w., a także procesy legitymizacji badań kryminalistycznych (od końca XIX w.) i mediacji (od końca XX w.) w Ukrainie i innych krajach. Skupiono się na zalążkach kryminalistyki w czasach Rusi Kijowskiej, Księstwa Halicko-Wołyńskiego, Wielkiego Księstwa Litewskiego, Państwa Kozackiego oraz w okresie włączenia ziem ukraińskich do Austro-Węgier i Cesarstwa Rosyjskiego, a także na pojawieniu się badań kryminalistycznych przed I wojną światową podczas rewolucji ukraińskiej oraz w czasie ekspansji bolszewików i ustanowienia władzy sowieckiej. Przeanalizowano tworzenie biur regionalnych (1923) i później instytutów ds. badań naukowo-kryminalistycznych (1925) w Kijowie, Odessie i Charkowie. W artykule przedstawiono specyfikę rozwoju kryminalistyki w kontekście ustanowienia i legitymizacji postępowania mediacyjnego w niepodległej Ukrainie. Poddano analizie postanowienia obecnie obowiązującego prawa dotyczącego badań kryminalistycznych. Autorzy omawiają perspektywy wykorzystania wyników czynności kryminalistycznych w realizacji procedur mediacyjnych przy rozwiązywaniu sporów w drodze negocjacji pomiędzy stronami z wykorzystaniem wniosków sporządzonych przez biegłych z dziedziny kryminalistyki. Wskazują najbardziej obiecujące rodzaje ekspertyz kryminalistycznych z punktu widzenia postępowania mediacyjnego (z zakresu stosunków ekonomicznych, handlowych, własności intelektualnej itp.) oraz określają perspektywy dla mediatorów w zakresie wykorzystania ekspertyz nie tylko w sporach w sprawach rodzinnych, pracowniczych, handlowych i administracyjnych, lecz także w sprawach karnych w czasie stanu wojennego i podczas powojennej odbudowy Ukrainy.

Słowa kluczowe: badania kryminalistyczne; czynności biegłego w dziedzinie kryminalistyki; ekspertyza kryminalistyczna; mediacja; mediator; postępowanie mediacyjne