

# Mediation as a means to resolve administrative disputes: an appraisal of the historical and legal aspects

*La mediación como herramienta para resolver conflictos administrativos.  
Una valoración de aspectos históricos y legales*

*A mediação como ferramenta de resolução de conflitos administrativos.  
Uma avaliação dos aspectos históricos e jurídicos*

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## Abstract

*Purpose:* The purpose of the article is a scientific analysis regarding the understanding of the essence and content of mediation as one of the most effective means to resolve administrative and legal disputes, as well as the latest draft laws, developed by the Government of Ukraine regarding the regulation of the mediation procedure. They are analyzed as a result of which own comments are expressed and recommendations for improving their provisions are provided.

*Methodology:* The methodological basis of this article were the methods of scientific cognition, which are mostly used in legal science nowadays, namely: formal-legal, analytical and structural-functional. The historical and legal aspects of the development of the institution of mediation are being analyzed in this work. Based on scientific sources, the essence of mediation has been clarified and the mediation procedure as one of the promising means to resolve administrative disputes has been analyzed. The impact of mediation on the quality of resolving administrative and legal disputes which occur among the subjects of administrative and legal relations is also determined. The main principles of the mediation procedure are defined and characterized, in particular, such as voluntariness, confidentiality, "*sincerity of the parties*" and neutrality. Proposals are provided regarding the intensification of the use of modern means of mediation during the resolution of administrative disputes. Emphasis is placed on the successful experience of a number of developed foreign countries in the researched area and the possibilities of its use in Ukraine.

*Conclusions:* The authors conclude that the resolution of administrative disputes through the use of mediation is a quite effective means to resolve conflicts. One of the key advantages of this means is its voluntary and informal nature, which gives ample opportunities for negotiations to the disputing parties. This is due to the fact that the mediation process does not put pressure on them and does not put them in a rigid framework.

**Keywords:** Administrative-legal dispute, administrative-legal relations, mediation.

## Resumen

*Propósito:* se pretende hacer un análisis científico en relación con la comprensión de la esencia y contenido de la mediación como una de las herramientas más efectivas para resolver conflictos administrativos y legales, así como de la nueva normatividad desarrollada por el Gobierno de Ucrania sobre la regulación de los procedimientos de mediación. Esto se analiza a la luz de los propios comentarios y se hacen recomendaciones para mejorar las disposiciones.

*Metodología:* la base metodológica para este artículo es la cognición científica que se usa en las disciplinas legales, a saber: el nivel legal formal, analítico y estructural-funcional. Los aspectos históricos y legales del desarrollo de la institución de la mediación también se analizan en este trabajo. Con base en fuentes científicas, se aclara la esencia del procedimiento de la mediación como una herramienta prometedora para la resolución de disputas administrativas. Además, se determina el impacto de la mediación en la calidad de la resolución de conflictos legales y administrativos que ocurren entre sujetos. Se definen y caracterizan los principios de la mediación, tales como la voluntariedad, confidencialidad, "la sinceridad de las partes" y la neutralidad. Se hace una propuesta para intensificar el uso de medios modernos durante la resolución de conflictos administrativos. El énfasis se sitúa en la experiencia exitosa de un número de países en vía de desarrollo y las posibilidades de su uso en Ucrania.

*Conclusiones:* los autores concluyen que la resolución administrativa de conflictos a través de la mediación es efectiva. Una de sus ventajas clave radica en su naturaleza informal y voluntaria, lo que deja un amplio margen para las partes en conflicto, esto se debe a que el proceso de mediación no ejerce presión y tampoco vuelve rígidos los marcos del proceso.

**Palabras clave:** disputa administrative-legal, relación administrativo-legal, mediación.

## Resumo

**Objetivo:** pretende-se fazer uma análise científica em relação à compreensão da essência e do conteúdo da mediação como uma das ferramentas mais eficazes para resolver conflitos administrativos e jurídicos, bem como os novos regulamentos desenvolvidos pelo Governo da Ucrânia sobre a regulamentação dos procedimentos de mediação. Isto é analisado à luz dos próprios comentários e são feitas recomendações para melhorar as disposições.

**Metodologia:** a base metodológica deste artigo é a cognição científica utilizada nas disciplinas jurídicas, a saber: o nível jurídico formal, analítico e estrutural-funcional. Os aspectos históricos e jurídicos do desenvolvimento da instituição de mediação também são analisados neste trabalho. Com base em fontes científicas, a essência do procedimento de mediação é esclarecida como uma ferramenta promissora para a resolução de litígios administrativos. Além disso, é determinado o impacto da mediação na qualidade da resolução dos conflitos jurídicos e administrativos que ocorrem entre os sujeitos. Os princípios da mediação são definidos e caracterizados, como a voluntariedade, o sigilo, "a sinceridade das partes" e a neutralidade. Propõe-se intensificar o uso de meios modernos na resolução de conflitos administrativos. A ênfase está na experiência bem-sucedida de vários países em desenvolvimento e nas possibilidades de seu uso na Ucrânia.

**Conclusões:** os autores concluem que a resolução de conflitos administrativos por meio da mediação é eficaz. Uma das suas principais vantagens reside na sua natureza informal e voluntária, o que deixa uma ampla margem para as partes em conflito, isto porque o processo de mediação não exerce pressão nem torna rígidos os seus enquadramentos.

**Palavras-chave:** litígio administrativo-judicial, relação administrativo-jurídica, mediação.

## I. INTRODUCTION

Three decades have passed since the countries of Central and Eastern Europe broke free from the Soviet yoke and entered the path of political transformation. This was largely possible due to the mobilization of society against the oppressive state. It was the anti-regime resistance of societies dreaming of subjective citizenship that lay at the foundation of political changes in this part of Europe<sup>1</sup>.

With the emergence of the first stably functioning social relations and ending with current trends in the administrative and legal sphere, the various parties to certain conflicts (disputes) preferred to reach an agreement, thus resolving all their contradictions with the opponent as soon as possible. To achieve this goal, they tried to use such methods that would allow them to reach an agreement with the other party to the conflict (dispute) in a prompt and effective manner.

One of the factors that convinced many societies to introduce and use mediation, the fastest and most mutually beneficial way to resolve disputes between the

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1 Jarosław Kempa & Artur Roland Kozłowski. *Participatory Budget as a Tool Supporting the Development of Civil Society in Poland*. NISPACEE JOURNAL OF PUBLIC ADMINISTRATION AND POLICY 1. June 2020. Pp. 67-79, 62. Available at: <https://doi.org/10.2478/nispa-2020-0003>

parties, was the low efficiency of the judiciary in many countries. That is, instead of trying for quite a long time to get the right solution for themselves in an inefficient, long-term and often corrupt trial, the parties tried to find a quality alternative to the court operating in the state. In this case, mediation should be considered as an alternative way to resolve the conflict.

Mediation is on the rise as an important form of Alternative Dispute Resolution (ADR) in the field of administrative law. Although all forms of administrative proceedings could potentially benefit from the positive influence of mediation on the relationship between disputants (administrative authorities and private actors), there seems to be an emphasis on the exploration of the possibilities of mediation in those disputes that are not yet brought before administrative courts. Most legal systems have growing policies to implement mediation, mediation techniques and communication skills within all processes that demand civil servants of governmental agencies to interact with private parties. When public law decisions are at the basis of the conflict, the structure and core aspects of administrative law will have an important role in deciding whether mediation could have a role in resolving the dispute<sup>2</sup>.

## II. UNDERSTANDING THE RATIONALE AND NECESSITY OF MEDIATION

According to numerous scientific publications, related to the subject of the article, the institution of mediation has currently become widely used in the world practice while settling the conflicts (disputes). First of all, its application is due to the fact that mediation procedures provide an opportunity to choose pre-trial and out-of-court methods for resolving conflicts (disputes), and parallel to that it maintains the ability to go to the Court of Law to resolve them. In rendering the process more effective and efficient, there was the need in adopting Directive 2008/52/Ec of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. Its main objective was that of examining and elucidating the necessity and facility that access to ADR methods and to promote the peaceful settlement of disputes, by encouraging the use of mediation and ensuring a balanced relationship between mediation and litigation. In particular, Paragraph 8 of the Preamble to the Directive 2008/52/Ec states that: "*The provisions of this Directive should apply only to*

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2 K. J. de Graaf, A. T. Marseille & H. D. Tolsma. *Mediation in Administrative Proceedings: A Comparative Perspective*. Eds. Dacian C. Dragos & Bogdana Neamtu. *ALTERNATIVE DISPUTE RESOLUTION IN EUROPEAN ADMINISTRATIVE LAW*. 2014. Springer. Pp. 589-605. Available at: [https://doi.org/10.1007/978-3-642-34946-1\\_](https://doi.org/10.1007/978-3-642-34946-1_)

*mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes*"<sup>3</sup>.

As a matter of common understanding, issues of mediation is very fundamental as the result of it is always fruitful and pragmatic. The question we should be asking ourselves lays in accessing the efficiency of such method of dispute settlement in the name of mediation. The notion is that resolving conflicts and disputes through mediation is gradually increasing in Ukraine, but the mediation procedure still remains unresolved at the legislative level. Despite the fact that Ukraine has ratified the UN Convention on International Agreements on Dispute Resolution, its application in the country has become problematic and of questionable character. It is worthy of note here that, when implementation of the dispute resolution is effected, it will strengthen the role of mediation considered as the alternative means for arbitration in resolving international commercial disputes, and will generally have a positive impact on the development of international trade.

The position occupied by the supposed concept or mechanism of mediation will help the mediator to settle conflict between parties. The essence of such placidity is in ensuring the restoration of dispute settlement and the advantages that it posits. It is but sure that victims who suffered from the effect of commercial dispute will be for sure preferring a simpler solution for settling disputes instead of being involved in the judicial system process. This solution may not compensate for damages resulting from crime, but the criminal victim prefers this process to be protected against the subsequent losses of involvement with the judicial system<sup>4</sup>. Of course, the fundamental principle of the practical success of using mediation is that it is seen as fast, flexible and cheaper option compared to legal adjudication (high legal costs, over-burdened courts and delays in disputes resolution machinery). Mediation has high success rate in countries such as United States, Canada, Australia, Korea, New Zealand, Singapore and Japan. There is, however, a need to improve quality and practice of mediation to build confidence among the parties and increase its effectiveness as a dispute resolution method.

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3 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. Available at: <https://op.europa.eu/en/publication-detail/-/publication/765b7161-8950-44ca-9b48-03ef-5954ce8a/language-en>

4 Mohammad Hossein Hajaryan, Iraj Golduzian & Ehsan Hajarian. *Mediation from the Penological Viewpoint*. JURNAL CITA HUKUM (INDONESIAN LAW JOURNAL) 2. 2019. Pp. 157-168, 160. Available at: <https://doi.org/10.15408/jch.v7i2.10718>

### III. EMPHASIZING ON THE JUSTIFICATION AND METHODOLOGY OF THE STUDY

Problematic aspects and perspectives to develop alternative means to resolve legal conflicts, including in the administrative and legal sphere, have repeatedly been under review by domestic and foreign scholars. It is worth noting that with the adoption in 2015 by the Verkhovna Rada of Ukraine as the basis of the draft Act on Mediation, the number of scientific studies has increased significantly. However, this Act was never adopted, and later such bills were submitted to the Verkhovna Rada of Ukraine. According to L. Marchuk, developing and analyzing scientific papers on issues related to mediation, and even the necessity of adopting a consistent special Act on Mediation, will be of great importance. The urgent need due to the significant benefits of mediation, including significant savings of time and means, achieving mutually acceptable solutions, voluntariness and impartiality, flexibility of procedure and fast settlement of disputes, will allow to form a legal basis for effective settlement of conflicts (disputes) in our state<sup>5</sup>.

As it is today, due to the fact that research on the issue of mediation is still highly relevant among scientists, many scientific papers are devoted to it. At the same time, legal doctrine needs further research, study of foreign experience and development of practical recommendations to ensure the effectiveness and efficiency of the institution of mediation in Ukraine. The issue here is not only in laying emphasis on the rationale or justification for the need of mediation in criminal and commercial disputes. The main worry raised here is at the level of enforcing the mediation decision and applicability. The problem is not only talking or appraising the relevance nature of the so called dispute settlement mechanism — the issue here is in seeing its enforcement and the satisfaction of the parties involved in it. How satisfactory are parties when issues of mediation dispute props up, and when resolving this dispute, does it fulfill the spirit and letter of the law? Researchers believe that, until these questions are answered, there will be no certainty and assurance that the *raison d'être* of mediation is accomplished.

In answering some of our worries and doubts when issues of mediation are concerned, it will be proper in positing some reflections on the objectives engaged in the settlement of administrative disputes. This article, therefore, is about accessing the place occupied by mediation in resolving administrative disputes. In view of this, the purpose of the article is:

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5 P. N. Biyukov & A. V. Pronin. *Mediation Procedure in Austria*. ARBITRATION AND CIVIL PROCEEDINGS 11. 2011. Pp. 34-36.

1. *To clarify the justification, necessity and content of mediation as one of the most effective means to resolve administrative and legal disputes;*
2. *To analyze the latest draft laws, developed by the Government of Ukraine regarding the regulation of the mediation procedure. These are analyzed as a result of which own comments are expressed and recommendations for improving their provisions are provided.*

To answer the aforementioned objective, it will be of great importance and relevance to provide a succinct and concrete methodology that will help in bringing out the results of the findings. The methodological basis of the article consists in the methods of scientific knowledge used in legal science. In order to achieve this goal, it will be of delightful platform in seeing whether the so called methods of resolving dispute through mediation have been pragmatic and real. One thing is providing the necessity of mediation in resolving administrative dispute, the other is examining its applicability of such dispute. The tendency here is that there is always a model that has been put in place that countries using this method should follow. The question one needs to be asking is whether the State of Ukraine – in all its ramifications, ratifications, signatories to all the treaties and laws on mediation – has been able to enforce these treaties or bi-standing laws to its brim. The issue is not only looking at the beautify nature and atmosphere of mediation, but rather seeing that it conforms to the objective of its creation, and parties are satisfied. Looking at the concept and application of mediation in Ukraine, it can be emphasized that the concept is used in the interrelationship and complementarity. Using the formal-legal method, scientific sources devoted to the introduction of mediation in Ukraine as one of the means to resolve administrative disputes were studied.

Due to the analysis of various scientific points of view on the role and place of mediation in the process of overcoming conflicts (disputes), including administrative ones, we were able to rethink the issue raised in the article, which is that of affirming and confirming that mediation is practical in Ukraine. It will be analytical in examining the method used by justifying some of the theoretical author's positions, for example, that by introducing an effective mediation procedure it is possible to avoid an unjustified prolonged judicial process, thereby accelerating the resolution of the conflict (dispute). Using the structural-functional method, the basic principles on which mediation should be based have been identified. Defining the principles of mediation as a means to resolve an administrative dispute is important because, like any activity, this process must be based on the initial provisions (i.e. principles) that all participants must

adhere to. Scientific works of specialists in the field of administrative law and other branches of legal sciences were the scientific and theoretical basis for this article.

## IV. HISTORICAL ASPECTS

In the context of a broad discussion of mediation issues, it should be noted that this practice has been well known since ancient times. In particular, it should be noted that trade was one of the first areas where mediation (intermediation) was used. Based on confirmed historical evidence, it can be stated that trade – or as it is also called “commerce” – for a long time remained almost the only area that was not covered by strict and unambiguous laws of the state. In other words, unlike all other spheres of public life, trade, since ancient times, has always had a relatively high level of freedom.

This freedom consisted primarily in the fact that the representatives of this industry, i.e. traders, had the opportunity to independently choose the other party (counterparty) in the trade contract of sale. They were also able to decide which product to buy or sell and which not. It should be emphasized here that due to the weak dissemination of state-defined rules of the right to trade, its participants often did not have reliable protection from the state judicial system.<sup>6</sup> That is why they wanted to find a kind of tool that would allow them to protect their rights and defend their interests, especially in the absence of reliable protection by the state. In this way, there was a need for “mediators,” i.e. persons who had a sufficient level of authority and trust on the part of all parties to the dispute, thus being able to help them to resolve conflict.

Mediation refers to the so-called ADR mechanism. The concept of ADR was introduced in the 1970s in the United States, and ten years later it became quite widely used. There is no serious negotiation process without mediators in the field of economy, politics or business in this country. There is the National Institute for Dispute Resolution, which develops new methods of mediation, and there are private and public mediation services. The American Arbitration Association has a great impact, which has approved its Rules of Arbitration and Mediation, which are used even in the consideration of internal disputes. In the 1990's the English term ADR practically became an international concept. In some countries, attempts have been made to replace it with certain counterparts, such as MARC (*les modes alternatives de resolution des conflicts*) or RAD (*reglement alternatif des differends*) in France and Canadian

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6 G. Meta & G. Pokhmelkina. (Comps). **MEDIATION – THE SKILL TO RESOLVING CONFLICTS. ACQUAINTANCE WITH THE THEORY, METHOD AND PROFESSIONAL TECHNOLOGIES.** Verte. (2004).



Quebec, or AKR (*aussergerichtlichen Konfliktregelung*) in Germany. However, such attempts have not been widely used in practice<sup>7</sup>.

The benefits to resolve a dispute through a mediator were quite noticeable. In particular, a key factor is that during the mediation process, the intermediary (mediator) does not have the authority to make a crucial decision in a dispute between the parties. Instead, they transfer the right of final settlement to the parties themselves, and their task is to ensure a mutually beneficial compromise between the parties. The mediator acts as a guarantor of its observance following agreement between the parties.

The term "mediation" comes from the Latin *mediare*, which means "to be a mediator." Translated from English, the term "mediation" (mediation) means "mediation, application or intercession." Mediation in law is a method to resolve disputes with the involvement of a mediator, who helps to analyze the conflict situation so that parties involved can choose the solution that would meet the interests and needs of all parties to the conflict. Unlike a formal trial, the parties reach an agreement on their own during mediation. Therefore, the uniqueness of the institution of mediation is that the mediator helps opponents to achieve results in decision-making without sacrifices and concessions to each other. Each participant is satisfied with their choice. It is on these grounds that the mediation method differs from the procedure for concluding an amicable agreement at the stage of litigation, as the purpose of the latter one is mutual concessions<sup>8</sup>.

Mediation is not a novelty, as it has a long history in many cultures and civilizations. It has long been used in various spheres of human activity to stimulate effective communication between the parties and to assist in finding mutually acceptable solutions. The inhabitants of ancient Babylon were among the first who introduced the process of mediation in their legal relations. As in most societies at the time, mediation was used in Babylon mainly in trade, where it was quite popular. It is also worth noting that, in addition to Babylon, the institution of mediation in one form or another was actively used in the Ancient World. This is particularly true for the ancient societies of ancient Greece and ancient Rome.

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7 T. Podkovenko. *Mediation as an Alternative Way of Resolving Conflicts: Genesis and Institutional Framework*. CURRENT ISSUES OF JURISPRUDENCE 9. 2017. Pp. 18; N. L. Bondarenko-Zelinska. *Introduction of Alternative Dispute Resolution Methods: European Experience for Ukraine*. PRIVATE LAW AND ENTREPRENEURSHIP 8. 2009. Pp. 163.

8 Yu Potemkina. *Mediation in Family Disputes*. YURYDYCHNA GAZETA. 2019. Available at: <http://jur-gazeta.com/publications/practice/simeyne-pravo/mediaciya-u-simeyni-hsporah-shlyah-do-primirennya-porozuminnya-tavregulyuvannya.htm>

Citizens of the above states actively used the services of intermediaries (mediators) to resolve various disputes that often arose among different members of society. Among other things, it is pointed out that, as in Babylon, trade was the main area of application of mediation for a long time. However, unlike the latter, the citizens of Rome and the Greek states found that mediation can also be used successfully to resolve disputes between the parties to a dispute not only in trade but also in many other public and private relations. An example is the occasional conflicts among representatives of various government agencies or between the authorities and associations (guilds) of citizens<sup>9</sup>.

As mentioned above, one of the most important conditions for the ultimate success of mediation was the existence of a certain authority or integrity of the person who acted as a mediator (intermediary) in resolving the dispute. It should be added that the level of efficiency and usefulness of using mediation as an effective tool to resolve disputes depended on it. Usually, people who held a strong position in the society of that time claimed to be mediators in the conflicts that took place in the Ancient World, especially in Rome. The majority of them were representatives of the aristocracy or people's tribunes. They used their influence effectively to resolve conflicts.

The greatest flourishing of mediation in the Ancient World was the use of this process for out-of-court settlement of disputes. And although it is emphasized that this state of affairs existed for a relatively short period of time, it is rightly distinguished as one that was closest to the administrative and legal realities of today. It is pointed out that ancient period of time created a kind of foundation for the further development of the legal field, and its elements can be observed in legal systems even today.

Despite the fact that the development of social relations that took place in antiquity, including the institution of mediation, had an extremely great potential, it was completely leveled after the collapse of the then states, especially the ancient Rome. In the Middle Ages, mediation lost its importance and was used only to resolve trade disputes.

Thus, the idea of mediation that existed and developed since the times of ancient civilizations has been important for understanding the origin of the institution of mediation. In fact, this is the beginning of the formation of a mediation institution as a means of conflict resolution involving a third (neutral) party, which is recognized by all parties. It was found out that initially mediation was used as a private hearing, which

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9 P. N. Biyukov & A. V. Pronin, *supra*, nota 9.

was the only form of conflict resolution, but it became legal during the formation of statehood and its institutions<sup>10</sup>.

This sphere began to gain its usefulness and relevance only in the 18th and 19th centuries. The statement according to which the process of rapidly increasing interest in mediation became possible due to the socio-political consequences that followed the Renaissance is considered rational. At the same time, it is worth mentioning that, unlike the historical path of the European states which include Ukraine, in many other parts of the world mediation has almost never lost its importance and relevance. For example, in several countries in Africa, Asia and South America, where ancient traditions still play an important role, mediators are treated as seriously as leaders or priests.

A similar situation took place among the Arab countries located in the Middle East. Due to the numerous disputes that arose among different tribes and nationalities, there was an urgent need for the services of a mediator. Usually, it is a person who does not have a strong affiliation with one of the parties to the conflict, but at the same time has sufficient authority to impact the behavior of all other parties. On the example of social legal relations, especially for this region, we can explore the basics of the mediation process, as well as its key principles.

Mediation as we know it today originated during the Great Depression in America in the 1930s as a way of resolving family and work conflicts. Due to mediation, protracted and extensive strikes were stopped. Mediation became most widely recognized and widespread in the United States after the 1976 Pound Conference. Canada, the United Kingdom, Australia, and New Zealand quickly adopted the American experience and introduced similar alternative conflict resolution institutions. Governments and non-government organizations in continental Europe have also supported the trend, and actively promoted and still promote mediation in their countries. In 2008 and 2013, the European Union adopted directives on mediation in civil and commercial cases, and ADR in the field of consumption. Today, mediation has proven to be an effective way to resolve disputes in most countries of the world, and it is gradually covering all spheres of human life. Through mediation, conflicts are resolved in almost all spheres of life, such as sports, adoption, franchising, art, taxation, the environment, etc.<sup>11</sup>

According to O. Karmaz's research, the analysis of foreign legislation in the field of mediation shows that, for example, in European countries laws on mediation were

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10 S. O. Korinnyi. *Implementation of Mediation in the Administrative Process of Ukraine*. Doctoral thesis. Uzhhorod National University, Uzhhorod, Ukraine. (2019). Available at: <https://www.uzhnu.edu.ua/uk/infocentre/get/19680>

11 National Association of Mediators of Ukraine. *Mediation in the World*. 2016. Available at <http://namu.com.ua/ua/info/mediation/in-the-world/>

adopted in the late twentieth-early twenty-first century. In particular, Romania adopted the Law on Mediation and the Organization of the Mediation Profession; Lithuania adopted the Law on Mediation in Civil Disputes; Germany adopted the Law on Support of Mediation and Other Forms of Out-of-Court Conflict Resolution; Bulgaria adopted Belarus and Kazakhstan Laws on Mediation, and in Australia Mediation Act, Chapter VI of the French Code of Civil Procedure contains Articles 131-1-131-15, aimed at regulating mediation relations<sup>12</sup>.

On the international stage, regulatory reform is often associated with harmonization initiatives, and conjures up glamorous images of endless consensus-building sessions in diplomatic centers and attended by actors from all over the world. Some mediation law reform processes, such as those of the United Nations Commission on International Trade Law (UNCITRAL), may live up to this image. However, international mediation law reform is shaped by the imperative pull and push of a diverse pool of stakeholders, multiple process layers, and competing cultural and disciplinary ideologies – a reflection of the inclusive and democratic nature of the mediation process itself<sup>13</sup>.

Nowadays, mediation is unanimously recognized as an effective means to resolve administrative and legal disputes. It is stated that this procedure has reached its flourishing and dissemination in the United States, Canada and Western Europe. In particular, in the United States, experiments on the introduction of mediation as a reliable means of alternative (out-of-court) dispute resolution began in the 1970s. And currently, there is almost no area of public relations where mediation is not used in this country.

ADR is embedded in the legal order of the European Union, which is based on the rule of law and other fundamental principles comprising democracy, freedom, equality, respect for human rights and human dignity. ADR is one of the several novel means used by the EU Commission to foster the correct administration of the EU Internal Market. This means is used both on supranational and national levels. At supranational level, internal ADR schemes might initially have been motivated by the requirement of effective legal protection of individual rights – as in the beginning of the establishment of EU agencies it was far from settled that their legal acts could be subject to judicial control by the EU Courts. ADR before agencies also relieves the burden on the EU

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12 Oleksandra Karmaza. *Institute of Mediation: Basic Concepts of Development*. ENTREPRENEURSHIP, ECONOMY AND LAW 2. 2017. Pp. 24.

13 Klaus J. Hopt & Felix Steffek. (Eds). *MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE*. Oxford University Press. (2013).

Courts and is a means to correct in a – compared to Court proceedings – rather quick and informal way of misapplication of EU Internal Market Law<sup>14</sup>.

With regard to European countries, it is emphasized that the number of those which have begun to adopt relevant regulations governing mediation is growing dynamically. It is noted that, the level of intensity and scope of mediation in Europe varies greatly from country to country. While in many of them mediation is actively used and is a clear option in the legislation, in other countries it is mentioned in legal acts only indirectly<sup>15</sup>.

The French system of administrative justice is traditionally attached to the administrative court (the Conseil d'État). Many independent bodies (*autorités administratives indépendantes*) combining regulatory powers with adjudicatory ones are considered at least in part as an alternative to courts, as they offer redress before individuals need to consider court action. The transplantation of other ADR tools may though be encouraged by the European Union, and so mediation, conciliation and transactions are making their way into the system. But the question still remains whether or not these tools will be entirely part of the French administrative culture in the coming decades<sup>16</sup>.

Slovene administrative regulation is considered as one of the most successful in the post-socialist states. As proven by empirical and comparative analysis, the effectiveness of legal remedies system is undeniable. Data reveal effective dispute settling within administrative procedure, with the exception of selected areas where there is still a rather long decision-making process. This and the still underdeveloped mediation tools are areas that need further improvements<sup>17</sup>.

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## V. ASSESSING THE FINDINGS AND QUESTIONING OF MEDIATION

It is a matter of emphasis that, in handling mediation issues and dispute, there is that need in refining the context which will help us to analyze and place a define method of research. Analyzing the methods of research has help us discover whether mediation and the settlement of administrative dispute are complementary or supplementary. There is no doubt that the State of Ukraine has observed and ensured that when issues of administrative disputes arises, mediation can be considered as an alternative or even the most acceptable means of resolving these categories of dispute.

The State of Ukraine and its dispute settlement institutions have played laudable and applaud able efforts in ensuring that when an issue of administrative dispute comes up, instead of using the judicial methods of settlement, which are in their entirety or extend considered by the victim as complex, time consuming and even expensive. The issue is that it is correct that the notion of mediation has been an old policy practice by many countries around the globe, and the State of Ukraine is not an exception to this practice as the state sees this method – or means of settling administrative dispute – as the finest, and why not, the most efficient and effective.

The question one needs to be posing is to ascertain whether the concept of mediation – or its supposed called mechanism – has been able in meeting up the objective of dispute settlement mechanism, and victims of administrative dispute are satisfied as to the decision of the mediation process. It will be exaggerating to place the notion of mediation as the best and most efficient when there are still some other methods of settling these disputes by the State of Ukraine, since it is an old practice in the country where victims are satisfied. The issue here is not only examining or looking at mediation as an old practice in Ukraine, the problem here is in ascertaining whether it has been able in meeting up the *raison d'être* of its establishment and enforcement in Ukraine.

There is no doubt that the State of Ukraine has practice this old policy or principle of mediation in administrative dispute, by making sure that victims of administrative dispute received or acquired the justice that they sought for as far as dispute is concerned. But it has become a complex issue in Ukraine and it has become difficult in enforcing the decisions of the mediation process for it to be effective. Most of the time the fact that in the dispute in question one of the parties is the state, it becomes difficult for the victims to receive the compensation expected, and this has resulted in seeking the judicial methods of settlement being the court.

This therefore defeats the original intention of the mechanism for the settlement of administrative disputes. There is no way this mediation process can stay in a vacuum, there is need for complementarity from the side of the court in ensuring its enforcement. The resolving process will only be complete or satisfactory if the so called decisions of the mediation process are implemented or enforced. So, issue of mediation notwithstanding the nature of the dispute in question needs the assistance of the court for its application. Whether the parties like it or not, there is practically no way they can escape from the ambit of the judicial process.

The many praises accorded to mediation in handling administrative disputes in Ukraine have been too encouraging and appetizing, to the extent that many think that it is the alternative and formidable means of settling disputes without the need of searching for other disputes settlement mechanisms, even less judicial or court settlements. But the question becomes rhetorical as the issue of the present of the law is still of utmost importance and necessity when it comes to issues of implementation or enforcement of the mediation decisions, due to the constant violations of decisions of the said system. The constant nature of violations and impediments that victims suffered from the aftermath of administrative dispute has seen the need in adopting a legal arena where the decisions of this mediation forum will be implemented.

## VI. WHETHER THERE SHOULD BE MEDIATION IN UKRAINE: FROM RHETORIC TO THE NEED OF ADOPTING THE LAW

Currently, the legislation of Ukraine does not regulate the mediation procedure, but the practice of resolving conflicts (disputes) through mediation is gradually increasing. At the same time, the Article 124 of the Constitution of Ukraine stipulates that the law may determine the mandatory pre-trial procedure for settling a dispute.

It should be also noted that the Minister of Justice of Ukraine signed – on August 7, 2019 on behalf of Ukraine – the United Nations Convention on International Settlement of Disputes by the Mediation Results (Singapore Convention on Mediation). Ukraine needs to adopt a special law that will define the main provisions in order to ratify and implement this Convention, in particular with respect to the scope of applying mediation, the procedure for its conduct and the status of mediators.

It should be noted that the need to prepare and adopt the Draft Law follows from the goal 12.2 *"The party to the agreement is protected from non-fulfillment"* of the Program of the Cabinet of Ministers of Ukraine, adopted by the Government Resolution dated 29 September 2019 No. 188-ix.

One of the mechanisms to achieve this goal in accordance with the provisions of this Program is to create an effective mediation system, which should significantly relieve the judicial system, since mediation will be trusted by the parties to the agreement. In order to implement the outlined tasks, several draft laws on the regulation of the mediation procedure have been recently submitted to Verkhovna Rada of Ukraine.

For example, lawmakers with the assistance of the Draft Law of Ukraine No. 2706 from December 28, 2019 and the Draft Law of Ukraine No. 3504 dated from May 19, 2020 offered to determine the legal principles and procedure for mediation in Ukraine, which are as follows:

- The mediation procedure will be applied in any conflicts (disputes) arising, in particular, from civil, family, labor, economic, administrative legal relations, as well as in criminal proceedings while concluding reconciliation agreements between the victim and the suspect, accused and in other areas of public relations;
- Individuals and legal entities will be able to address a mediator for mediation like they address the court, arbitration court, international commercial arbitration, as well as during court, arbitral or arbitration proceedings or during the execution of a court decision, arbitration court or international commercial arbitration;
- Mediation will be conducted by mutual consent of the parties to mediation in accordance with the principles of voluntariness; confidentiality; independence and neutrality, impartiality of the mediator; self-determination and equality of the rights of the parties to mediation;
- Any individual who has a higher education and has undergone basic training in the field of mediation in Ukraine or abroad will be able to acquire the status of a mediator;
- Mediator's training will be at least 90 hours, including 45 hours of practical training, and will include theoretical knowledge and practical skills on the principles, procedure and methods of mediation, legal regulation of mediation, mediator's ethics, negotiation and conflict (disputes) resolution;
- Training in the field of mediation will be provided by educational institutions, organizations providing mediation, associations of mediators, business entities of any form of ownership, organizational and legal form, which have the right to provide educational services in the field of mediation or to organize their provision in accordance with the legislation;



- Mediators' registers will be able to be maintained by associations of mediators, organizations providing mediation, as well as public authorities and local self-government agencies that involve mediators or use their services.

It was also offered to define the rights and obligations of the mediator and the parties to mediation, the procedure for mediation, as well as the requirements for the mediation agreement and the agreement on the conflict (dispute) resolution, based on the results of mediation. However, these draft laws have their shortcomings that need to be properly finalized.

## VII. PROSPECT AND THE FUTURE OF THE MEDIATION FORUM

Enshrining the possibility of creating an association of mediators and organizations at the legislative level that provides mediation is worth noting as positive. At the same time, the Article 1 of the Draft Law only provides a definition of these terms, but without further definition of the legal status of such entities authorized to provide mediation services. This, in particular, follows from the rule of law principle enshrined in the Article 8 of the Constitution of Ukraine, according to which legal norms must be clear and unambiguous, since otherwise cannot ensure their unequal application, does not preclude unequal interpretation within law enforcement practice.

Therefore, it is necessary to clearly detail the legal status of these entities at the legislative level, including the possibility of mediation by several mediators, as well as to regulate the liability of the mediator for damage caused by them during the mediation. In our opinion, this will force the mediator to perform their duties more rationally and strictly, because otherwise the mediator may harm the parties to the mediation by disclosing confidential information. The unequivocal need to standardize this issue is further evidenced by the fact that the mediation procedure, according to the Article 15 of the Draft, may begin before the conclusion of the relevant agreement. Therefore, if the mediator discloses confidential information, they will not be able to be prosecuted on the basis of the relevant agreement, since the latter is not concluded yet.

Moreover, the outlined shortcomings have a negative impact on other issues determined in the Draft Law. In particular, the Article 13 of the Draft Law provides the existence of significant number of certain registers of mediators. Such registers may be established by any association of mediators or by any organization providing mediation, as well as by state and local self-government agencies, which may

maintain and publish registers of those mediators they involve or whose services they use. Besides, the Draft does not address the issue of maintaining these registers, free access to them, etc. We believe that in order to ensure greater access to information on mediators, it would be appropriate to introduce a single register of mediators as a general information system for providing information on all mediators.

It is worth noting that, in accordance with the provisions of the Article 1 of the Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, the Directive is not applied to tax, customs and administrative disputes or the state's liability for acts or omissions in the exercise of public authority. In this regard, the use of pre-trial mediation in civil disputes is debatable, where the party of such civil disputes is the state, territorial community, their agencies, state and municipal enterprises, minors, persons with disabilities, disputes related to state secrets, etc. It is also hardly appropriate to use mediation in cases on administrative offenses.

## VIII. CONCLUSIONS

The need to introduce the institution of mediation in the national legal system is based on the positive results of the practice of applying the institution of reconciliation in many countries around the world, which indicates its effectiveness. In addition, it will be in line with Ukraine's general position on the harmonization of national legislation with the European Union legislation, since a number of recommendations and decisions of the Council of Europe are focused on the issue of conciliation procedures. Nowadays, it is an indisputable fact that the introduction of ADR mechanisms is appropriate at the present stage of development of the legal system. This will not only reduce the burden on the judicial system, but also speed up the resolution of disputes. Thus, the adoption of a legal act that can ensure the proper regulation of the mediation procedure, the binding nature of the decisions made as a result, is a pre-requisite for the application of this alternative method of dispute resolution.

This position is consistent with the constitutional requirements, because the state in accordance with Part 5 of the Article 55 of the Constitution of Ukraine, guarantees everyone to protect the rights and freedoms from violations and unlawful encroachments by any means not prohibited by law.

Thus, it can be stated unequivocally that mediation is enshrined in law in almost all developed countries and is successfully applied there. This is why in order to eliminate corruption risks during resolving court disputes, protracted trial and to avoid unnecessary, corruption components in the courts and in general in all state bodies, is

an urgent need to introduce out-of-court (alternative) means of resolving disputes and conflicts. To meet such societal needs, a mediation procedure is an ideal alternative to litigation. However, even with the current imperfect judicial system, Ukrainian society is in no hurry to use mediation. The main reason is the banal lack of understanding of what mediation is and what are the mediator's powers and roles. Another reason is public distrust of the institution of mediation, due to a lack of understanding of the "rules of the game" in the mediation procedure.

Ukraine should join the promising administrative and legal trends that are currently taking place in developed European countries. Among other things, it is about the mediation procedure, which has recently been increasingly used by various European countries.

## XI. REFERENCES