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Information about Project:

Mediation: Training and Society Transformation/ MEDIATS
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Project goal:
enable Universities to be one of the key players in facilitation of the processes of mediation in Azerbaijan, Georgia and Ukraine to enhance democracy and objective problem resolution by acquiring best European practices.

Specific project objectives:
1. To develop and implement Master's degree program «Mediation».
2. To establish sustainable Mediation Federation.
3. To promote mediation values within the society in Azerbaijan, Georgia and Ukraine.

Project Duration:
· November 15, 2018 – November 14, 2021.

Project Coordinator:
· Netherlands Business Academy, the Netherlands.

Project Co-coordinator:
· «KROK» University, Ukraine.

Partners:
· Fundacion Universitaria San Antonio, Spain,
· Turiba University, Latvia,
· «KROK» University, Ukraine,
· V.N. Karazin Kharkiv National University, Ukraine,
· Yuriy Fedkovych Chernivtsi National University, Ukraine,
· Khazar University, Azerbaijan,
· Ganja State University, Azerbaijan,
· Ilia State University, Georgia,
· Batumi Shota Rustaveli State University, Georgia,
· Hultgren Nachhaltigkeitsberatung UG, Germany.

Activities:
· Learning of EU experience,
· Development of MDP in Mediation,
· Launch of Master Degree Program in Mediation,
· Development of the Mediation Federations,
· Quality management,
· Dissemination and sustainability,
· Project Management.

Expected results:
· Master Degree Program in Mediation is implemented at 7 HEIs,
· Qualified staff,
· Mediation Federation is created at each Partner country,
· Methods/ action plan of promotion of mediation values into the society of Ukraine, Georgia and Azerbaijan,
· Qualified specialists-mediators, able to resolve disputes peacefully.

The Project is co-funded by the Erasmus+ Program of the European Union.

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CONTENT

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MEDIATS Mediation: Training and Society Transformation

ONLINE MEDIATION IN SPAIN AND THE NEW CHALLENGES POSED BY COVID-19

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Abstract. *This article examines the impact that COVID-19 pandemic is having on mediation processes in Spain. For that purpose, the guiding principles that feed mediation are analyzed to-gether with the problems arising from the implementation of the use of new technologies an elec-tronic media in the online mediation area. This assesment is delimited by the Spanish legislative framework and the legal and social consequences that COVID-19 has generated during 2020.*

Keywords: *online mediation, COVID-19, new information and communication technolo-gies, digital restorative justice*

JEL Classification: *K10, K15, K36, K41*

Formulas: 0; fig.: 0; tabl.: 0; bibl.: 13.

Introduction

The "Covid-19" coronavirus crisis has provoked a series of conflicts at a global level which affect all the economic and financial levels, as well as the legal and so-cial ones. However, the most common conflicts are the ones affecting familiar envi-ronments, whose common elements are the mobility restrictions and prohibitions in order to fight against the pandemic.

Mediation is a tool that, despite not being new, throughout these last years has gained relevance in all kinds of sectors, from the business one to the family one. In the current circumstances, and specifically with regard to the Spanish situation after various months of lockdown and state of alarm, mediation has become a necessary complement of the judicial system, with no aim of substituting it, although the slowness and the bureaucracy itself of the legal system discourage the citizens from resolving their conflicts in courts [1] Royal Decree 463/2020, 14th march, declaring the state of alert for the management of the health crisis situation caused by COVID-19.

This is why extra-judicial mediation must take a step forward and, together with the use of new technologies, solve those disputes that cannot be lost due to that discouragement. The implementation of these new technologies, including video-conferencing systems, real-time translation and the creation of the online mediator figure, should help under the present circunstances.

Literature Review

Mediation is defined as a procedure or a process that assumes the existence of a conflict or dispute between two or more persons or bodies. These parties try to reach an agreement, through mediation, able to provide a solution to the difficulties deriv-ing from the conflict and to resolve it. At a restorative justice level, the dimension of the aims and the scope of the agreements affect the structure, because the restorative process generally aims not only to the pacification of the conflict and to satisfying the interests of the parties, but also to the strengthening of the community bonds, the reconciliation between the parties and the possible prejudices deriving from the criminal trial [2. pp. 145-146]. Vilalta Nicuesa, A.E. (2011), "El marco jurídico: derecho comparado".

The guiding principles of mediation constitute the structure for the establish-ment of the legal provision that will derive from the mediation process, since this process aims at becoming a system for the resolution of conflicts even at the height of the pandemic. We will point out some of these principles:

- The principle of freedom or willingness is established as the main pillar since mediation, as a consensual institution, requires that the process and the adopted agreements comply only and exclusively with the parties' will. One of the keys to the success of mediation consists precisely in the fact that the parties freely decide to use this system for the resolution of conflicts in order to reconcile positions and achieve an agreement that is satisfactory for both, and that the parties are totally free to start the procedure and they can withdraw from it at any time, with no need to state any reason [3. p. 8]. Ortiz Pradillo, J.C. (2011) "Análisis de los principios in-formadores de la mediación en materia civil y mercantil".

- The principle of impartiality establishes that the mediator is not required to act independent-

ly in the sense of not being submitted nor subordinated to nothing nor anyone apart from the legal system, but rather with regard to his/her impartiality towards the parties. If the conflicts describe a series of circumstances and situations that may raise doubts regarding the independence of the mediator, he/she may be obliged to renounce [4. p. 156]. Alexander, N. (2013), "Harmonisation and Diversi-ty in the Private International Law of Mediation: The Rhythms of Regulatory Re-form".

- The principle of confidentiality is a guarantee of success for mediation, be-cause it contributes to guaranteeing the frankness of the parties and the sincerity of communications during the process; together with willingness, it composes the es-sence itself of mediation, since it derives from a clearly privatistic conception. On some occasions, however, it is implicit in the definition, since it is also identified with discretion, privacy and with the professional secret, but the principle of confi-dentiality is not binding in those mediations or issues in which the parties expressly agree so [5, pp. 258-259], Coben, J. & Harley, P. (2004), "Intentional conversation about Restorative Justice, Mediation and the Practice of Law".

- The principle of physical presence is one of the other principles that charac-terise mediation procedures, since the dynamic of conflict resolution itself is based on giving back to the parties the role of protagonists in the achievement of an ami-cable settlement of their differences, listening to them and recovering channels of dialogue between them so that they can express, in an environment of trust and tran-quillity, their problems in order to find a solution [6, pp. 436-437], Lasheras Herre-ro, P. (2008). "Mediación Familiar: oralidad y principios del procedimiento". Orali-ty necessarily requires immediacy, seen as the personal and direct contact between the mediator and the parties, and such principles have been defined in Spain through different laws with different expressions such as physical presence or personal nature. This principle precisely is the one that is most affected by the current circum-stances since, in remote mediation, parties and mediators communicate through electronic devices and, although in principle it was only foreseen in Spain in case of cross-border conflicts, these rules have changed [3. pp. 30-32]. Ortiz Pradillo, J.C. (2011) "Análisis de los principios informadores de la mediación en materia civil y mercantil."

Aims

The aim of this article is the qualitative analysis of the effect that COVID-19 pandemic is having on mediation processes in Spain, highlighting the importance of mediation and its usefulness for the future challenges of restaurative digital justice.

Methods

A theoretical methodological approach has been carried out using documentary sources, including: scientific publications, public initiative guides, legislation and jurisprudence.

An essencial aspect of the information used comes from legislative analysis conducted by experts in procedural law, which also contributes for a critical vision of the problems presented. This information was analized and interpreted in order to get a global perspective of the subject and possible solutions.

These concepts and descriptions will allow us to know the implementation of new technologies and to shape hypotheses with the purpose of overcoming the pro-blems faced by online mediation, all within the framework of Spanish social charac-teristics and legislation.

Results

The progress in electronic communication allowed a substantial change in per-sonal, professional and consumer relations, which are now possible at any time and with people from different parts of the world. In Spain there was a delay in the as-similation of ADR techniques; however, with the creation of Law 5/2012, of 6 July, mediation in civil and business matters has become more relevant, being mediation one of the techniques that can entail more advantages. As we know, the impact of Covid-19 entails that the management of these conflicts must be carried out through electronic devices, but this resolution of conflicts through the creation and use of a virtual environment was already foreseen in the Spanish Law on mediation in civil and commercial matters (LMACM - Ley de mediación en asuntos civiles y mercan-tiles) This electronic use has given the possibility to carry out mediation even through automatized systems in which the figure of the mediator is completely re-placed by computer programmes that do not only provide guidance and offer alter-natives of agreement to the parties (such as the blind bidding system), but also write the agreement that is finally reached and

later send it to the parties, with no inter-vention at all form the mediator at any phase of the procedure. This regulation, as it is obvious, gives rise to doubts and questions regarding the problems it may cause [7, pp. 6-8], Talavera Hernández, J.A. (2015), "La figura del mediador en la medi-ación online".

We must bear in mind that online mediation is a structured and confidential procedure in which two or more conflicting parties voluntarily request the participa-tion of a neutral third party to help them achieve a joint agreement, without the pos-sibility, for the mediator, to impose any solution. In this case, the neutral third party communicates with each party, sometimes through caucuses or during joint ses-sions. Thanks to the technological element, these acts of communication can be car-ried out through a series of means ranging from e-mail or electronic blackboards to video-conferences or IP telephony services. All the phases of the mediation process that are carried out online can count on functionalities that allow to file a claim or respond to it through an online form and even to use a discussion forum for the acts of communication between the mediator and the parties, or to eventually use video-conferencing services. In the most paradigmatic cases, the platform itself can be de-signed so that it even has the configuration and trademark of the licensee. In other services, the bodies offer the use of virtual rooms to carry out an online mediation process after paying the corresponding amount (these rooms include a set of com-munication tools such as private and public chats, video-conferences, etc., so that both the parties and the mediator can use them) [8, p. 7], Poblet, M. et al. (2011), "Tecnologías para la mediación en línea, estado del arte, usos y pro-puestas".

The crisis provoked by Covid-19 has offered, somehow, unlikely futures, as we may call them: scenarios in which it would be possible to break the resistance to the use of technology in certain areas of the administration of justice, something that we saw as culturally and technically unlikely, but that was proved possible thanks to the plans, aimed at reducing the effects caused by the suspension of courts activity, pro-posed by the Spanish General Council of the Judiciary (Consejo General del Poder Judicial) [9], Agreement of the Permanent Commission of the Council of the Span-ish Judiciary, 14/03/2020.

Within these scenarios we can think about the extension of remote restorative justice to carry out processes in a completely digital form. We must consider the context of the COVID-19 crisis in terms of the unfavourable conditions due to the psychological impact of the pandemic and, specifically, of the lockdown, with feel-ings and emotions related to fear, anguish, anxiety, stress, sadness, loneliness and lack of concentration. At the same time, in those conditions, the desire to connect with others and the desire for solidarity and humanity are awakened. In this sense, the experts of the World Health Organisation underlined that, in general, the re-sponse to these challenges must be to show affection and care towards others by "taking into account the recommendations for social distancing, and projecting closeness through a phone call, a postcard or a videoconference". Since the appear-ance of the COVID-19 crisis, various organisations that promote and carry out re-storative processes discussed on how to continue them while in a condition of lock-down and social distancing, through debates and proposals that fall within the scope of what we have described as familiar futures [10, p. 21], Varona Martínez, G. (2020), "Justicia restaurativa digital, conectividad y resonancia en tiempos del COVID-19".

Discussion

Despite pressure from COVID-19 pandemic to embrace technological change, the truth is that the judicial systems are not responding to COVID-19 crisis as expected. His-torically, judicial practice has always been associated to the creation and exchange of paper documents; although the use of technology is not something completely new, the truth is that the use of digital tools in courts is further remote than it seems. These defi-ciencies can also be applied to the same Alternative Dispute Resolution (ADR) and Online Dispute Resolution (ODR) systems, since the coronavirus crisis showed the diffi-culty of using in a proper manner all these new technologies. A series of innovations are necessary to ensure security and confidentiality, since video-conferencing systems such as Zoom and Skype favour, on some occasions, opening and viability over privacy and safety, for which these systems that were so widely used during the pandemic may be inadequate for legal issues [11, pp. 29-32], Sourdin, T. & Zeleznikow, J. (2020), "Courts, Mediation and Covid 19".

Facing the insufficient institutional compromise, it is necessary the persuasion and support of the judicial bodies and of the competent Administrations, who will have to carry out an adequate management of the change with organisational measures that will make its progressive implementation easier, with due regard for the principle of legality. The achievements made, as well as the existing challenges, are many, but today we can affirm that, in the Spanish legal system, mediation constitutes a necessary reality that is complementary to the judicial path, aimed at the search for a satisfying solution to the conflict, thus allowing to reduce the excess of judicial litigiousness, which will inevitably increase due to the crisis caused by COVID-19, after the resume of the official bodies' activity [12, p. 45], Avilés Navarro, M. (2020), "La mediación en el orden jurisdiccional contencioso administrativo en España".

Despite all this, is it obvious that these alternative forms of conflict resolution through the use of new technologies and, specifically, electronic or online mediation, entail a progress and a way to bring justice closer to the individual, and to reduce pres-sure, at the same time, on the jurisdictional bodies. And the fact that it has been adopted, by the European Union, as a meaningful element of the common space of safety and jus-tice in Europe makes mediation, and online mediation in particular, an adequate mecha-nism to simplify the life of citizens and companies, by providing a fast and effective so-lution to litigations, not only national ones but also cross-border ones [7, pp. 35-37], Ta-lavera Hernández, J.A. (2015), "La figura del mediador en la mediación online".

That said, will it really be the solution to avoid the judicial bottleneck in Spain? Will it really bring the citizens closer to justice? Mediation, and even more online media-tion, is a valid and useful tool to solve conflicts in a civilised way, and it will be effective as long as there are good mediators, good regulating norms and, mainly, as long as a cul-ture aimed at finding agreements is created. These conditions do which does not exist nowadays and that we see them as something difficult to reach, is created. Only once we will be able to see the judicial or arbitral litigation as the last resort to be used and not as the first one, things will start to change [13] Pérez Marcos, E. (2020), "Métodos alternativos de resolución de conflictos en tiempos de COVID-19: la gran oportunidad de la mediación".

Conclusions

2020 has been a period of judicial paralysis, and it has been proven that the extra-judicial paths are a fast and effective method. The exceptional nature of the situation has allowed to negotiate the new situations and to reach satisfying agreements that provide guarantees to the parties involved in these processes.

Due to the health emergency caused by COVID-19 pandemic, the alternative meth-ods of conflict resolution have become the ultimate tool in order to face the judicial col-lapse and to avoid, for once and for all, excessive judicialisation in Spain. Many initia-tives emerged to promote negotiation, arbitration and mediation, figures that had existed from many years but to which it seems we now want to give a decisive boost during these times of pandemic.

Mediation, specifically, is acquiring the shape of a great opportunity to face the COVID-19 situation. The development of online or electronic mediation presents itself as one of the most advantageous solutions in conflict resolution. This electronic form of carrying out mediation can comply with all the mediating needs and principles thanks to the existence of specific norms regulating the detailed mechanisms to guarantee the secu-rity of the electronic means used, the identity of the parties (through electronic signature), and confidentiality.

In these times of crisis that we are experiencing, it is necessary to make the most of COVID-19 pandemic to make a decisive bet on mediation and the rest of alternative methods for the resolution of conflicts in order to make mediation, for once and for all, a part of the Spanish culture, because beyond the judicial collapse or the temporary situa-tion of the pandemic, extra-judicial agreements entail a benefit for everyone.

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MEDIATS Mediation: Training and Society Transformation

CONFIDENTIALITY PRINCIPLE IN MEDIATION AND ITS EXCEPTIONS IN LATVIA

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Abstract. *The article analyses confidentiality principle in mediation and its exceptions in Latvia. Since 2014, when Mediation Law was adopted in Latvia, a number of mediated disputes has significantly increased. Although from the surface a principle of confidentiality seems to be with explicit content and clear borderlines, nevertheless theory and practice shows zones of still undefined concepts, which until now have not been analysed in Latvia. The object of the research is a concept of confidentiality principle. The aim of this work is to analyse scope of subjects of confidentiality principle, and elaborate on preconditions to for exceptions from mediation confidentiality. Methods of scientific and professional literature review, document and comparative analysis, as well as interview method was applied in this research. The topic of the article is discovered both from theoretical and practical aspect.*

Keywords: *mediation, confidentiality principle, exceptions from confidentiality, vertical confidentiality, horizontal confidentiality.*

JEL Classification: *J52, K40, K41*

Formulas: 0; fig.: 0; tabl.: 0; bibl.: 26.

Introduction

The principle of confidentiality in mediation and its exceptions are provided in Latvian law, leaving open the question about a borderline, crossing which confidentiality is no more guaranteed. Privacy is one of the special advantages of mediation compared with court proceedings. Accordingly, any restriction on confidentiality reduces the benefits of mediation and the interest in using mediation. If mediation is not confidential, mediation parties have no reason to disclose information at their disposal, as this could be used against them. Only if mediation confidentiality is legally protected, the mediation process has the advantage guaranteed by confidentiality. If confidentiality in mediation is only a declarative phrase without genuine and effective legal protection, and where confidentiality can be infringed for formal reasons, there is no safe environment in mediation to reveal all facts. Therefore this article will analyse substance and expression of the principle of mediation confidentiality in Latvia.[1]

Mediation in a narrower sense is a process of voluntary cooperation in civil and commercial matters as defined in Article 1, part 1 of the Mediation Law, in which the parties seek to reach mutually acceptable agreement through a mediator who does not take a decision binding on the parties, taking into account the principles of confidentiality and neutrality and objectivity of the mediator.

Mediation is, on the other hand, a negotiation process in any area of law in the presence of a neutral and objective third party, who does not take a decision binding on the parties, taking into account the principles of confidentiality and neutrality and objectivity of the mediator. In Latvia, mediation is defined in a wider sense as a negotiation process in the presence of a third neutral party in a number of similar but not equal laws, which provides both different requirements for negotiators – mediators and different protection in terms of the principle of confidentiality vis-à-vis mediators and mediation parties.

Literature Review

Although mediation in Latvia was known in a wider sense of this term prior to the adoption of the Mediation Law in 2014 [20; 5; 13; 15], its popularity in civil matters increased rapidly from the moment when mediation was legitimised in the regulatory enactments – the Mediation Law [16] and the Civil Procedure Law [6].

Statistics on the activity of Latvian certified mediators show that starting from 2016 more than hundred civil law cases annually undergo mediation [22]. Permanently the biggest interest in mediation remains in family law disputes, representing a ratio of 72-80% from all mediation processes. Mediation in 110 family cases was launched in

[1] This article was elaborated in the Erasmus+ "Capacity-Building projects in the field of Higher Education"(E+CBHE) as activity "Mediation: training and society transformation/ MEDIATS". Project number: 599010-EPP-1-2018-1-NL-EPPKA2-CBHE-JP

2016, 351 in 2017, 334 in 2018 and 197 in 2019. A significant increase in the number of mediation in 2017-2018 was due to the fact that the Ministry of Justice of Latvia, in cooperation with the Council of Certified Mediators, implemented the "Mediation in Family Disputes" programme, funding five free mediation sessions for families with disputes affecting children's interests. When funding was temporarily phased out in 2019, this was immediately reflected in the statistics for mediation. Meanwhile, in criminal cases where mediation is called as the settlement process, the settlement proceedings take place annually in the last six years around 1665 (2019) – 1090 (2015) per year [26].

In such circumstances, where a significant proportion of all disputes per country is addressed through mediation, a need to examine safety of the mediation service, including in terms of confidentiality, increases. So far there are no researches done on mediation confidentiality in Latvia. Separate authors have mentioned confidentiality principle in their publications and monographies in the Latvian language – J. Bolis, Z. Gereiša, etc.

Aims

The purpose of this article is to identify concept of mediation confidentiality in Latvian national law, and to disclose risks related to exceptions of this principle.

Methods

Comparative and analytic method was applied to research definitions of mediation and confidentiality principle in law. Empirical research method was used to examine practical examples of mediation activities and confidentiality principle observation in Latvia.

Results

Mediation in terms of form and content differs from other forms of dispute settlement. In fact, mediation is a negotiating process conducted by a third neutral party which, unlike the court and arbitration proceedings, does not take a decision binding on the parties.

Despite the apparent simplicity of the concept of mediation, in Latvia the concept of mediation in the Latvian language is used in three different terms in laws, although in substance it actually means the same – negotiating process in the presence of a third neutral person who does not accept a decision binding on the parties. Civil and commercial law uses the concept of mediation [mediācija] [16 and 6], criminal law and administrative proceedings use the concept of settlement [izlīguma process] [12, p. 121] [1, p. 80.1], while copyright uses the concept of process of intermediary [vidutāja process] [3, p. X.1]. Due to differences in terms of mediation and due to the content of different laws, not only the designation of the mediation process in each legal area, but also, other aspects, differ. For example, the privacy limits and protection of mediation, which will be analysed in this article below.

Mediation in a narrower sense in Latvia is the process of voluntary cooperation defined in the definition of Article 1(1) of the Mediation Law, in which the parties seek mutually acceptable agreement to resolve their disagreements through a mediator in civil or commercial matters, the scope of the areas being determined by the Mediation Directive. Mediation in Latvia is, on the other hand, a negotiating process in the presence of a neutral third party in any field of law, which does not take a decision binding on the parties.

Understanding mediation in a narrower or wider sense is essential in assessing applicable law to process of mediation, mediator, mediation parties, and their rights and obligations. For example, Article 84, Part 1, Clause 6 of the Civil Procedure Law provides a prohibition for a mediator who has participated in mediation in this or related other case to be a representative in civil proceedings. Or, for example, Article 106(5) of the Civil Procedure Law sets a prohibition to summon and question in a capacity of witnesses a person who has participated in mediation in this or other proceedings. The prohibitions imposed by the Civil Procedure Law shall apply only to mediator or mediation parties who have participated in mediation within the narrower meaning of that term, namely mediation governed by the Mediation Law. The restrictions specified in the provisions referred to in the Civil Procedure Law are not applicable to mediators and mediation parties in the wider sense of that term, namely mediators and mediation parties who have participated in the mediation process, which is governed not by the Mediation Law, but by other regulatory enactments, such as the mediation process in criminal proceedings governed by the Criminal Procedure Law, by using the term "settlement process" or through mediation in copyright proceedings governed by the Copyright Law, using the

term "process of intermediary". Therefore legally there can be a mediator as a party in civil proceedings who led the mediation process in criminal proceedings, because in criminal proceedings the term of the mediation process is a "settlement process", or a mediator who has led the mediation process in copyright dispute, since the term of the copyright mediation process is a "process of intermediary".

Multiplicity of the concept of mediation in Latvian regulatory enactments poses a risk that mediators and participants in the mediation process do not benefit from confidentiality protection, which arises from the nature of mediation, and which is weakened by terminologically unequal regulatory enactments.

Discussion

The use of a third, neutral party in the negotiations, as well as the need for open and fair talks between participants in the mediation process, outlines the importance of confidentiality in the mediation process [8, p. 139]. In any successful mediation, two preconditions must be provided: firstly, the mediator must be trusted by the mediator and, secondly, the parties to the mediation process must be convinced of the mediation confidentiality [8, p. 139]. Confidentiality contributes to openness, procedural honesty and neutrality and objectivity of the mediator [21, p. 583]. Only knowing that the mediation process is confidential have grounds for disclosing all information without fear that it will be used sooner or later against the person who disclosed the information.

Confidentiality is one of five principles of mediation alongside volunteerism, equality between the parties, cooperation between the parties, neutrality and objectivity of the mediator. Confidentiality is the advantage of which, as a result of its existence, this form of dispute settlement, like arbitration proceedings [24, p. 23.1], is more appealing than proceedings before a national court with the principle of openness inherent to it [6]. In choosing the way in which disputes are resolved, mediation may be appropriate either directly or including due to its inherent confidentiality, which guarantees that information disclosed in mediation will not be transmitted to persons who have not participated in the mediation process. The parties, while confident about the privacy guarantee of mediation, may feel safe and open to disclosure as information, it feels. Otherwise, in the absence of confidentiality in mediation, there would be no grounds for disclosing information to either the mediator or the other participants in the mediation process, as this could potentially harm the information provider itself in the future. By promoting mediation as a means of dispute settlement, confidentiality is highlighted as a special advantage which is not possible in multiple categories of proceedings.

Confidentiality is a crucial element of mediation: it encourages participants to speak openly and with candour. The greater the disclosure by the parties of their real concerns, fears, interests, needs and aspirations, the greater the prospect of the mediator being able successfully to facilitate a settlement [23, p. 80-81]. It is important to disclose all information in mediation as openly a possible, including needs, concerns, expectations and feelings. Any caution in the presentation of such information, including, for example, due to fears of privacy breach, may impair the effectiveness of mediation.

A clear and predictable legal framework for mediation confidentiality is one of the signs of a qualitative mediation process at national level. When testing the quality of mediation in a comparative perspective, mediation confidentiality may be assessed in the form of "insider/outsider" and "insider/court", in the first case assessing whether participants in the mediation process (from inside the mediation process) may disclose information to persons who did not participate in mediation (outside) and in the second case, when assessing whether the parties or the mediator (from inside of the mediation process) can disclose information to the court [2, p. 8-9], for example by being summoned and interrogated in the court hearing about information obtained during mediation.

The mediation confidentiality cannot be effectively guaranteed only by a civil agreement between the parties and the mediator. The mediation confidentiality requires legal protection so that neither the mediator nor the participants in the mediation process can be interrogated in court or otherwise forced to disclose the information obtained in mediation. Therefore, the existence of effective law provisions is a prerequisite for safeguarding the confidentiality in mediation. The protection of all types of information is important, preventing the transmission of information to any person who has not participated in the relevant mediation process, regardless of the form and content of the

information disclosed. Equally protected shall be written, verbal, and non-verbal information.

The purpose of mediation confidentiality is to create an environment of absolute certainty for the mediator and participants in mediation, so that they can disclose information during mediation without being exposed to the risk that any of this could come to the disposal of others or have negative consequences.

The mediation confidentiality communication is a prerequisite to assuring participants' overall trust in the mediation process [8, p. 138]. Participants' faith in the system will be fostered through the creation of enforceable confidentiality rights and privileges [8, p. 138]. Confidentiality has always been considered to be an essential feature of alternative dispute settlement (ADR) instruments.

The mediation confidentiality has dual character: it creates rights and obligations. The obligation arising from confidentiality requires to keep confidential and not to disclose any information obtained during mediation and, in the event of a breach of that duty, to compensate caused damages.

The right arising from confidentiality means the right to demand any person to refrain from disclosing information obtained in mediation, the right not to be interrogated about the information obtained in mediation and the right to claim damages from anyone breaching confidentiality. Any breach of confidentiality is very serious and could result in the mediator being sued [11, p. 23]. If a certified mediator has infringed the confidentiality obligation, a participant in the mediation process may submit a complaint to the Board of Certified Mediators for such action.

In Latvia until now there has been one case where a complaint regarding the conduct of a certified mediator has been examined in relation to breach of confidentiality, where the mediator disclosed to the Custody Court more information than the Mediation Law allows [17]. In the particular case the mediator had issued a statement regarding the result of mediation, exceeding content limits specified by Article 1(8) of the Mediation Law. Although in her explanations to the Mediator Certification and Certification Commission, the mediator pointed out that more information was provided with a view to ensuring the protection of the rights and interests of children, which is a permissible derogation from the principle of confidentiality and stems from Article 4, Paragraph 4(1) of the Mediation Law, the Commission found a breach and the Council imposed a sanction on the mediator – explained incorrectness of conduct.

In Latvia mediation is possible in civil, administrative and criminal cases, and it is regulated in a number of regulatory enactments in the relevant field of law – the Mediation Law [16], Copyrights Law [3], Civil Procedure Law [6], Administrative Procedure Law [1] and Criminal Procedure Law [12].

In general, the concept of confidentiality in Latvia is mentioned in 156 laws. On the other hand, the principle of confidentiality, using terms as "confidentiality" and "prohibition to disclose information", is provided for such professions and activities as psychologists [19, p. 12(3), p. 14(5)], sworn advocates, mediators [16, p. 4], arbitrations [24, p. 23(1)], intermediaries in copyright disputes [3, p. 67.9], the field of protection of children's rights [4, p. 71(1)] and official secrets [18, p. 3(1), p. 9(3)].

Mediation Law in Latvia was adopted implementing European Parliament and Council Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters [9]. Clause 16 in preamble of the Directive regarding confidentiality provides that Member States should encourage the training of mediators and the introduction of effective quality control mechanisms concerning the provision of mediation services to ensure the necessary mutual trust with respect to confidentiality. Clause 23 of preamble provides that „confidentiality in the mediation process is important and this Directive should therefore provide for a minimum degree of compatibility of civil procedural rules with regard to how to protect the mediation confidentiality in any subsequent civil and commercial judicial proceedings or arbitration". Article 7, part one of the Directive provides that „mediation is intended to take place in a manner which respects confidentiality" and Member States shall ensure that „unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process".

At the same time two exceptions from me-

diation confidentiality principle are stated in Clauses a) and b), part one of Article 7 of the Directives saying that mediation confidentiality is not applicable, "where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person" and „ where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement". Part two of Article 7 permits to Member States to enact "stricter measures to protect the confidentiality of mediation", despite exceptions.

Latvia, when transposing the provisions of the Mediation Law and the Civil Procedure Law, has introduced the requirements laid down in the Directive in terms of confidentiality, close to the text of the Directive. The first, second and third paragraphs of Article 4 of the Mediation Law transpose the requirement of Article 7, Paragraph one, of the Mediation Directive that:

1) information obtained or related to mediation shall be confidential, unless otherwise agreed by the parties,

2) the mediator shall not disclose the information provided by the other party if the other party has not agreed to it, and that

3) it is prohibited to interrogate mediators and mediation parties as witnesses regarding the facts which have become known to them in mediation.

In terms of the exceptions to confidentiality provided for in the fourth paragraph of Article 4 of the Mediation Law, the Mediation Law almost literally transpose the provisions of Article 7(1)(a) and (b) of the Mediation Directive. However, there are more detailed and possibly wider restrictions on confidentiality in Latvia than the expresis verbis provided in the Mediation Directive, adding the protection of freedom and sexual inviolability as to the protection of public order, the protection of children's interests, the protection of the individual's physical or psychological integrity. The Mediation Directive does not give a Member State the right to impose more restrictions on confidentiality in its national laws. On the contrary, Article 7(2) of the Mediation Directive states that Member States may "introduce more stringent measures to protect the confidentiality of mediation".

The mediation confidentiality is also protected by civil procedural rules by prohibiting the summoning and questioning as a witness the persons who have participated in mediation in a particular or related case [6, p. 106(5)]. The Civil Procedure Law does not prohibit the expresis verbis from questioning as a witness persons who have participated in the settlement process in criminal proceedings or persons who have participated in process of intermediary in copyright dispute. Although Article 106 (1) of the Civil Procedure Law prohibits questioning in a capacity of witness "persons who do not have the right to disclose the information entrusted to them by their post or profession", only some, but not all persons may benefit from this clause, namely, mediators of settlement procedures in administrative or criminal cases, and mediators in a copyright dispute, whose job qualifies as a profession. However there is no civil procedural basis for participants in criminal proceedings to refuse to testify in civil proceedings. Such a breach of confidentiality could probably be prevented by the equalisation of mediation terminology in civil and criminal matters.

Mediation in criminal cases is possible in accordance with the Criminal Procedure Law, where the mediation process is referred to as the settlement process. Criminal proceedings is the legal pioneer in Latvia in terms of mediation, since the settlement process was legitimised in the Criminal Procedure Law from 1 October 2005, when the Criminal Procedure Law entered into force.

The mediation confidentiality in criminal cases is guaranteed only partially because only "a mediator of the State Probation Service has the right not to testify regarding settlement proceedings, as well as regarding behaviour of the parties involved and third parties during the settlement meeting" [12, p. 6]. The parties of mediation in criminal cases do not have this privilege. The criminal proceedings law does not, unlike the Civil Procedure Law, provide for an absolute prohibition to interrogate a mediator, but a right of the mediator to testify voluntarily. The protection of privacy in criminal case mediation is weaker than in civil mediation. In criminal proceedings, it shall be permitted to interrogate any person involved in mediation if it does not comply with the scope of Article 121(6) of the Criminal Procedure Law, including mediator and mediation participants from the field of civil or

administrative proceedings.

Article 381, Paragraph one of the Criminal Procedure Law stipulates that a mediator trained by the State Probation Service is not the only person who can facilitate and implement the mediation or settlement process in criminal matters. This article entitled "Actualization of the settlement" states that settlement "may" be facilitated by a mediator trained by the State Probation Service, while leaving the possibility to perform the functions of mediator to other persons.

However, in the administrative process mediation is possible under the Administrative Procedure Law, using the concept of the amicable process instead of mediation [1, p. 80.1]. The Law on Administrative Procedure does not provide for the amicable process as a mediation process with the participation of a third neutral party, but as the broadest possible settlement process, which may also take the form of negotiations directly between the parties involved. Therefore, the Administrative Procedure Law does not define either the concept of the intermediary or mediator of the settlement process, the principles of settlement, or the rights and obligations arising from confidentiality. If mediation is used in the administrative process as a method for resolving the dispute, it is possible to use the Mediation Law.

In the same way as Article 106(1) of the Civil Procedure Law, Article 163(2) of the Administrative Procedure Law prohibits questioning as a witness "a person who, after his or her position or profession, has no right to disclose the information entrusted to them". However, the protection of this rule in the field of mediation may only be exercised by a mediator in civil matters, a mediator in administrative or criminal proceedings and a mediator in a copyright dispute, where their act in their profession. Participants in mediation or settlement proceedings, however, have no administrative procedural basis to refuse to testify in the administrative proceedings. Such a breach of confidentiality could be eliminated as comparing the terminology of mediation in all areas of the law, and by supplementing Article 163 of the Administrative Procedure Law by adding persons who participated in mediation to the circle of persons released from questioning likewise in the Civil Procedure Law.

Copyright mediation is possible under the Copyright Law, where the mediation process is referred to as the process of intermediary. The Copyright law was supplemented by Chapter X.1 entitled "Intermediaries", transposing Directive 2014/26/EU of the European Parliament and of the Council [10], where Clause 49 of the preamble says that „ it is appropriate to provide, without prejudice to the right of access to a tribunal, for the possibility of easily accessible, efficient and impartial out-of-court procedures, such as mediation". The Copyright Law establishes a system of dispute settlement parallel to the Mediation Law through a neutral third party who does not take a binding decision. The requirements for the mediator and the general principles of mediation are similar but not equal to the requirements of the certified mediator and the principles of the mediation in civil cases. Likewise in mediation in civil cases, in copyright mediation there is a principle of cooperation between the parties and the principle of neutrality of the mediator, but unlike civil mediation, the mediator in copyright cases is allowed to "make his proposals for a fair settlement of the dispute" [3, p. 67.7], however, as in civil and criminal case mediation, without taking a binding decision.

The mediation process in copyright matters is confidential, by imposing an absolute prohibition on questioning a mediator and the parties in mediation [3, p. 67.9]. The prohibition of question mediators and parties under the Copyright law applies to all kinds of judicial proceedings, covering civil, criminal and administrative cases. Thus, the mediators and mediation parties are legally more protected than the mediation parties in criminal and civil matters.

The mediation confidentiality is multidimensional in time, space and in respect to the person. In the time dimension, mediation shall clearly identify its starting and ending time, which is important for establishing the confidentiality limits of mediation. The mediation confidentiality protects information obtained during mediation, but not information obtained before or after mediation. Entering into a written agreement with the mediator can determine the beginning of the mediation period. It is possible to record the end of mediation with a statement from the mediator regarding the result of mediation, but the end may also be a moment when either party refuses to continue mediation. Neither the Criminal Procedure Law nor the Copyright Law provides for a legal instrument by

which the end of mediation could be recorded.

The dimension of the mediation in space is to be determined with a view to identifying which national legal provisions are applicable to the legal framework for the mediation, which is particularly important in cross-border mediation cases.

The confidentiality subjects of mediation are mediators and parties involved in the mediation, or participants in mediation. The parties to mediation shall be parties, persons who wish to resolve their disagreements through mediation, as well as other persons present in mediation who have agreed to participate in mediation.

The special subject of the mediation confidentiality is:

1) in civil matters - a natural person designated freely by the parties who chairs the mediation process [16, p. 1(4)]. Unlike a certified mediator within the meaning of Article 1(5) of the Mediation Law, a mediator within the meaning of Article 1(4) of the Mediation Law has not specified any qualification, age, education or other requirements. Therefore, the only parameter for determining decisively whether a person is a mediator who leads the mediation process and who is subject to the principle of confidentiality, is the existence of a contract with a mediator. A written form is provided for in the contract with the mediator. Accordingly, the conduct of the mediation process without written agreement with the mediator does not provide sufficient grounds for the application of the principle of confidentiality. Whereas a mediator without a certificate, his or her certified mediator acquires rights and obligations arising from the principle of confidentiality only when a contract with the mediator has been concluded;

2) in criminal matters – an intermediary from the State Probation Service;

3) in copyright cases – a mediator – a natural person chosen freely by the parties who leads the mediation process and complies with the requirements specified in the Copyright Law and is included in the list of professional mediators [3, p. 67.3, p. 67.4].

Confidentiality as a principle has three components reflected in the relationship between the parties to mediation and the mediator, mediator and judge, and in the relationship with society or social control [25, p. 299]. The mediation confidentiality works both horizontally (in relations between equal participants in mediation) and vertically (in relations between the parties and the mediator). Confidentiality shall be equally effective in horizontal and in vertical dimension.

The object of confidentiality is information obtained during the mediation. The form of information may be written, oral, as well as that expressed by non-verbal communication, such as gestures, mimics and other body language or expressions such as blush, crying, etc.

The mediation confidentiality is not absolute. The regulatory enactments provides for a number of exceptions from the principle of confidentiality s for a number of exceptions from the principle of confidentiality the principle of confidentiality is not applied in accordance with the Mediation Law if disclosure is required in one of the seven cases:

1) for the provision of public order,

2) the protection of the rights or interests of the child,

3) in order to prevent the risk to the life of a person,

4) in order to prevent the risk to the health of a person,

5) in order to prevent the risk to the freedom of a person,

6) in order to prevent the risk of sexual inviolability as of a person,

7) in order to implement or comply with an agreement reached by mediation.

Although the exceptional cases are normative and the number is preclusive, any exception must be interpreted reasonably. None of the above exceptions has been defined by regulatory enactments with such clear boundaries that their perception would not require adequate interpretation. Exceptions to the mediation confidentiality should derogate from the principle of confidentiality in order to preserve the meaning and characteristics of mediation. Derogations from the mediation confidentiality are intended to defend specially protected values listed in regulatory enactments - public order, children's rights, the life, health, sexual inviolability, freedom and agreement entered into by mediation.

Until now, neither the doctrine nor the regulatory enactments have defined the criteria or conditions under which it would be justified to violate the limits of confidentiality by referring to

the above values. It is not specified at what level or stage the confidentiality should be infringed by reference to these values. A formal reference to the values referred to in the Mediation Law is not yet sufficient ground for infringing the confidentiality of mediation. Data from the survey of Latvian certified mediators show that several certified mediators have encountered cases where employees of Custody Courts request information on the course and content of mediation by telephone, referring to the "protection of the rights or interests of the child", formally the basis set out in the Mediation Law, in order to violate confidentiality. Only the consistent and rigorous defence of certified mediators has allowed confidentiality to be maintained by preventing disclosure.

The mediation confidentiality shall only be infringed in cases where information about infringement of an object protected by law is so substantiated and reliable that there is no doubt as to the possibility of a risk. Unjustified doubts or curiosity about the content of mediation are not yet sufficient to violate the confidentiality of mediation.

Conclusions. In Latvia, there are similar regulatory enactments, but not equally regulated mediation as a voluntary process for negotiating and cooperating with the parties through an objective and neutral third party, which helps to reach a mutually acceptable solution in conditions of confidentiality. In civil and commercial matters, mediation is regulated by the Mediation Law, criminal proceedings - Criminal Procedure Law, calling this process a settlement process, but in copyright cases the Copyright Law, calling this process an intermediary process. The confidentiality subjects of mediation are mediators and parties involved in the mediation. Mediation confidentiality works horizontally (in relations between equal participants in mediation) and vertically (in relations between the parties to mediation and the mediator). Confidentiality is equally effective in both dimensions. The regulatory framework for mediation in civil, criminal and copyright matters provides for a different protection of the confidentiality of mediation, which poses a risk to mediation confidentiality in cross-sectoral situations. The mediation confidentiality is not absolute and may be limited in the cases specified by law, in each situation assessing the necessary balance between the super purpose of the protection of confidentiality as the substance of mediation and the need to defend specially protected values. A formal reference to the values referred to in Mediation Law is not yet sufficient ground for infringing the confidentiality of mediation.

Acknowledgements. This study will be relevant for practicing mediators and lawyers, as well as legal scientists researching confidentiality and privacy sector.

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MEDIATS Mediation: Training and Society Transformation

ACCESS TO PROFESSION OF MEDIATOR IN GEORGIA: GENDER, EDUCATION, AND OTHER DIMENSIONS

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Abstract. *In this article, we discuss the profession of the mediator, what kind of requirements or restrictions are prescribed for professional mediators in different countries, how different characteristics of a mediator can affect the mediation process or the outcome of the mediation. The article provides review and the comparative analysis of eligibility criteria for access to the profession of mediator set by the law in Georgia and other countries with further survey of Georgian mediators' gender and education based on the official data of Unified Register of Mediators in Georgia. The analysis of the data that includes 54 mediators shows that 57,4% of mediators are female and that most mediators have a degree in law (88.8%). Other fields of education are Psychology (7,4%), Economics(1.8%), and Public relations (1.8%).*

Keywords: *Mediation Law, Sociology of Mediation, Personality of Mediator, Qualification Requirements for Mediators, Georgian Association of Mediators.*

JEL Classification: *J52; L84*

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Introduction

The Hague Conference on Private International Law defines mediation "as a voluntary, structured process whereby a 'mediator' facilitates communication between the parties to a conflict, enabling them to take responsibility for finding a solution to their conflict" [4]. Mediation is becoming a more and more popular method for resolving conflicts in a variety of contexts and the profession of mediator is developing and defining its meaning.

The mediator is a third party in a mediation – an impartial independent person who guides the parties through the mediation without any decision-making power [3, p. 1577]. In a new law of Georgia on Mediation (2019) the mediator is defined as "a natural person registered with the Unified Register of Mediators in Georgia who meets the requirements of this Law and agrees to conduct mediation, regardless of his/her status and selection/appointment procedure" [1].The new law has led the country to set criteria for the accreditation of mediators and to establish the Unified Register of Mediators.

European Commission for the Efficiency of Justice published the handbook for mediation lawmaking in June 2019 and underlines the importance of the existence of Unified register lists of Mediators and foreseeing it in the national law that for practicing mediation should be necessary that a person is on the unified list. It will maintain adequate safeguards capable of unqualified people from conducting mediation. The reputation of the profession of mediator and mediation itself can be damaged by the incompetent mediators in the eyes of society. It may also lead to the reduction of the rates of recourse to mediation.

There are many issues within mediation that warrant attention as the literature in this sphere has grown significantly in the last decades.

After the process of transforming the mediator into a separate profession began, the discussion had arisen of how to regulate the activity of mediators and whether it should be regulated in any way.

The mediation process is influenced by many factors and one of them is the role of the mediator. Mediator's behavior itself is influenced by many factors, including the age, gender, personality, professional skills, experience, educational background, education in the field of mediation, their beliefs, etc. [10]

Literature Review

Some of the significant works in this area are monographs by V. Fisher [6], L. Marlow [11], where the advantages of a lawyer and a psychologist are studied on the example of foreign mediation: a role of a mediator, as well as a set of competencies that a professional mediator must possess.

Although the mediator does not make decisions for the parties and he/she only helps the parties to reach an agreement, the mediator can indirectly "influence" the content of the final decision of the parties involved.

Stuhlmacher and Morrissett studied the link

of the gender of the mediator to the perception of mediation and stated some interesting differences in behaviors or communication styles of men or women that may have an influence on the mediation process. But in the summary of the analysis authors underline the importance of power differences between two genders that becomes more salient than gender itself. Power issues are particularly important in disputing peers, such as husband and wife, employee-supervisor and etc. have often had unequal levels of power [13].

The issue of registration and certification of mediators arose. As well as the different standards to which this profession should be formulated.

Aims

The article is aimed to compare eligibility criteria for access to profession of mediator set by the law in Georgia and other countries., discussing relation between a personality of mediator and his or her ability to organize proper and successful mediation process.

The purpose of the study is to analyze two indicators: gender and educational background of the mediators registered in the Unified Register list of Mediators in Georgia and to find out how different characteristics of a mediator can affect the mediation process or the outcome of the mediation.

Methods

To study the main indicators, we used data from the Georgian Association of Mediators, using doctrinal method analyzing eligibility criteria for access to the profession. We used the quantitative analysis method to determine the gender balance in the list and the diversity of university educational background of the registered mediators.

Eligibility criteria for access to the profession of mediator in Georgia and other countries are studied on the base of doctrinal and comparative legal methodology.

Statistical analysis of gender and field of university education indicators in the Unified Register of Mediators records is conducted to clarify relation between personal background of Georgian mediators, eligibility criteria envisaged by the law, and professional skills necessary to maintain the mediation process.

Results and Discussion

In 2019, a law on mediation was enacted in Georgia, based on which a Unified Register list of Mediators in Georgia [2] was created and a mediator certification program was approved. Until now, there were many ways in Georgia to adjust the mediator profession and conduct the mediation process.

The Law of Georgia on Mediation [1] defines the term "mediator", in particular, a mediator is only a person who is registered in the Unified Register of Mediators of the Georgian Association of Mediators and therefore meets the requirements of the law.

In 2019 Georgia signed the Singapore Convention on Mediation, which is the United Nations Convention recognizing the mediated settlements.

The law distinguishes between two types of mediation:

"Judicial mediation – the mediation that is initiated after a claim has been filed with the court, in accordance with the procedure established by the Civil Procedure Code of Georgia, if the court refers the case to a mediator;

Private mediation – the mediation that is initiated by the parties on the basis of a mediation agreement, without referring the case to a mediator by the court."

In both cases, the mediation must be conducted by a mediator registered in the Unified Register of Mediators, which confirms the high standard set by the state for the professional competence of the mediator. Which is realized in the form of a unified register of mediators.

"A legally competent natural person with no criminal record, who has completed a mediation training/training for mediators in accordance with a certification programme for mediators and who holds a certificate issued by the Mediators Association of Georgia may be registered with the Unified Register of Mediators in Georgia"[1].

Different countries have different requirements for people who wants to enter the profession of a mediator.

As mediator has to deal with very sensitive cases, moral standards of impartiality and neutrality are very high. That's why next to the list of different requirements for mediation we see some standards for the mediator's reputation as well.

There are many countries, where only a person with no criminal record may become a mediator. For instance, in Lithuania a person with a history of crime related to corruption cannot practice mediation. In Slovenia practicing mediation is

forbidden for people who have convicted for intentional crime or offense. A person whose sentence raises 'doubts as to the reliability of practice of mediator' is not allowed to be a mediator in Austria. Belgium requires a record clear from disciplinary and administrative sanctions together with criminal records for potential mediators.

Mediation is a complex field. The stereotypical view that only a lawyer can be a mediator cannot be considered as a truth. In 2002 Jacqueline M. Nolan-Haley in his work stated that lawyers had a monopoly in mediation: "Mediation is a big business today that is practiced by lawyers and non-lawyers and is closely related to the business of law. Lawyers have a long-standing monopoly on the law business and do not look favorably on sharing their power with nonlawyers." In his article Nolan-Haley has argued that for bringing us closer to the needs and interests of the parties involved in the mediation process, the systemic change is necessary, including collaboration and power-sharing among professionals in multiple disciplines to reform the legal practice from a problem-solving perspective instead of upholding professional monopoly of lawyers [12].

Process of mediation was developed and became usual in legal practice. This is the reason why the people interested in the profession of mediator are mainly lawyers - they were trained and practicedthe mediation. Accordingly, the stereotype that medi ation is part of the legal profession exists in Georgia till now.

Personal qualities and skills needed to perform the function of a mediator may be found in arepresentative of any profession. Every adult of legal age can become a mediator. However, in the example of many countries, we see that they settle some age qualifications for their citizens. For example, in Austria only a person not younger than 28 can become a mediator, in Poland a person must be at least 26 to enter the list of qualified mediators (European Handbook for Mediation Lawmaking, 2019). In Florida, the required age is 21 and a person should be of good moral character.

We see the requirements of university degrees for starting the career as a mediator in some countries as well. For example, Azerbaijan, Cyprus, Lithuania, Serbia, Slovenia and Spain require a University degree for potential mediators. In the Czech Republic, a Master's degree is required. Turkey's requirements are more concrete and only a person with law degree can become a mediator.

Among the practicing mediators of the practitioner we most often meet the representatives of the following two professions, professionals in the fields of Jurisprudence and Psychology. Other fields of university education in social sciences are also represented.

U.S. domestic law defines different requirements for potential Mediators: Few states require a bachelor's degree in a specific field for family court mediators. There is required a law degree for court-approved mediators in some states as well [5].

In Delaware Requirements of mediators' qualifications vary by court. In the Court of Common Pleas, the requirement is a bachelor's degree in social services or a related field is required together with a 28-hour mediation training.

For civil court cases in Michigan mediator must have a Juris Doctor degree or a bachelor's degree in conflict resolution, for domestic relations cases, a mediator is required five years' experience in family counseling or university degrees from one of the following fields: law, social work, psychology, counseling, marriage and family therapy, or behavioral sciences.

For custody mediators the Pennsylvania Supreme Court requires University degree and practical experience in law, psychology, family therapy,

Table 1

Gender and higher education fields of Georgian mediators according to the Unified Register of Mediators in 2021

Number of registered mediators	Gender			
54	Female: 31		Male: 23	
	Field of university education			
	Law: 48	Psychology: 4	Economics: 1	Public Relations: 1

counseling, psychiatry, or other fields of behavioral or social science [5].

Based on the Law on Mediation, the Mediators Association of Georgia was established, which is a membership-based legal entity under public law established by the Law of Georgia on Mediation and is the only association that self-regulates mediators. to ensure professional self-regulation of mediators.

The Law of Georgia on Mediation defines the term "mediator", in particular, a mediator is a person who is registered in the Unified Register of Mediators of the Mediators Association of Georgia and therefore meets the requirements of the law.

At the moment,Georgian Association of Mediators unites 54 active mediators in the Unify register. There are no university background or age requirements for potential mediators in Georgia, any legally competent natural person can become a mediator, who has no criminal records and has completed an accredited training course in mediation.

The analysis of mediator registration list data includes the study of data based on two characteristics, namely gender distribution and the field of mediator university education.

Gender balance is maintained between mediators, with 31 of the 54 members being female and 23 male.

All members of the professional association listed in the public register have a higher university education, Bachelor's, Master's or Ph.D. degrees, and the distribution of the field of education is as follows: 88.8% of members of the professional association listed in the public register mediators have a law degree. Other fields of education obtained by the mediators are Psychology (7.4%), Economics (1.8%) and Public relations (1.8%).

The presence of lawyers as the majority in the mediators' list may strengthen the stereotypical view in our society that only a lawyer can be a mediator.

Conclusions

In 2019, a law on mediation was enacted in Georgia, based on which a Unified Register of Mediators in Georgia was created and a mediator certification program was approved. Until now, there were many ways in Georgia to adjust the mediator profession and conduct the mediation process. During this period, mediation at all stages was mainly developed within the judiciary.

Because of that, lawyers today are dominant in the field of professional mediation.

The article reviews the steps taken by the mediator profession before creating a unified register. There is a comparative anailisis providen of eligibility criteria for access to profession of mediator set by the law in Georgia and other countries.

Our research is based on a survey of mediators currently registered in Georgia, who they are, what education they received, and what activities they did before starting a mediator career. Our study has shown that vast majority of registered mediators have a law degree Some of registered mediators have a degree in Psychology, Economics, and Public Relations. It should be noted that gender distribution among Georgian mediators is balanced.

To deal with the overcrowding of the mediation profession in Georgia by lawyers, we suggest Georgian Association of Mediators to promote the profession of mediator among students and alumni with the different educational backgrounds.

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MEDIATS Mediation: Training and Society Transformation

FEATURES OF THE FAMILY MEDIATION IN TERMS OF DIVORCE

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Abstract. *The article reveals important role of the psychologist as a mediator in family disputes on examples from history and current practice of mediation in Georgia, focusing on activities of the project "Advocacy for the Protection of Children and Youth" implemented on the basis of the psychology clinic at Batumi Shota Rustaveli State University.*

Key words: *mediation, psychologist mediator, domestic violence, family disputes, children in mediation.*

JEL Classification: *J52; L84*

Formulas: 0; fig.: 0; tabl.: 0; bibl.: 28.

Introduction

Realities of modern life are full of conflict and controversy: in family, at work, in society and international community. Escalating conflicts generate and are generated by psychological pressure. Usual way to deal with conflicts through adjudication creates even more pressure, stress, and finally leads to pains of failure.

Mediation is a negotiation process in which a neutral mediator assists the opposing parties and/or their representatives in achieving a mutually beneficial agreement; it is one of the methods of alternative dispute resolution (ADR) called so because people choose mediation instead of going to the court.

Practice of mediation is a complex field. Every adult can become a mediator, but professional conduct needs specific skills. The fields closest to the essence of mediation are jurisprudence and psychology, of which psychology plays a most significant role. In mediation, personal relationships beyond a dispute are crucial; the advantage of psychologists is that they used to deal with relations and feelings, when lawyers hardly can forget legal ways of dispute resolution to approach a problem only from the human point of view.

Literature review

Orjonikidze, Kartsivadze and Bujiashvili (2021) point out that focusing on personal problems and resolving them is one of the most important prerequisites for resolving a dispute. A psychologist will be better able to solve the problem in this way than a lawyer. They list several advantages of the psychologist-mediator, namely:

1. She/he is not focused on the legal settlement of the dispute and does not give a legal assessment to the actions of the parties;

2. She/he does not follow the structure established by the procedural law for a lawyer. The mediation process is not conducted as a judge, however, it has the ability to manage conflict and resolve disputes;

3. Since the issue is approached from a "human" point of view, the psychologist manages to establish a more direct relationship with the parties, which has a positive impact on the dispute resolution process [1].

The development of mediation in Georgia by public policy began about two decades ago. As a result of the implemented changes in the legislation, notarial, court, medical, tax, family mediation appeared. Lipartia (2015) points out that implementation of ADR today is mainly the state project aimed to unload the judicial system [2].

As reported by the National Center for Alternative Dispute Resolution (2013), on September 28, 2019, the law of Georgia on mediation entered into force, which aims to institutionalize mediation. One of the important innovations of this law is the creation of an equal and competitive environment for the development of judicial mediation and private mediation. Until January 1, 2020, the activities of court mediators were carried out on a voluntary basis, and today, the work of all mediators involved in the mediation program is funded from the state budget [3].

If we look at history, we will see that every country has its own tradition of dispute resolution.

According to Tkemaladze (2016), Georgia is no exception, the nation developed early-stage forms of mediation long before the state started to cultivate it. This method of dispute resolution was maintained in the middle ages and has survived in some parts of Georgia, in particular, in Svaneti and Khevsureti this institution still operates today. The main purpose of the mediation was to reconcile the parties peacefully. Ancient mediators practiced an evaluative approach, arbitration-like, making a decision by which the offender was liable for compensation in favor of the victim. The decision should have been such as to satisfy the aggrieved party and force it to reject hostility and revenge [4]. Such decision-making today is usually practiced by the courts in family disputes, but a more voluntary modern mediation process helping spouses to make their own decisions starts to compete with the judiciary.

Purpose

The aim of the article is to explain the role of the psychologist as a mediator in family disputes on examples from historical and contemporary development of mediation in Georgia, in particular, from the practice of psychology clinic at Batumi Shota Rustaveli State University (BSU Psychology Clinic).

Method

The article employs interdisciplinary methods and statistical analysis of data gathered at the BSU Psychology Clinic when providing the service of mediation in the project "Advocacy for the Protection of Children and Youth".

Results and Discussion

In ancient forms of mediation which are still practiced in some regions of Georgia, the number of mediators depended on the complexity of the crime. In simple disputes, the number of mediators ranged from 2 to 4, while in complex cases such as murder, their number rose to 12. Mediators were usually chosen by the parties, however, their names could also be named by the intermediary man. Usually, the parties named an equal number of mediators, however, there were exceptions. Men were chosen as mediators, who were distinguished by honesty, authority, wisdom, sincerity, god-fearing. The mediator should have good communication skills and be able to “find the right words in a critical situation. As a rule, the mediators were only men, especially in the mountains. Only in exceptional cases, and even later, could a woman be appointed as a mediator. The oath played a big role in the mediation process, especially the oath on the icon, which had a great probative value. It can be said that to some extent the oath on the icon was even a pillar of the institution of mediation, as it was the oath that conditioned the confidence of the parties in the process, as well as the execution of the decision made by the mediators.

Mediation in the valley was mainly related to family separation. Historical materials preserved to this day show that the division of family property with the help of a mediator was widespread in all parts of Georgia. Even more, mediator involvement in family disputes has survived into the 20th century. The mediators' duty was to describe the entire family property (movable and immovable) and to draw up a document on the divorce and division of the family property ("Division sheet", "curtain sheet", "decision on division of property", etc.). This document was written in as many pieces as there were participants. One piece had to stay with the mediator as well.

In Adjara, the division of property by "fish-cash" was established. The mediators were dividing the whole property equally and assigned a certain mark to each share. After that, they were throwing in a hat as many marked sticks as many shareholders there were. The individual stick was an expression of belonging to a predetermined share that only the mediators knew about. They were mixing the sticks in the hat with each other, after which each participant was taking out one of the sticks and accordingly owned his property. The family was choosing mediators itself, who were often family relatives, neighbours, or distinguished people in the village. This role was often played by the brothers of the participants' mother. There could have been one person as a mediator. It was possible to elect three people, one of whom was elected as the head and called the ober-mediator. The person chosen as a mediator should have been smart and experienced, well-versed in literacy and land measurement. The authority of the mediator determined the frequency of their election. In exceptional cases, mediators may be invited as observers and fact-providers.

The main distinguishing feature between the historical form of mediation and today’s mediation is that historically, the mediator has made

the decision. Therefore, in parallel with the reconciliation of the parties, the mediator also had the function of establishing the truth. In the modern sense, mediation precludes decision-making by the mediator. Under the current system, the mediator's role is limited to asking questions to the parties, conducting the process and finding possible ways to resolve the dispute, while the decision on the agreement is made by the parties themselves [4].

If old Georgian art of mediation rarely involved jurisprudence skills (rather moral intelligence and customary wisdom), modern emphasis on helping people to decide for themselves instead of imposing on them authoritative solution to dispute makes psychology skills even more important for mediator, despite knowledge of jurisprudence is also useful to formalize agreements and participate in the state-driven mediation framework emerged after legal reform.

Our personal experience many times proved the significant role of a psychologist as a mediator in solving family problems.

In Georgia, from December 6, 2016 to May 2019, the public health foundation implemented the project “Advocacy for the Protection of Children and Youth” (№-ENPI/2016/379-321) in cooperation with the organisation "Step Forward", rehabilitation and development charity center "Tanaziari" and the International Catholic Child Bureau (BICE).

The associated partners of the project were Batumi Shota Rustaveli State University (BSU) and Child Helpline International (CHI).

The aim of the project was to improve the child protection system, protect children and young people who are victims of domestic violence and sexual violence, prevent violence against them and respond to cases appropriately. The main activities of the project were carried out in Tbilisi, Adjara (Batumi).

Activities implemented by the three regional centers within the project are presented in detail in the following table:

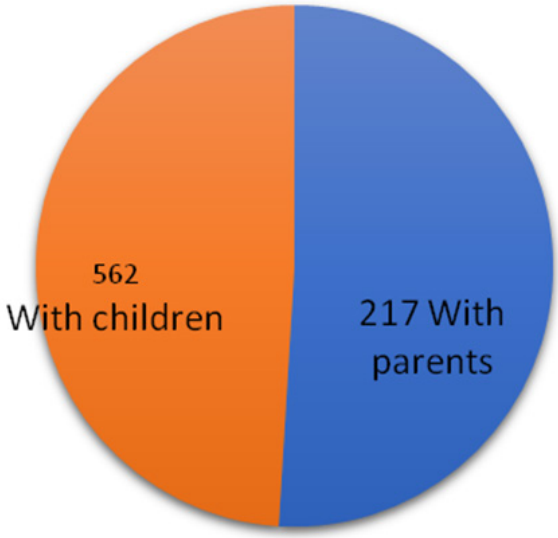
Services provided at the center	
Total online adjustments	953
One-time consultation	502
The number of completed cases	430
The number of current cases	9
Services will be provided in the future	12
According to the type of entry	
By self-flow (for example, after school training)	208
From a social agency	91
From an educational institution	16
From law enforcement	79
From a health care facility	2
Other	55
Quantities in started / completed cases	
Number of successful cases in completed cases	339
Number of failed cases in completed cases	92
Number of children - parent / legal guardian / caregivers	493
Total number of children / youth	439
0-6 years old	82

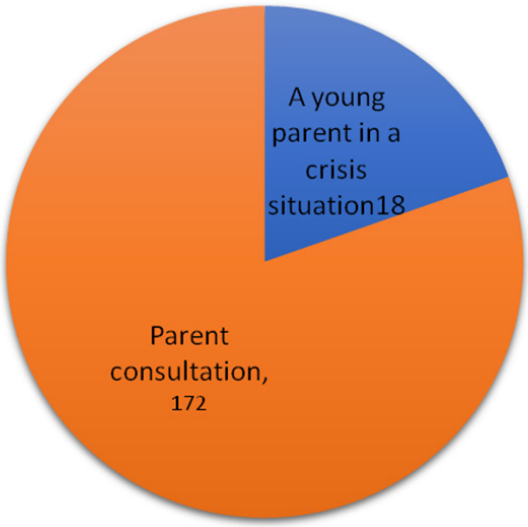
7-12 years old	183
13-21 years old	176
Girl	225
Boy	214
According to the type of violence	
Psychological violence	256
Physical violence	102
Sexual violence	66
Neglecting	15
According to the type of victim	
A child victim or witness of domestic violence	232
Child and young victim of sexual violence	79
A child with disabilities who is a victim or witness of domestic violence and other crimes - will receive services tailored to their individual needs	137
Child from divorced families - dealing with divorce trauma / therapy	171
Children and young people attempted to commit suicide due to violence will receive counseling and rehabilitation services	32
In or out of state care victims of various forms of violence Young (18-21 years old)	82
Parliamentary commission for the murder of two minors on Khorava street.	30
Total number of meetings with parent / legal guardian / caregiver	1258
Number of meetings with children	2132

Batumi children and youth advocacy center actively cooperated with the Adjara social service agency, the psychologists working at the center submitted court-based findings on family dispute issues involving minors. Although the project did not provide for the position of mediator, but in fact, psychologists and social workers had to combine the function of mediator, they played the role of conciliator in resolving various conflict situations: psychological, physical, sexual violence, neglecting, domestic violence, bullying at school, and family disputes.

The diagrams show the total number of consultations conducted by the center's psychologists, both with children and parents.

With full protection of confidentiality, we present one of the most successful cases. The case concerned the relationship of the children with their father after the divorce. In particular, the divorced couple had two young children (a 3-year-old girl and a 5-year-old boy) who lived with their mother. According to the court decision, the father was given the right to take the children 2 days a week but did not have the right to leave the children with him overnight. The mother opposed to the idea of children staying overnight in the father's family as she felt that the ex-husband would not be able to take care of the children because he already had a second family, the infant and at the same time, his stepson and his wife's sister lived with them. The





father lives with his second family in a small apartment where there are no desirable living conditions for the children. The father filed a lawsuit against his ex-wife. The social agency turned to us for help. The center's psychologist and social worker investigated the case and planned to arrange a meeting of the spouses together with them. The meeting between the spouses took place several times and both parties came to an agreement that since the children were small at first, the father could take them during the day 2 days a week, and after 2 years it would be possible to leave them with him overnight as well.

A child-centered interview room has been set up at the BSU children and youth advocacy center. Authorised and competent representatives of the Ministry of Internal Affairs and the Prosecutor's Office were allowed to use the room and/or be present during the conversation with juveniles.

After the completion of the project, BSU Psychology Clinic continues its work on a private basis. The number of referrals to the clinic is quite high.

Many clients from Batumi, other cities and regions benefit from the clinic's services.

Conclusion

Both from theoretical perspective and practical experience, the psychologist is the most competent professional to deal effectively with divorce and family disputes. In particular, stereotypic thinking about legal actions and law enforcement among lawyers hardly helps them to reconcile disagreements between spouses in amicable and voluntary way, nor to repair family relations, at least when lawyers aren't developing psychological skills. Knowledge of psychology of the people helped Georgian elders to mediate family disputes in past times, and our modern project "Advocacy for the Protection of Children and Youth" as well as mediation practice in the BSU Psychology Clinic succeeded because of psychologists' professionalism. However, training in the field of mediation and basic legal knowledge are helpful to resolve problems of private and family life in the complicated socio-legal environment of Georgia.

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MEDIATS Mediation: Training and Society Transformation

GEORGIAN MODEL FOR REGULATING MEDIATION IN THE BACKGROUND OF LEGISLATIVE REFORM

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Abstract. *Article provides a general overview of legislative provisions of law of Georgia "On Mediation" and accompanying legislative amendments adopted by the Parliament in Georgia in 2019 and highlights the specific characteristics of Georgian regulatory model of mediation. The paper examines the evolution of mediation in Georgian legal system from its initial introduction in sectoral legislation in 2011 to adoption by the parliament of Georgia of a new law "On Mediation" and its accompanying legislative changes. The article argues that sound legislative basis is one but not the only precondition for the well-functioning mediation system. Public trust and awareness of stakeholders is another factor in order to achieve that aim. Article explores the legislative novelties and highlights the important changes in this field of law. In author's opinion the new law fills the legal gaps that existed prior to the reform. At the same time, the article underlines the weaknesses of new legislation that need to be addressed for further development and full implementation of mediation in Georgia.*

Keywords: *Mediation regulation in Georgia, national mediation frameworks, Law of Georgia On Mediation, Georgian Association of Mediators*

JEL Classification: *J 52, K 20, K41*

Formulas: 0; fig.: 0; tabl.: 0; bibl.: 28.

Introduction

Legislators and regulators are faced with the problem of overloaded justice system. For many, traditional adjudicative model of litigation is time-consuming and expensive. Impartiality of judges and independence of judiciary still remains unachievable goal in many parts of the world. These problems can be mitigated with the introduction of well-developed regulatory framework for various alternative dispute resolution mechanisms. Mediation has long been considered as one of the popular methods for solving the conflicts in societies.

Although alternative dispute resolution mechanisms and mediation have a rich presence in Georgian legal history, mediation legislation is a relatively new concept in the modern Georgian legislation. The first legislative activities in the field of civil law mediation started only recently with the introduction of court mediation 2011, followed by the notarial mediation in 2012 and mediation in collective labor disputes.

Soon it became evident that the sectoral legislation hindered the formation of coherent and well-developed mediation system and there was a need for further legislative reform.

On 18 May 2019 the Parliament of Georgia adopted the Law of Georgia "On Mediation" and legislative package deriving therefrom, by which amendments were introduced to several legislative acts, namely Civil Procedure Code of Georgia, Civil Code of Georgia, Organic Law of Georgia on Common Courts, Law of Georgia on "Enforcement Proceedings", Criminal Procedure Code of Georgia, General Administrative Code of Georgia, Law of Georgia "on Accounting, Reporting and Audit", Law of Georgia "on State Duty", Law of Georgia "on Arbitration". Mentioned legislative amendments will be discussed along with the relevant provisions of the law of Georgia "On Mediation"

Some provisions of the new law "On Mediation", by which establishment of association of mediators became possible, was enacted upon publication, however, essential provisions of the law came into force only from 1st January 2020.

Due to the novelty of the legislative reform it is still early to comprehensively assess whether the goals of the reform have been fully achieved. At the same time, it is possible to make some conclusions regarding the mediation model suggested as a result of this reform.

The aim of this article is to provide the brief overview of the basic principles and main provisions, as well as the structure and the scope of the mediation legislation.

Literature Review

Vast literature exists on the development of mediation and current trends in legislative and regulatory models of mediation and the prospects of successful introduction of mediation in post-socialist countries in particular.

There is a broad consensus among the scholars that development of mediation in general and its legislative framework in any society is greatly influenced by the cultural context. Mediation, in the words of Nadja Alexander (2001), "does not exist in vacuum. It operates against a backdrop of national dispute management culture and institutional rules and regulations" [1, p. 1]. Another prominent mediation scholar, Shahla F. Ali, (2018), based on the different national experiences, also stresses the "prominent influence of unique domestic factors in a country's eventual adoption of a particular mediation model" [21, p. 273].

It has been pointed out, that any successful mediation program in a given country is dependent on the existence of public trust to legal system and procedural equality. Whether the countries with a socialist heritage qualify for this requirement is subject to debate. Emily Steward Haynes (1999) has emphasized the existence of public trust and respect of legal institutions to function effectively and also noted that that emerging postsocialist legal institutions in central and Eastern Europe had "neither this base of well-established procedural equality nor substantive fairness in both statutory and common law" and that "consequently, any successful mediation design should not be wholly implemented by either the legal system or the government" [13, pp. 257-258, 281].

Steven Austermiller (2006) has summerized three main arguments which are generally are put forward against appropriateness of mediation and ADR in emerging legal systems – lack of public trust in the legal system that would carry over to a mediation program, no credible threat of effective enforcement of the mediated settlement, and its cultural inappropriateness for societies like post-communist Europe [5, pp. 144-145].

In Georgian legal literature devoted to the history of mediation in Georgia, there is substantial evidence of use of mediation in the past. As Sophie Tkemaladze (2017) notes "mediation was a developed method of dispute resolution already at the early, pre-stage of social development in Georgia" [23. p.10].

Michael D. Blechman (2011), international expert, in an assessment of development of ADR in Georgia, conducted even prior to the initial introduction of court mediation in Georgian legislation in 2011, came to the conclusion that the prospects for developing mediation in Georgia were "reasonably good" largely due to the recognized need of such an instrument within the legal profession and governmental agencies and their perception that mediation fitted well with the Georgian culture [8, p.3].

Thomas J Stipanowich (2015) made an observation that mediation practice and its regulatory framework was "evolving in diverse ways" also reflecting, among other factors, "the influence of the marketplace (which often means the legal marketplace), the role of culture, and the interplay between mediation and systems of adjudication" [22, p. 1200].

It is interesting to note that importance of legislation on the development of mediation is debatable. As an international evidence review of mediation in several common law countries conducted by Scottish Government (2019) shows, in the case of the United States legislation when there is already a growing culture if acceptance of mediation, while in case of Australia the culture would not have grown without legislation [20, p. 18]

It seems that there is no direct correlation between the adoption of mediation legislation and the real usage of that ADR instrument. Carrie Menkel-Meadow (2016) maintains that comprehensive efforts to study the use of mediation so far have demonstrated a "less then optimistic view of the relationship between enabling or encouraging legislation or procedural rule drafting and the actual usage of mediation." [17, p. 35]. Yet, comparative studies provide an evidence that many countries do not have consolidated mediation legislation at all. Sophie Pouget (2013) has observed that out of hundred economies surveyed, 54% did not have a consolidated law encompassing substantially all aspects of commercial mediation [18, p. 9].

On the other hand, the function attributable to the legislation in the development of mediation should not be underestimated. As Marie-Anne Birken and Kim O'Sullivan (2019) have pointed out a specific mediation law need not be a pre-requisite of development of mediation. On the other hand, EBRD's experience shows that such legislation serves to legitimize the practice in the eyes of business, the judiciary and legal advisers and does have a useful promotional effect [7, p. 215].

Furthermore, mediation legislation can be assessed in light of the regulatory robustness rating

system criteria as proposed by Nadja Alexander (2017). Thus, congruence of domestic and international legal framework, transparency and clarity of content of mediation laws, certain and predictable regulation of insider/outsider confidentiality, with some flexibility and insider/court confidentiality, enforceability of mediated settlement agreements and international mediated settlement agreements, impact of commencement of mediation on litigation limitation periods cannot be evaluated without recourse to the legislative context [4, pp. 6-13].

As to the nature and types of mediation legislation, legal scholars use several methods for distinguishing the various legislative tools used by the regulators. "There is no perfect model law on mediation that could be applicable to any country", as L. Rozdeiczer and A. Alvarez de la Campa (2006), the authors of the IFC's "Alternative Dispute Resolution Manual" note, but there are critical features that should be considered when drafting the mediation legislation [10, p. 38] Moreover, "European handbook for Mediation Lawmaking", prepared by CEPEJ - European Commission for the Efficiency of Justice (2019) encourages the drafters of the national mediation laws to address the following issues in the draft laws: scope, definitions, mediator, invitation of mediation, mediation process, mediation settlement, means to incentivize mediation, information on mediation and transitional provisions [10, pp. 6-7].

Legislative acts in the field of mediation can be classified in many ways. Roby Carrol (2002) provides an illustration of three types of legislation in the field of mediation. These three types include procedural, regulatory and beneficial legislation. According to the author one legislative act can contain all three types, or one or two only. The procedural legislation highlights the institutionalization trend in the field of mediation, while the regulatory and beneficial legislation reflects the codification trend.

As Carrol points out, procedural legislation "specifies mediation as a dispute resolution process", while the regulatory legislation "regulates the practice of mediation by mediators". Lastly, beneficial legislation "supports the mediation process by clarifying the rights, obligations and protections of parties to mediation, mediators, and, to a limited extent, third parties to the mediation." [9, pp. 172-173].

Another distinction, as proposed by Nadja Alexander (2008), can be made in connection with procedural laws and interface laws. The latter category includes the laws "dealing with the interface between the mediation process and other proceedings". In the author's point of view, "legislation better serves the objectives of regulatory provisions dealing with what happens when mediation process interface with the legal system" [2, p. 16),].

Nowadays two core models of mediation regulation are known. Based on the legal sources of mediation, Klaus J. Hopt and Felix Steffek (2013) differentiate between two models of mediation regulation at a macro level: extensive regulation entails detailed regulation of not only mediation process, but also of mediators' profession, and restrained regulation is expressed in less legislative interference in the field of mediation [14, pp. 17-19].

As for the scope of scope of regulatory plan, Nadja Alexander and Felix Steffek (2016) draw a line between general, sector specific and integrated approach [3, p. 23]. Regarding the issue of different legal regimes for national and cross-border mediation, Carlos Esplugues (2015) proposes the division among countries accepting either monistic or dualistic approaches [11, p. 23-24].

Aims

The purpose of this paper is to analyze the general structure, system and the general regulatory principles of new mediation law of Georgia and its accompanying acts. The paper aims to explore the regulatory goals of the legislator in introducing the legislative reform and role that this legislation can play in further development of mediation in Georgia. The author's aim is to investigate the positive aspects brought about by the new legislative framework, as well as the shortcomings of existing legal regime.

Due to the novelty of legislative acts and the breadth of problems associated with the regulation of mediation in general, it would be beyond the scope of this paper to scrutinize every aspect of mediation regulation scheme but this article will contribute to the further research of the regulatory aspects of mediation and further elaboration of legislative tools in Georgia.

Methods

Several methods were used in analyzing the

regulatory framework for mediation in Georgia. The paper discusses the evolution of the legislative provisions on mediation in the national legislation culminating with the adoption of the law "On mediation" and uses doctrinal research and policy analysis of the core concepts and principles behind the legislative reform found in the policy briefs of national and international organizations, as well as in the governmental policy documents and the explanatory notes to the legislative act.

Results and Discussion

As it was already mentioned above, before enactment of the new law, the legislative provisions on mediation in Georgia were very scant and dispersed in various legislative acts. There was a need for a more broad and detailed legislative approach. Despite the existence of legislative toolkits, model laws and best practices in mediation regulation field, success of institutionalization on mediation largely depends on the suitability of proposed legislation to the peculiar needs of each country. Thus, it becomes more important to analyze the major provisions and principles of the Georgian legislative acts in this field which will shed a light on the approaches taken by the Georgian legislator in overcoming those difficulties.

1. Mediation regulation prior the introduction of the law of mediation of Georgia of 2019

The first legislative act that introduced the mediation in Georgia was the 2011 amendments to the Civil Procedure Code of Georgia. Special chapter was added to the Code which only regulated court mediation. Article 1873 provided the list of cases subject to mediation. Cases in the field of family law (with the exception of adoption and restriction or deprivation of parent's rights), as well as the inheritance and disputes among neighbors were subject to mediation irrespective the will or consent of the parties involved. Any other dispute could also have been transferred to court mediation with the consent of the parties to the dispute. Thus, the legal act contained the triggering mechanisms of court mediation but some important procedural, standard-setting, as well as beneficial legislation was absent.

Shortcomings and scarcity of legislative provisions was somehow compensated with the legal act of the High Council of Justice of December 14, 2016 on the "Rule of Administration of Court Mediation Process" which contained several aspects of organization and administration of court mediation.

Pilot project was launched in the capital but the use of mediation was very limited. Thus, the number of cases transferred to court mediation under the pilot project did not exceed 27 per year in 2013-2016. There were 51 court mediation cases in the years 2017 and 2018 each, while in 2019 that number decreased to 31.

Beside the legislative tools, other instruments have also been implemented to facilitate the parties to make use of court mediation. Since 2016, by the decision of the High Council of Justice of March 14, 2016, additional question has been added to the civil claim and response official forms, which requires the parties to state their position on the issue of transferring the case to the court mediation.

Overall, there is a consensus in the Georgian legal literature that the court mediation project did not meet the desired results and that the relevant legislation had significant gaps. Aleksandre Tsuladze (2016) in an article exploring the conceptual vision of court mediation and the recommendations of international experts, shared the point of view that despite the sectoral regulation of court mediation in Georgia in the form of the special chapter in the Civil Procedure Code, non-existence of legislation regulating the mediation in general led to the "incomplete legislative frame" and "reduction of confidence towards the institution amongst the potential users thereof" [25, p. 152]. Even more decisively, Levan Zhorzholiani (2015) asserts that those provision were "very week" and "lying dead awaiting awakening" [28, p. 125].

Another instance of mediation in civil cases is associated with the introduction of legislative amendments to the law of Georgia on Notaries of March 16, 2012. The only article 381 added to the law called "notarial mediation" serves as the legislative basis of this institution in the legal system till today. The said article empowers the notaries to act as the mediator between the disputing parties in family law disputes (with the same exceptions as found in the court mediation), inheritance law and neighbor law disputes. Besides, notaries can act as mediators in any other disputes unless the legislation provides for a special procedure for mediating such disputes. The law stipulates that the notarial

mediation can be carried out only with the consent of the parties to the dispute. Specific feature of notary mediation is the possibility for a notary to draw up a settlement agreement in the form of notary act and in case of non-fulfilment by any party of obligation under this settlement agreement may be enforced without recourse to a court on the basis of the writ of execution issued by a notary. The law gives mandate to the Minister of Justice to regulate the procedure of notarial mediation. By the order of the Minister of Justice of Georgia of August 10, 2013 special chapter XI (articles 99-110) on notarial mediation was added to the "Instructions on Carrying Out Notarial Activities". Article 100 of the instructions defines the notarial mediation a process of resolution of a private law dispute under which process the parties with the assistance of one or more mediator-notaries are trying to conduct negotiations with the aim of reaching agreement. There is a mention of principles of notarial mediation – neutrality and impartiality of mediator-notaries, self-determination of parties, confidentiality. In connection with the confidentiality principle, it is noteworthy that article 102 declares the process of mediation to be confidential. Mediator is prohibited from disclosing information received during the mediation. As for the parties to the notarial mediation, the rules are more flexible. Unless otherwise agreed between the parties, no information or document disclosed in the process of mediation can be used as an evidence at court, arbitral tribunal or any other dispute resolution agency. This rule does not apply if the document or information is used by the party which it disclosed or if the other party to mediation received that document or information from other lawful source.

Article 105 provides general rules for the mediation process. Obviously, notarial mediation legislation leaves open the issues of influence of mediation on limitation periods and its effect on court proceedings in connection with the same dispute.

Ministerial Order obliges the Chamber of Notaries of Georgia to organize the teaching courses in mediation for notaries and to maintain the register of certified mediator-notaries on its web-page. Currently, there are more than 75 certified mediator-notaries and the register is available online.

Until 2016 use of notarial mediation was rare. With the adoption of law of Georgia of June 3, 2016 notarial mediation can also be used in the case of a dispute between the parties during the implementation of the state project of special administration measures in regard to the systematic and sporadic registration of real property.

As regards the mediation in collective labor disputes, relevant provisions can be found in the "Labor Code of Georgia" and governmental resolution #301 dated November 25, 2012 on "Review and resolution of collective disputes with mediation procedure". Those legal acts have been amended in December of 2020 with the effect that some of the provisions within the Code were rearranged and modified.

Collective Dispute between an employer and a group of at least 20 employees or between an employee and an association of employees shall be resolved through the conciliatory procedures that involves direct negotiations, or mediation if one of the parties to the dispute sends an appropriate written notification to the Minister of Internally Displaced Persons from the Occupied Territories, Labour, Health and Social Affairs of Georgia. At any stage of negotiations, a party may apply to the Minister in writing to appoint a mediator to initiate mediation. After receiving such a notification, the Minister shall appoint a dispute mediator. Additionally, in the case of public interest, the minister may appoint a mediator on her own initiative as well.

Collective Disputes Mediation Organization Service of the Ministry shall select a candidate from its own register of mediators who must be then appointed by the Minister.

A dispute mediator shall not be obliged to disclose any information or documents she became aware of as a mediator.

The Labor Code sets administrative sanctions for failure by an employer or an employees' association for failure to participate in conciliation procedures, or for noncompliance with a reached agreement in mediation. The sanctions include a warning, or a fine.

As regards the enforcement of agreements reached as a result of mediation the Labor Code stipulates that a party to the dispute may apply to a court for the enforcement of the agreement. The rules established by the Code of Civil Procedure of Georgia apply to the enforcement proceedings. With the adoption of the law on amendments to the

Code of Civil Procedure of Georgia of September 29, 2020 special chapter XVIV14 has been added to the Code that regulates the enforcement of mediation agreements resulting from collective labor disputes. Application for enforcement shall be lodged to the relevant city (region) court. The court shall decide on the issue of enforcement within 10 days without oral hearing unless the court decides otherwise. The court may refuse enforcement of mediation agreement in collective labor disputes only if the content of such agreement contradicts the Georgian legislation, public order, or because of its content it is impossible to enforce agreement. Decision of the court granting enforcement is final and cannot be appealed, whereas the refusal of enforcement can be challenged through lodging a private complaint to the court.

2. Aims of legislative reform of 2019

It must be noted, that generally success of mediation is not resulting only from the choice of regulatory model. However, existence of coherent regulatory environment plays significant role. Hence, discussions on legislative regulation of mediation preceded the adoption of the new law "On Mediation". Thus, among the Georgian mediation scholars, Irakli Kandashvili (2017), argued for the necessity of creating the framework mediation law which would encompass both the court (judicial) mediation and commercial mediation and establishing a professional regulatory body for future mediators [15, p. 114-122]. On the other hand, Tsertsvadze (2013), drew attention to positive and negative sides of regulation and made several important recommendations for the future reform [24, p. 21-24]. Gurieli (2020) is supportive of the extensive regulation model which would also reflect all the relevant issues from the mediation practice and the mediation theory [12, p. 137].

Kobaladze (2019) suggested that the proposed future mediation model should not be analogy of a legislation of any particular European country but individual and subject to assimilation with Georgian legal practice [16, p. 40].

Aim and the goals of the new legislation are explicitly articulated in the Explanatory Note to the new mediation law. Some of the problems leading the legislator to enactment of the new law were the overload of court system, absence of proper institutional underpinning for mediation, scarcity of legal norms regulating the activities of then existing mediation associations. Enactment of the new law was considered as a means of use of "radical measures" – increase of demand and supply in the field of mediation.

The drafters acknowledged that pilot projects of court-mediation did not meet the expected results because of lower awareness and lack of trust among the legal professionals and the society at large. In addition to several non-regulatory problems hindering the development of mediation in Georgia, the drafters specifically mentioned the areas stemming from the then existing legislative and regulatory framework: non-existence of unified state policy, lack of legislative guarantees defining the superiority of mediation over adjudicative system (including the protection of confidentiality and exclusionary rules of evidence for the information received in the process of mediation), absence of code of ethics of mediators and the standards of certification and continuing education for mediators, as well as functioning system of liability rules and sanctions against the mediators.

Most importantly, the explanatory note makes reference to the obligations of Georgia under the Association Agreement and Association Agenda between the European Union and Georgia 2017-2020. The Association Agenda specifically mentions the necessity to develop alternative dispute resolution mechanisms, including mediation.

Reception of the new mediation law from the legal scholars so far has been positive. Gurieli (2020) considers the enactment of the law as "an attempt of approximation of national institution with the standards aimed to the democratic values" [12, p.130].

Thus, it is interesting to examine the structure, content and nature of the new law of Georgia "On mediation" and amendments it brought about in Georgian legislation.

3. Adoption of Law of Georgia On Mediation of 2019

The new law envisages necessary norms of institutionalization of mediation, firstly notions of mediation and mediators itself, core principles of mediation, main responsibilities of mediator, issues related to conclusion and enforcement of mediation agreement and mediation settlement. The process of mediation itself did not come within regulatory grid. In this part, the Georgian law elicits features characteristic to restrained regulation model.

However, special features are typical to mediators' professional regulation, which includes elements of state regulation (obligation of membership in the unified professional union of mediators, professional and qualification requirements towards mediators) and self-regulation (establishments of mediators' obligatory qualification and professional, as well as behavior standards by the association of mediators of Georgia).

Attempt to regulate by law court mediation, as well as private (voluntary) mediation must be considered as an important novelty. Although, it is obvious that taking into account specifics of court mediation, it is usually subjected to higher level of regulation than private mediation.

4. Structure of the law On mediation

The new law "On mediation" consists of 19 articles, which are arranged into four chapters. In chapter I of the law general provisions are reflected. The first article outlines scope of application of the law. The second article defines important terms (mediation, mediator, mediation agreement, mediation settlement, etc.), while in the third article principles of mediation are enumerated.

Chapter II of the law (mediation process) is the most comprehensive one and considering issues regulated therein, it significantly exceeds the scope of the title. In addition to rules for selecting mediator and circumstances to be considered during selection (in cases of judicial, as well as private mediation), here we find rules, which list circumstances precluding a person from participation in a mediation as a mediator, and in case of former mediator, includes circumstances prohibiting participation of the same person afterwards with other status on the same or related issues. In terms of legislative technique, it could be better to detach obligation of providing information by mediator to parties from article 6 and have it as a separate article.

Article 7 of the law determines the moment of initiation of mediation, as it is crucial to indicate exact moment of its commencement, because of important legal consequences attached to it, first of all, in terms of suspension of period of limitation and application to the court or arbitration on the same issue. In article 7 only the latter issue is regulated, and suspension of period of limitation is governed by article 12. In the same article, the immanent principle of mediation is described – voluntariness, which gives right to the party of mediation to refuse to participate on any stage during mediation process, if not regulated otherwise by the mediation agreement.

In article 8 of the law, rules of general nature regarding mediation process are presented. Legislator does not try to regulate in details methods and means for conducting mediation by the mediator, which is justified, as it is important to give mediators possibility to maximally display their skills in the mediation process.

Article 9 regulates two independent, but inter-related issues and maybe in this case also it would be justified to separate them. The issue envisaged in first and fourth paragraphs relates to determination of the exact moment of completetion of mediation and issuance of document certifying this fact by the mediator, which is also important in terms of period of limitation. In the second and third paragraphs the written form of agreement resulting from mediation and rules for its signing are determined. It would be desirable that issues related to mediation agreement have been regulated with the separate article in the law.

Article 10 of the law enunciates the scope of application of confidentiality principle in mediation, Rule of remuneration of mediator is regulated under article 11, for cases of judicial, as well as private mediation.

The fact that initiation of private mediation suspends the period of limitation, derives from article 12 of the law. According to article 13 the court has an authority to enforce agreement resulting from mediation upon application of either or both parties of the same mediation.

The third chapter of the law is devoted to form of professional organization of mediators. Article 14 establishes legal person of public law – Georgian Association of Mediators, which is self-regulatory body for mediators. In the same article authority of general meeting, highest body of Association of Mediators, and provisions regarding maintenance, publication and accessibility of mediators' register are prescribed. The law delegates regulation of other issues related to membership in the association and activity of association itself to the Statute of The Georgian Association of Mediators.

Authorities and rules for formation of the Executive Council of the Georgian Association of

Mediators, the collegial body of management, are prescribed in article 15 of the law, and issues related to election and term of service of chairperson of association may be found in article 16. Article 17 lists sources of finance of the Georgian Association of Mediators.

At last, the final chapter IV of the law entails transitional and concluding provisions, which were significant in terms of first meetings of the association of mediators only.

The structure and content of the law is consistent with the recommendations in mediation lawmaking as it contains interface, as well as procedural and beneficial laws. Meantime, as already mentioned, special rules apply to court mediation and enforcement of settlement agreements arising from private mediation in the Code of Civil Procedure of Georgia.

5. Scope of Regulation of the Law On Mediation

Remarkable features of the regulation of Georgian model of mediation is the fact that there is a general law "On Mediation", which is a systemized act regulating mediation and is applicable to court mediation, as well as private mediation. Moreover, in particular fields particular regulating norms are applicable.

Therefore, Georgian model of regulating mediation displays features of general and sectoral model according to regulation plan.

It is noteworthy, that Georgian law "On Mediation" does not put any boundary between national and cross-border mediation and such choice in favor of monistic regulation must be considered as justified step.

It must be noted, that for court mediation provisions of the law "On Mediation" are applied considering particularities of special norms inserted into the Civil Procedure Code. The newly added chapter in the Civil Procedure Code (Chapter XXI1 court mediation) includes special rules to be used for court mediation. Special stress must be put on list of cases subject to court mediation, as well as special term defined for court mediation and negative financial outcomes envisaged in case of avoiding participation in the court mediation with non-justifiable reasons.

Court mediation is performed on the basis of court ruling, which is not appealed separately. Family, inheritance, neighborhood, labor disputes (except collective disputes), also disputes related to communal rights, non-property related disputes, disputes deriving from credit-loan agreement of value up to 1000 GEL, property disputes with value up to 2000 GEL may be assigned to court mediation. As for other property related disputes, they may be assigned to court mediation only in case of parties' approval. In more details, procedural and organizational aspects of court mediation are presented in the "Court Mediation Program" approved by the High Council of Justice by the Decision N1/366 from 27 December 2019 of the High Council of Justice "on the approval of the Court Mediation Program". According to article 5 of the mentioned act, in cases subject to mediation the court is entitled to render ruling on transferring case to mediator after presenting claim and response, in the following cases: (a) if considering the nature of the dispute, future relation between parties is unavoidable; (b) one of the parties has expressed consent to apply mediation; (c) dispute is significantly of personal nature; (d) it is obvious, that time and/or reputation in crucial for the party; (e) court expenses may exceed value of the subject of dispute; (f) there is a mediation agreement between parties and litigating party indicates about that; (g) best interest of juvenile requires prompt decision of the issue; (h) mediation is important for the interest of protecting long-term business relations of disputing parties and ensuring legal-economic stability; and (i) other circumstances show the reasonableness of considering dispute through mediation.

Transferring case to the mediator is not limited to making claim at the court and having stage of preparatory hearing. It is admissible to transfer case to the mediator at any other stage of the process, in case of parties' agreement. For giving more information to participants of the process about advantages of mediation, "Court Mediation Program" envisages possibility to conduct information meetings for this purpose, where parties and their representatives will hear explanations about advantages of mediation, roles of mediator and parties. In case of agreement of the parties, information meetings may transform into mediation process, in such case the court must be notified about that, and it will issue ruling on transferring case to mediator.

The law of Georgia "On Mediation" does not directly indicate that mediation is performed

on private disputes and there is no indication similar as in the law on arbitration "property related disputes based on equality of persons, that may be resolved among parties", but law may not be applied for administrative law cases, as it is in some mediation legislation of other countries and nor the administration legislation gives such grounds that law can be applied to disputes of other nature, rather than private.

Special types of mediation existing in Georgian legislation before adoption of the law, such as - notary mediation, mediation for the purpose of resolving collective disputes, mediation envisaged under Juvenile Code and mediation existing in the field of land registration, was left outside the scope of regulation of the law "On Mediation".

The third article, defining principles for conducting mediation, has a significant importance to the scope of regulation of the law, as is gives special status to these principles. Issues evolved in the process of mediation, if they are not directly regulated by the law, must be decided based on the mentioned principles of managing of mediation.

However, it must be stressed that the sectoral mediation legislation, especially in the field of notarial mediation and collective labor dispute mediation, are very limited in the scope and do not provide clear rules on all the aspects of mediation. It would be advisable to expand the application of the new mediation law to those fields of mediation as well. Beside the scarcity of rules in sectoral legislation, there are some inconsistencies as well which will be highlighted in connection with separate provisions of the new law below.

6. Mediation Principles

The law includes set of mediation principles, which not only plays regulatory function in cases directly prescribed by law, but also emerge in various provisions of the law.

Principle of voluntariness is the immanent feature of mediation, and it was desirable to pay attention to this in the definition of mediation and not only mentioning it in the framework of private mediation. The basis for initiation of private mediation is agreement between parties, as for the court mediation, transfer of case to the mediator by the court or other authorized body.

Significance of the principle of voluntariness is underlined by the fact that party to mediation may refuse to participate in it on any stage, if something different is not defined by the mediation agreement.

Principle of self-determination has also basic significance. In private mediation the selection of mediator depends on the agreement between parties, they are free to consider or not to consider professional or personal characteristics of candidate for mediator in the process of selection. Parties are free to agree on rule of managing mediation, which is not defined by the law. Parties to mediation have right to participate in the process personally, or through representative. However, mediator has right to ask direct participation of the party considering circumstances of the case. Parties are entitled to define duration of mediation. With regard to the mediation process and final result of mediation, paragraph 9 of article 8 directly indicates on the principle of making free, impartial and informed decision by the parties. In case of successful completion of mediation process, parties and/or their representatives conclude mediation agreement. One or both parties apply the court for enforcement of mediation agreement.

Significance of the principle of fairness and equality derives directly from the nature of disputes subject to mediation, as well as paragraph 6 of article 8 of the law, which obliges mediator to provide equality of parties in the mediation process.

Validity of principles of impartiality and independence is ensured by the particular provisions of the law "On Mediation", as well as by amendments introduced to various legislative acts. First paragraph of article 5 of the law "On mediation" obliges parties (if parties do not agree on the candidature of mediator, in that case Georgian Association of Mediators) to consider circumstances, that ensure selection of independent and impartial mediator. Paragraph 1 of article 6 imposes on mediator the obligation to provide information to parties, in the framework of which, the mediator is obliged to notify parties to mediation before initiation of mediation and/or after commencement of mediation, on any stage of mediation process, about those circumstances which may put in doubt his/her independence or impartiality. In case of such circumstances, mediator may refuse to lead mediation process, despite the written agreement of parties. Along with the general requirement for impartiality and independence, with the same article of mediation law and by special legislation con-

ditions for excluding participation of mediator are determined and on contrary, excluding conditions of mediator's participation as a person carrying out other procedural, professional or representing authority on same or related cases. In particular, mediator may not be a person, who participated in the discussion of the same dispute or some case essentially related thereto as a judge, juror, prosecutor, investigator, public servant, mediator notary or mediator in the collective labor dispute, representative of party in the court and arbitration, provided audit and/or legal service to any party of mediation. The prohibition prescribed by the law has adverse effect as well and it is prohibited for mediator to participate with any status in the same case or case essentially related thereto.

From this dual prohibition exception is made only for participating as an arbitrator in arbitration, if parties after emerging of mediation issue agree in written form to select arbitrator as a mediator and, vice versa, appoint mediator as an arbitrator in the mediation process by parties' agreement.

The principle of confidentiality is regulated by the law "On Mediation" separately in article 10 of the law. In addition to the law "On Mediation", protection of confidentiality is ensured by the amendments introduced to Civil Procedure and Criminal Procedure Codes.

Practically, confidentiality is applied on mediation process (including after mediation) and on the information, which was disclosed during mediation process and distributed to parties of mediation, as well as other participants of mediation and person receiving confidential information himself/herself. The extent of this obligation, as it was said, is different considering participants of mediation.

The law prescribes that confidentiality obligation is applied on information, which became known during the process of mediation or substantially derives from mediation process, if it is not regulated differently by the written agreement between person giving information and party/parties, or by the law, as well as in case there is no need to disclose information for determining moment of suspension of limitation period. The law "On Mediation" does not specify the form of such information (oral, written, etc.).

In the framework of confidentiality obligation participants of mediation are not allowed to use information during court or arbitration hearings or discussing dispute by any other mean, if the law does not prescribe otherwise.

As for the mediator, he/she is not allowed to disclose information, received from party during individual meeting, to parties of mediation, without clear consent of this party.

Along with the already mentioned terms (agreement concluded between parties and person disclosing information and other terms prescribed by the law), the long list of terms for releasing from confidentiality obligation is presented in the law "On Mediation". Exceptions are directed to protect public and private interests such as, ensuring life, health, freedom and protecting best interests of juveniles, investigating grave crimes, executing court decisions and other legal acts. For the purpose of not endangering principle of confidentiality in condition of numerous exceptions, in future a lot will depend on the provision of the law, which puts cases of information disclosure in the framework of requirement for adequacy of lawful aim and requirement for proportionality, in a way that the confidentiality of information is maximally protected from third persons. Meanwhile, scholars warn about the necessity of evaluation of confidentiality exemption provisions with "maximum caution" [6, p. 201].

Although there is an extensive list of mediation principles in the new mediation law, in the sectoral mediation legislation of notarial activities and in the Labor Code there are references to some, but not all, of the mediation principles.

7. Notion and Types of Mediation

The Georgian law "On Mediation" defines notion of mediation, which is divided into types of judicial and private mediation. Mediation is defined as "process, notwithstanding its title, by virtue of which two or more parties try to resolve dispute by mutual agreement with the help of mediator, whether the process is initiated by parties' initiative or with the basis and rules prescribed by the law."

In the definition of mediation given by the law, there is no indication on structured, voluntary and confidential nature of mediation process. The law considers principle of voluntariness as feature characteristic only to private mediation. As for the confidentiality, this principle is prescribed more comprehensively in separate article of the law and is found in other provisions of the law as well.

It must be considered, that despite the financial stimulation prescribed for court mediation and financial sanctions determined for avoiding mediation without excusable reason, the rule indicated in paragraph 5 of article 7 also applies to court mediation, where the party has right to refuse to participate on any stage of mediation process, if the law or mediation agreement does not provide otherwise, which is manifestation of principle of voluntariness. Even though Civil Procedure Code puts obligation upon party to participate and be present, but this does not mean that dispute necessarily must be ended up with mediation settlement. Therefore, indication on principle of voluntariness would be desirable in private, as well as in court mediation occasions. According to legislative definition, private mediation is conducted by the initiative of parties, based on the agreement between parties of mediation, and court mediation is conducted after presenting claim to the court, in accordance with the rule defined by Civil Procedure legislation in case of giving case to mediator by the court.

8. Participants of mediation process

The law distinguishes from each other parties to mediation and mediation participants. Mediation parties are those natural and legal persons, as well as organizations without any status (for instance civil law partnerships), which have dispute between each other. On the one hand, mediation participants, except parties, are mediators, representatives of parties and third persons. Naturally, the law provides diverse approaches towards each participant of mediation. Some provisions of the law apply to all participants of mediation (for instance confidentiality obligation), however number of provisions may be applied to mediation parties and mediators. Some provisions of the law apply to parties, as well as mediators (for instance, parties and mediator sign the mediation agreement, parties and mediator agree on remuneration of mediator).

There is no determination in the law on what type of legal relation is developed between mediator and parties to mediation. Based on the varied experience among different jurisdictions Carlos Esplugues (2015) mentions the difficulties connected with the specific classification of contractual relationship between the mediator and the mediating parties [3, p. 36].

9. Commencement of mediation

Mediation process affects legal condition of the participants of dispute, hence, it is important that law clearly provides moment of commencement and completion of mediation, when the flow of limitation period is suspended. Time of commencement of mediation is counted differently in cases of judicial and private mediation.

Court mediation is considered to have started from the time when the court transfers case to mediator based on the motion filed by parties. As for the private mediation, in this case, the law "On mediation" considers as a starting point not conclusion of mediation agreement by the parties, but addressing mediator by one or both parties. As it may be important for the party to prove with evidence the moment of commencement of mediation, the law obliges mediator to issue to party a document confirming the commencement of mediation.

10. Agreement on mediation

The law prescribes written form of the agreement on mediation, which is the prerequisite for starting mediation. The rules on civil transactions under the Civil Code apply also to the agreement on mediation.

Certain procedural outcomes follow the conclusion of agreement on mediation. As a general rule, the law "On Mediation" provides that in case of mediation agreement, in which the parties agree not to apply to the court or arbitration until the expiration of a certain time frame or until the occurrence of certain circumstances, the court and arbitration shall not review the dispute until the fulfilment of the conditions of the mediation agreement. However, if the claimant proves that without court or arbitration hearing the claimant will suffer irreparable damage the court or arbitration can still review the dispute. What is meant under irreparable damage the law does not define that and it will be crucial in future to develop judicial practice in right direction.

The respondent participating in the agreement on mediation may appeal such agreement before the expiration of term for presenting answer to the claim.

Remuneration of mediator is subject to agreement between parties to mediation and mediator. The detailed regulation of the remuneration issue is less necessary in case of private mediation. As for the court mediation, here mediators perform their duty without remuneration, or get remuneration from state budget. In more details, on court

mediation cases the issue of remuneration of mediators' activity is regulated by mentioned "Court Mediation Program" and "Rules on remuneration of mediators' activity" approved by the High Council of Justice of Georgia enacted by the Decision N1/367 from 27 December 2019 of the High Council of Justice "on the approval of the Court Mediation Program". Mediator participating in the court mediation process is obliged to conduct mediation without remuneration in two cases in each year. On other cases, activity of mediator is reimbursed on an hourly basis, remuneration of which is received by mediator quarterly.

11. Mediation Process

The law "On Mediation" does not determine restrictions with regard to the term of duration of mediation. However, the imposition of two years suspension term of period of limitation, eventually, has impact on the duration term of mediation. According to the law, the term of mediation is not limited, however the law considers admissible to determine duration of mediation by the agreement between parties. At the same time the law requires that during the mediation process parties shall be provided with sufficient time and possibilities in order to reach the agreement. The court mediation term is limited to 45 days (but not less than 2 meetings) by the Civil Procedure Code. This term may be prolonged with the same duration by parties' agreement.

The approach of legislator is justified in terms of less regulatory interference in the mediation process. The law gives possibility to mediation parties to agree on the rule of managing mediation process, which is not prescribed by the law. In case of absence of the agreement the rule of procedure of mediation is defined by mediator for effective resolution of case, taking into account circumstances of the case and parties' opinion.

Essentially, the wide area for discretion in the mediation process stays with parties and with the mediator.

12. Termination of Mediation

The law "On Mediation" prescribes preconditions for termination of mediation and determines exact moment of its completion. Mediation is considered as terminated: (1) in case of finishing mediation with the agreement – from the day of conclusion of written agreement between parties; (2) in case of terminating mediation with written agreement between parties – from the day of agreement as well; (3) when one party refuses to continue participation in the mediation – from the day of declaring refusal; (4) in case of term defined for mediation – from the day of its expiration; (5) in case mediator after the consultations with parties considers that continuation of mediation will be unreasonable or unjustified – from the day of such statement.

Mediator is obliged by the law to issue document confirming the termination of mediation. Importance of such document emerges in case, when mediation does not terminate with settlement.

13. Concluding Mediation Settlement and Its Enforcement

Reaching mediation settlement depends on mediation parties. Even though mediator facilitates parties to receive informed and independent decision, and in case of parties' consent he/she also can suggest settlement terms as well, taking into account their interests and positions expressed in the mediation process, but the law simply indicates that mediator has right to make decision, with regard to the dispute between parties, individually. Mediation agreement is composed in written form by parties and their representatives. Mediator has right to assist parties in composition of mediation agreement. Mediation agreement is signed by parties and mediator. In case of court mediation, the mediation settlement act is presented to judge for approval.

Enforcement of mediation settlement is ensured by the law "On Mediation", as well as Civil Procedure Code of Georgia and law of Georgia on Enforcement Proceedings. Implementation of mediation settlement is done by the court, but in case when its prescribed by parties' agreement.

Party to mediation has right to apply to the court. For ensuring implementation of mediation settlement, party to mediation is entitled (before mediation, as well as in the process) to apply to the court with the request to secure the mediation settlement, and in this case provision for securing claim are used, taking into account specifics of mediation agreement.

In case of private mediation, the court discussing the issue of enforcement of mediation agreement would be district (city) court in accordance with the location of claimant, and in case of court mediation – the court, which transferred dis-

pute to mediator. The issue of enforcement is deliberated within 10 days after receipt of application without oral hearing, unless court decides to conduct oral hearing, and in such occasion the issue is discussed within 30 days. The court provides writ of enforcement along with the court ruling. The court ruling on enforcement of mediation settlement is final and cannot be appealed. Comparing to this, court's rejection to execute mediation settlement may be appealed by private complaint.

Civil Procedure Code recognizes two general grounds for rejecting enforcement of mediation settlement: (1) contradiction of mediation settlement with the legislation of Georgia, and (2) deriving from the essence of mediation settlement, impossibility of its enforcement.

Requirement prescribed for transactions under the Civil Code of Georgia do not apply to the mediation settlement. Moreover, deriving from general nature of preconditions prescribed by the law, it is interesting for the future, what are perspectives of developing consistent approach by common courts towards grounds for rejecting enforcement of mediation settlement.

As already mentioned, the legislative reform left the notarial mediation legislation intact. As a result, there are different rules in connection with the enforcement of mediation agreements under the private mediation rules of 2019 law and the notarial mediation agreements. Notarial mediation agreements are concluded in the form of a notarial deed and parties can dispose of applying to court for its enforcement and directly enforce such an agreement on the basis of writ of execution issued by an of Mediators

The high density of regulation of mediator's profession is specific characteristic of Georgian model of mediation. In comparison to other legislative norms necessary to institutionalization of mediation, there is no precise answer to the issue of reasonableness and the scope of professional regulation of mediators and the methods chosen for it. Although proper qualification of mediators is important for valuable development of mediation, but part of countries avoids regulation of this issue through legislative act. Obligation to enter into membership of professional union prescribed by the legislative act is even more rare, especially when it is obligatory for mediators to have membership in only one professional union. Exactly these features distinguish Georgian model of mediation from other models.

According to the new law "On Mediation", mediator is a natural person registered in unified register of mediators, who suits other requirements prescribed by the same law and agrees to manage mediation. In the unified register of mediators, a capable natural person, not having criminal conviction record, who has completed mediation/ mediator's training and holds certificate issued by mediators. Mediators registered in the mediators' register at the same time are members of Georgia Association of Mediators. Georgian Association of Mediators, as a legal person of public law, performs self-regulation of mediators. It is noteworthy, that the law does not directly mentions mediators' citizenship, comparing to the law "on Lawyers", which imposes restriction on citizenship for lawyers.

As far as according to the law, mediator may be only a member of the Association of mediators and, therefore, in case parties select a person who is not member of Georgian Association of Mediators as mediator, provisions of the law will not apply to such mediation – including with regard to the enforcement of mediation settlement. For legislations of some other countries it is also possible to introduce different regulations for mediation performed with participation of "certified mediators", where mediation settlement composed with participation of "non-certified mediators" lacks guarantees for enforcement. However, in many other countries professional qualification of mediator depends on mediators themselves. While having analogous requirements for arbitrators in the Georgian legislation, it is interesting that the law sets higher requirements for mediators participating in the less formalized process, comparing to arbitration proceeding.

As for the obligatory membership of mediators in the Georgian Association of Mediators, which is the only self-regulating organization, Georgian legislator probably relied on analogous models of professions' regulation. For instance, similar professional organization form exists with regard to advocates and notaries.

It is also noteworthy that similar models of mediators' organization have been introduced in several other countries of Eastern and South-Eastern Europe as well. Study of the mentioned model of professional organization for mediators with

mandatory memmbership, in relation to the case-law of the Constitutional Court of Georgia and European Court of Human Rights, exceeds the scope of current overview. However, it is obvious that there is a significant difference between professional activities of lawyers, notaries and mediators.

Georgian Association of Mediators produces unified register of mediators, approves ethical standards of mediators and rules of procedure for disciplinary legal proceeding towards mediators, and imposes disciplinary liability towards mediators. Core principles and directions of activity of Georgian Association of Mediators, and other issues related to its activity are determined by the statute of Association.

In December of 2019 the first meeting of mediators was conducted and bodies of Association of Mediators were elected.

As it follows from the provisions of the law "On Mediation", mediation ethics and disciplinary proceedings for violation of ethical standards is based on self-regulation. Adoption of the Code of Ethics is scheduled for the next general meeting of mediators in 2021.

Association of Mediators of Georgia has adopted a "Strategic Development Plan for 2020-2025" that envisages five main priorities of development and indicators thereof. The first priority concerns the functioning the high-professional standards in mediation and increase of number of mediators. Sharing the professional knowledge and skills has been set as another priority. Third priority aims to support the full implementation of court mediation and increase of court mediation cases. Development of mediation environment and interdisciplinary harmonization has also been identified as one of the priorities. It sets the aim to form a coordinated policy for different mediation forms (notary mediation, collective labor dispute mediation). Finally, the association sets an aim to ensure its financial stability and organizational efficiency.

Leaving the notarial mediation and collective labor dispute mediation out of scope of the new law has consequence in terms of professional regulation of mediators too. Besides the Association of Mediators of Georgia and its member mediators, notary mediators are united in the Chamber of Notaries of Georgia. Another register of mediators is maintained for collective labor dispute mediators. Thus, unity of professional standards for all mediators is questionable.

Conclusion

Adoption of the new law "On Mediation" is a result of work during several years and its adoption is definitely a step forward in fostering the further development of mediation in Georgia.

New legislation provides the legal guidance for mediators and disputants, sets the fundamental principles of mediation, sets triggering mechanisms for commencement of private, as well as the court mediation cases and interaction of mediation process with traditional dispute resolution mechanisms.

At the same time, we have identified several shortcomings of the legislation. First of all, despite the enactment of a special law "On Mediation", the new law does not apply to other models of civil mediation, namely, the notarial mediation and collective labor dispute mediation that existed before the new general law came into force. Sectoral legislation in those fields covers only small part of the list of issues which are crucial for the functioning of well-developed mediation in collective labor disputes and notarial activities. There are three different registers of mediators individually maintained by the Association of Mediators of Georgia, Chamber of Notaries of Georgia and the Collective Disputes Mediation Organization Service. It can be said that the adoption of the new law did not bring about the desired coherence and unity of mediation system.

Most importantly, public awareness of mediation is still low even after legislative reform. One of the priorities of the Association of Mediators of Georgia is to raise the public awareness within society without which the new legislative framework will be ineffective.

In contrast to the positive attitude towards and promising expectations of mediation within the legal professionals, as the research commissioned by UNDP and EU (2019, 2020) confirmed large part of the Georgian population and businesses entities are unaware of the mediation. 2019 population survey on ADR in Georgia and 2020 business survey on ADR in Georgia shows that 80% of Georgian citizens and businesses never heard of mediation [26; 27]. But that situation can be changed in a positive way, as the same studies reveal that 56% of mediation users assess them positively and after receiving more information on mediation, more than

half of both companies and citizens opined that they would rather choose mediation than apply to a court for adjudication if disputes arise.

Amendments have not brought any significant increase in court-mediation cases. On the contrary, there were only 8 court mediation cases in 2020. That means that public awareness of the benefits of mediation is as much important as the well-developed legislation.

In general, the legislation covers all the essential areas and incorporates important rules which are paramount for successful functioning of mediation.

Although, it is impossible to reach successful implementation of mediation and justification of high expectation towards it only by the adoption of the law, but the new Georgian law creates good precondition for further development of Georgian model of mediation.

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MEDIATS Mediation: Training and Society Transformation

WHY BUSINESSES IN COUNTRIES OF EASTERN PARTNERSHIP NEED MEDIATION (BRIEF THEORETICAL DISCUSSION)

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Abstract. *Businesses are eager to use the dispute resolution mechanisms which are fast and require less costs. At the same time, these mechanisms should be neutral, free from corruption and must not have negative influence on business processes. Mediation is considered as one of the popular methods for solving the conflicts in business sphere. It is distinguished not only from courts but also from other methods of alternative dispute resolution. Gradually, mediation becomes popular in Eastern Europe and in post-socialist world as well. The court systems which are overwhelmed by disputes can benefit from mediators who can relieve the judges from the immense number of cases. Moreover, popularizing the mediation can be profitable for businesses too. Article gives the basic analysis of positive aspects of mediation and underlines its superiority in comparison to traditional courts and other methods of alternative dispute resolution.*

Keywords: *Mediation, Businesses, EaP.*

JEL Classification: *K200, J520, M200*

Formulas: 0 fig.: 0 tabl.: 0; bibl.: 10.

Introduction

Mediation is considered as efficient alternative dispute resolution (ADR) mechanism which has potential to solve the conflict among parties with using less time, money and other resources than traditional methods of case solution. The efficiency of the ADRs is especially vivid in commercial cases when the parties want to solve the dispute as soon as possible because the conflict adversely affects the development of business, reduces the potential gains, increases the expenses and negatively influences the business processes.

Unfortunately, in the Eastern Europe, in the former member countries of Soviet Union, mediation is not well-developed institute and the businesses do not have the opportunity to fully use the potential of mediation as a tool for alternative dispute resolution.

In the developed countries, the mediation has long standing tradition as the efficient mechanism capable for dealing the interests of the parties and presenting them the best solutions. Almost in all countries, courts, as government bodies, lack flexibility regarding costs and length of procedures. Therefore, governments and civil society organizations advocate for using the measures for alternative dispute resolution, including mediation. Despite the challenges, mediation is widely considered as one of the best methods for managing the disputes among parties.

The situation is different in the Eastern Europe, especially in the countries which were previously members of the Soviet Union. Soviet totalitarian regime, closed and corrupt governance didn't give much options for free and apolitical dispute resolution process. Therefore, the court system was lacking trust and integrity. The situation regarding the courts is remaining largely unchanged. Though there are reforms implemented in the court system, it still has problems in integrity, qualification, and trust. The court procedures are scattered in time, and disorganized. This has also negative effects on the economic development. Therefore, there is a necessity for developing the effective alternative dispute resolution tool.

The article aims to give the readers the brief analysis of the positive aspects of mediation, and formulate the theoretical ground justifying its usage.

Literature Review

According to E. Sussman (2009) Mediation is a process in which the Mediator tries to bring parties together with using different methods [1, p. 56]. The methods of solving disputes among parties is associated with costs. The administrative procedures envisaged in the courts proceedings generally require more expenses than during the mediation.

Though it has been mentioned above that the mediation is relatively less developed in Eastern Europe, there are studies which demonstrate that evolution of Mediation is generally weak process in throughout the world too. In Policy Research S. Pouget (2013) has mentioned that more than half

of the countries surveyed out of 100 didn't have a consolidated law composing of all aspects of commercial mediation but at the same time, 64% of surveyed economies had laws that provide for court referral of cases to mediation [2, p. 9].

At the same time, costs and procedures of mediation is different not only from court proceedings but also from other alternative dispute resolution mechanisms as well, such as arbitration. Studies claim superiority of commercial mediation to commercial arbitration in terms of costs and procedures. S.I. Strong (2016) highlights that commercial arbitration is going through existential challenges, such as – cost of the arbitration which can be really huge, and the time for completing the procedures which, especially cross border disputes, require one to two years [3, p. 6]. There are also doubts about efficacy of the arbitration process [P. Lucarelli (2012), 4, p. 2]. With this, the costs and procedures of the courts is more similar to those of arbitration, therefore, mediation is different both from the courts and from the arbitration as well. E. Sussman (2009) states that "the opportunities and advantages afforded to the parties in a mediation have been proven time and again in the resolution of commercial private disputes" [1, p. 56].

Moreover, unlike courts, ADRs can offer "win-win" solutions where the parties can preserve their relationship [C. A. Carr and M. R. Jencks (1999-2000), 5, p. 209].

Most importantly the papers indicate that:

(a) With using mediation parties can get speedier resolution with reduced cost (E. Sussman (2009), 1);

(b) Mediation enables the business parties to preserve the steady relationship (C. A. Carr and M. R. Jencks (1999-2000), 5);

(c) Parties keep confidential information, and remain creative throughout the process [T. Stipanowich (2004), 6, p. 10];

(d) Commercial mediation is a dynamic, structured and interactive process where the neutral party is using negotiating techniques to resolve the problems, with this significantly reducing the burden on courts [EBRD, 7];

(e) Almost all economies, most importantly the developing countries, recognize voluntary mediation as a valid method of resolving the contractual disputes [World Bank, 8].

Despite the fact that there are number of articles and researches in this sphere, more should be done to precisely analyze the reasons of the problems of commercial mediation in EaP countries, particularly, why the mediation is not yet formed as the alternative to traditional dispute resolution, and whether the mediation is considered as sufficient legal mechanism for the businesses to apply to it when the disputes occur.

Aims

The purpose of this paper is to analyze the features of mediation for countries of EaP. It is impossible to discuss all issues in this paper, and article doesn't aim to give the detailed analysis of the challenges of mediation in the countries of EaP but this article will support the enhancement of the theoretical ground for further researches that should answer the questions about problems on commercial mediation and the execution of the measures for their solution.

Methods

To study the aspects of commercial mediation and support its promotion in EaP, we used various methods. First of all, the article is actively using the historical research method and compares the perspectives of different countries and viewpoints.

Furthermore, the paper uses doctrinal research with analyzing legal concepts, and principles.

At the same time, we used the method of policy analysis with analyzing the documents of international organizations and policy briefs.

Results and Discussion

As it was mentioned above, socialist regimes affected the development and freedom of courts. This resulted in creation of the quasi-judicial institutes which needed reforms to improve their functioning.

What were the main problems in judicial system after the collapse of the Socialist Bloc:

- Lack of neutrality: in Soviet Union, and in socialist countries of the Eastern Europe, the judicial system was politicized, therefore, it was under heavy influence of central government. This absence of impartially remains till nowadays and affects the development of the court system. It is widely assumed that the court systems in EaP are comprised of members of specific, and closely connected, groups of individuals, which control the judicial system and are dealing with the government.

- Corruption: judicial systems in Post-Soviet world are one of the most corrupt institutions. Though number of reforms were held in countries of EaP aiming to reduce the area for corruption, the effects of these reforms are weak.

- Lack of professionalism: this particular problem is still considered as one of the core problems despite the huge efforts both from the side of the state and from civil organizations to bolster the competence among representatives of the court sphere.

These problems cause the following material adverse effects:

- Lack of trust: from the purposes of our paper we can say that the trust from the investors side is important because it enhances the economic development of the country, and attracts further investments. Parties know that if they can trust the impartiality and neutrality of the court system, it will positively affect their will to invest money.

- Violation of administrative procedures which are envisaged to deal with the court cases. Judges are violating the reasonable time-schedule given for discussing of the certain cases, and are discussing them with violation of the established procedures;

- Absurd amount of resources allocated for hearing. These resources include time till the final decision will be announced, finances spend for the preparation of the case and payment of the court fees.

Going to the court is becoming not a business wise choice.

Therefore, using of the alternative dispute resolution mechanisms is strongly recommended. From the discussion above, the mediation should consider the following challenges:

- Allocation of resources – the time and money spend on the mediation should be less compared to the resources we are using during the court hearings.

- Impartiality – the mediators should be neutral and trustworthy individuals who can deal with both parties, and neither of the parties should have the feeling that they are cheated or misled.

- Professionalism – there is no obligation for the mediators to be representatives of the legal sphere. But as they are representatives of the private sphere, their low competence would be more vivid, and the attitude from the parties towards the mediation will be lowered.

Is the mediation the institute which can overcome the challenges of the court system, and present itself as the prominent alternative dispute resolution body?

Positive aspects of mediation:

Mediation can become the important tool for solving the disputes. There are several positive aspects of mediation which can be helpful for conflicting parties, such as:

- Parties can control the outcome of mediation with the help of neutral mediator [J. Kerwin (2020), 9];

- After spending several hours in the process of Mediation, Mediators can help parties to discover their weak and strong points or understand the situation from the point of view of other party;

- Direct communication with the parties is conducted on neutral ground;

- Ways of reimbursement are much broader than in court systems;

- Privacy of the proceedings in ensured;

- Mediation has the possibility to save time and money [J.R. Allison (1990),10];

- The chances for negotiations, and resulting in mutually beneficial agreement are higher than in courts.

How the mediation should position itself in post-socialist world:

- Parties are in charge of the case, they are the ones to make the decision, and not the judges;

- Court system is more competitive and increases chances of corruption;

- Privacy is ensured which is the rare thing in Post-soviet world;

- Having the chances in negotiations is important because it enables the parties to have the relationship in the future as well;

- Mediation reduces the costs and speeds up the process.

Conclusion

Based on the discussion and results of the article, it can be concluded that having only single solution mechanism represented by courts is a bearer of significant risks which can have negative outcomes for the parties as they will be obliged to provide more resources in terms of court and lawyers' fees and wait for several years till the final decision while awaiting for the unfavorable decision. The mediation, on the contrary, gives speedy alter-

native to the parties, and they can allocate affordable resources to the proceedings. At the same time, the results of the mediation can be profitable for all of the disputing parties. Mediation needs promotion in countries of EaP. Businesses can make the profitable use of the alternative dispute resolution mechanism. The article aims to underline the importance of mediations and its positive characters. Studies and papers should popularize the positive aspects of mediation, analyze its challenges and suggest its application to practical problems which are so frequent among businesses in the countries of EaP.

Acknowledgements.

These studies will be relevant for businesses, professionals, students and society at large. The article aims to popularize mediation and present it as alternative and effective dispute resolution method. Implementation of mediation will have long-term positive perspectives on commercial entities.

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MEDIATS Mediation: Training and Society Transformation

ONLINE MEDIATION – TOOL FOR DISPUTE RESOLUTION DURING LOCKDOWN

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Abstract. *Article reviews the development process and stages of online mediation. Online Dispute Resolution and online mediation became even more important tool due to pandemic situation in whole world, than ever before. Therefore, article aims to discuss advantages and risks for online mediation. Article provides main characteristics of traditional mediation and their link with online mediation tools.*

Keywords: *Mediation, Online, COVID, lockdown, Technology, Innovation, Legal Procedure, Litigation*

JEL Classification: *K40, K41, O33*

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Introduction

On March, 2020, World Health Organization announced COVID-19 as a pandemic [1]. As a result, many countries decided to take restrictive measures and most of them, used lockdowns, as a major step for preventing further expansion of virus. Most of the countries closed international boarders and internal movement within the country [2].

Amongst other directions (For example, education was one of the biggest sector effected by lockdown. Over 1.2 billion children were out of the class-rooms) [3], virus effected litigation procedures. For example, in USA, "the Federal Courts have taken a variety of approaches to mitigating the risks of COVID-19. At the trial court level, for example, the U.S. District court for the Southern District of New York announced on March 13, 2020, that it would postpone new civil and criminal jury trials" [4, p.1]. In Georgia, court hearings were organized online, courts increased electronic document submission process and staff started to work distantly [5].

Even before COVID-19 era, it was acknowledged, that "technology is a powerful tool changing the world on a daily basis" [6, p.33]. During lockdown, the role of online meetings have drastically increased, Online meeting platforms became extremely popular throughout the world, e.g. zoom, webex, Microsoft Teams, Google Meet. Facebook announced messenger rooms for up to 50 people usage. [7].

In this process, mediation services had to adapt the modern reality and plan the activities accordingly.

The purpose of this article is to analyze the possibilities for increasing role of online mediation as the tool for dispute resolution during lockdown. Besides, it will be assessed the problems arising out of online mediation and the possible relevant outcomes to use this period as a lessons learned.

Literature review

This article uses articles and researches of various scientists. The articles are published in reputable law journals. The authors discuss development of online mediation.

Article from Victor Terekhov, "Online Mediation: A Game Changer or Much Ado About Nothing?" focuses on the phenomenon of Online Mediation. The article aims at clarifying the notion of "online mediation", showing some of the most obvious benefits and drawbacks of this dispute resolution method. [6, p.33].

Article from Sarah Rudolph Cole and Kristen M. Blankley, "Online Mediation: where we have been, where we are now, and where we should be", proposes to explore questions about cost of online mediation, also, whether online mediation substitutes physical meetings, to what extend online mediation works, and what challenges are essential for dispute resolution process. [8, p. 193-194].

Article from Yuxian Zhao, "Rethinking the limitations of online mediation", maintains that online mediation, by its unique features, may result in at least the same level of the efficiency with conventional offline mediation. Specifically, the text-based and asynchronous natures of online mediation, together with its easy access to technology, help mediation participants better process information, handle emotions, manage processes, and generate settlement options [9].

More recent article is reviewed from J. Lampe, who is researching specific issues related to COVID-19. Therefore, this article is important as being the one reviewing actual problems caused by pandemic situation in the courts [4].

Aim

Aim of the Article is to analyze past evolution of online mediation. Using online tools for mediation became more actual during lockdown measures, as a result of fast spread of COVID-19 in whole world. Therefore, such analysis will help to assess possibilities for development of online mediation in future.

Methods

In order to analyze the importance of online mediation and possibilities for its further development, comparative method has been used between traditional and online mediation. It is used scientific researches on mediation, which review history and development of mediation, including, online mediation. Besides, it was analyzed modern challenges and situation around world, caused by COVID-19. Systemic method was also used to analyze connection between traditional and online mediations.

Results

Online Mediation can be defined as the procedure, where "the IT tools present the driving force of the whole process and cannot be dispensed with" [6, p.38].

Online Mediation started to be offered in the late 1990s, though it ceased to be an interesting topic in the beginning of 2000s. Though, after that, it started to increase for three main reasons: 1) improved web-technologies; 2) extreme workload of the courts; 3) relocation of most businesses to the web [6, p. 38-39].

In general, "Online Dispute Resolution most commonly resolves e-Commerce or other internet-related disputes" [8, p. 196]. Here, it is even logical and reasonable to use internet, as a tool for efficient dispute resolution tool. Therefore, many businesses involved in e-Commerce use Online Mediation as a mechanism for dispute resolution [6, p.39]. "Moreover, a great number of consumer cases concern relatively small matters ($5 $100 in average). While being sensitive to consumers, these disputes are, beyond all doubt, unprepared to offline consideration, as the sole preliminary steps to be taken would consume much of the potential award. [6, p.42]"

Though, e-Commerce is not the only area where Online Mediation could be efficient mechanism for Dispute Resolution. It started to replace other off-line based disputes [8, p. 196]. "In yet other situations a physical meeting might be possible though highly undesirable as is the case with various kinds of matrimonial and family disputes, especially those involving interpersonal violence or abuse. Here joint mediation is not the wisest solution." [6, p. 42]

In general, Mediation is based on the following principles:

1) It involves three parties – two parties, who have dispute and the third, neutral part – the Mediator;

2) Non-adjudicatory role of the Mediator – mediator has no power to make decision, he/she is facilitating the process;

3) Flexible and Informal nature of the procedure;

4) Private Origins – it is mainly used for private law relate disputes. Even though, this trend is becoming less and less relevant for the meditation, due to increased number of mediations in public sector, still, the driving sector is private sector for the mediation;

5) Voluntary participation;

6) Mostly face-to-face interaction. [6, p.36]

The goals of mediation have been considered to include the followings:

· Encourage the exchange of information,

· Provide new information,

· Help the parties to understand each other's views,

· Let them know that their concerns are understood,

· Promote a productive level of emotional expression,

· Deal with differences in perceptions and interests between negotiators and constituents (including lawyer and client),

· Help negotiators realistically assess alternatives to settlement,

· Encourage flexibility,

· Shift the focus from the past to the future,

· Stimulate the parties to suggest creative settlements,

· Learn (often in separate sessions with each

party) about those interests the parties are reluctant to disclose to each other, and

· Invent solutions that meet the fundamental interests of all parties. [9, p.168-169]

Of course, the list mentioned above, is not restrictive and is more indicative, but, this could be used as a good comparator between the traditional and online mediation.

Discussion

There has been always many discussions about efficiency of mediation in general. It could be noted, that these discussions has been even increased since development of online mediation.

Therefore, discussions regarding mediation could be divided by two parts: (i) discussion on mediation in general; (ii) discussion on specifically online mediation.

Though, spread of COVID-19 through world and increase of lockdown measures in most countries, force-majeure circumstances and number of disputes, has increased the role of alternative dispute resolution. Moreover, it has increased the importance of online mediation. In most cases, online dispute resolution has even applied in courts and thus, it is obvious, that the applicability of online mediation has been also increased.

As a result of such development, the discussions should be developed within interested groups on how to ensure better efficiency of online mediation in future.

Conclusion

If we compare above-mentioned principles and goals of the traditional mediation, it could be concluded, that Online Mediation is a mechanism, which has almost all the characteristics to achieve the same goals.

Even though, it doesn't use face-to-face meetings, it could be easily replaced by the meetings by using internet tools.

During the evolution of Online Mediation, it would be hard to predict, that it could have been such relevant to develop Online Mediation tools. Actually, during lockdown, parties who had disputes, had limited choice of Dispute Resolution mechanisms and maybe, it was the very moment for Online Mediation. Parties had limited access on transportation due to lockdown, therefore, they had to use online tools and online

As the world is expecting the further peaks or waves for COVID-19 [10], mediators, relevant associations, judiciary system has to be prepared for next stage. Mediators could promote online mediation as an efficient, fast, less costly and future based tool. It is worth to mention, that internet tools are also adapted more for online sessions, caucuses (It is possible to create separate "room" during the group meeting through various platforms), etc. Therefore, there are less and less reasons to avoid online mediation.

Even more, development of online meditation is must to happen now!

Acknowledgements.

This article will be useful for the professionals interested in mediation. Also, students of the universities will get more information and knowledge on mediation. In addition, as the mediation is new institution in Georgia, article will be important document for increasing awareness on mediation and it should be interesting for wide range of public. Article will be starting point for further discussions on development of online tools for mediation.

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MEDIATS Mediation: Training and Society Transformation

MEDIATION AS A VALUE AND CHANCE FOR UKRAINE

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Abstract. *In the article mediation as a qualitatively isolated self-sufficient value (culture) of a developed civil society is investigated from the standpoint of anthroposociocultural approach. It is substantiated that the quintessence of mediation is the preservation and protection of human dignity in resolving conflicts by their participants with the assistance of professional mediators, as well as revealed the basic principles of mediation – human-centrism, denial of violent orders in society and paternalism. It is proved that mediation has a complex nature – it is dialogical, it exists as both a public good and a social service, it is a form of freedom, justice and social partnership, and the attributes of mediation are the trust of the conflicting parties to each other and social optimism. It is substantiated conclusions that: a) the assertion of mediation as a value (culture of mediation) in society is a real Copernican revolution in public views on methods of conflict resolution and one of the most important manifestations of the subjectivity of the individual; b) mediation belongs to paradigmatically opposite values in comparison with the values of state judiciary; c) mediation embodies the postmodern way of being and thinking, and therefore can be adequately perceived through the corresponding categorical-conceptual apparatus of non-classical standards of science, from the worldview and methodological approaches of postmodernism.*

Keywords: *mediation; judiciary; value; value matrix of mediation; value matrix of judiciary; anthroposociocultural code of mediation; sociocultural code of judiciary.*

JEL Classification: *D74; D79; K10; K19; K30; K40; F51; J52.*

Formulas: 0; fig.: 0; tabl.: 0; bibl.: 41.

Introduction

One of the most fundamental consequences of qualitative transformations in Ukraine in the post-Soviet era of its development were: overcoming the administrative-command system, inherited from the past, as the core of social development; emergence and strengthening of civil society; paradigmatic change of the purpose of social progress and means of its achievement. The quintessence of these changes is most adequately and capaciously captured in Article 3 of the Constitution of Ukraine: «An individual, his/her life and health, honor and dignity, inviolability and security are recognized in Ukraine as the highest social value.

Human rights and freedoms and their guarantees determine the essence and the direction of the activity of the State. The state is responsible to the person for its activity. The establishment and maintaining of human rights and freedoms is the main duty of the State» [1, art.3].

All of the above, taken together, symbolizes the emergence in Ukraine of a new type of sociality – on the forefront of history instead of the faceless masses, embodied by the state, came individuals as its creators, who seek self-realization. Human-centrism has become not only the goal, but also the principle of social life. This sharply complicated it, multiplied in a geometric progression the traditional ones and gave rise to new contradictions and conflicts, which are growing like an avalanche. The latter is a normal phenomenon, because there are attributively contradictory by their nature both human himself [2] and the existential structure of the human world [3].

The emergence of new types of sociality, a new type of society as a whole, as historical experience shows, inevitably requires adequate changes in the fundamental principles of people's life pattern. They include among other the way of resolving conflicts and disputes. Paradigmatically in Ukraine it remained the previous one. Thus, according to Article 124 of the Constitution of Ukraine «justice in Ukraine is administered exclusively by the courts». Moreover «the jurisdiction of the courts extends to any legal dispute» [1]. In democratic societies around the world this model has long been supplemented by a number of other, including alternative, models of conflict resolution.

In Ukraine at the turn of the XX century – the beginning of the XXI century in the field of judiciary there was a situation similar to the situation in the USA in the 60's – 70's of the XX century,

when it ceased to satisfy both the nation-state due to its inability to cope successfully and with acceptable time and material costs with the growing avalanche of conflicts, and the relevant civil society due to its incapacity to establish and maintain a peaceful social environment. After all, resolving a legal dispute (judging the parties to the conflict) in accordance with its inherent matrix of justice, the judiciary ultimately divides them into winners and losers in the relevant conflict. As a result, the confrontation of the various subjects of social relations between them is only preserved and intensified over time.

The United States found a way out of this situation in the creation during the last quarter of the XX century an effective system of mediation as an alternative to judicial proceedings way of resolving conflicts by their participants directly with the assistance of professional mediators and consistently implemented it in everyday practice [4;5;6;7;8;9;10].

For the time being, Ukraine seeks to solve the above-mentioned problem in a paradigmatically different way – by reforming and improving the judiciary. However, the latter has not changed cardinally for two decades and continues to be primarily in a value-based conflict with the new Ukrainian society. Persistent attempts to integrate the institution of mediation into the national legal system as part of the judiciary since 2005 have not helped. So where should we look for the reasons for the latter – in the wrongly chosen strategy of applying new ways of resolving conflicts, that are qualitatively different from their previous state, or in the shortcomings of implementing the chosen strategy of resolving conflicts in society?

Literature Review

One of the methodological keys to the scientific explanation of the above dilemma can be found in comparing the value matrices of judiciary and mediation. In foreign philosophical and scientific literature this problem has long been the subject of research by representatives of various cognitive traditions. In particular, the following works of European scholars are devoted to the philosophical and ideological principles of judiciary [11;12;13;14;15]. What they all have in common is the direct paradigmatic dependence of their concepts from the constitutional constructions of justice as an institution. At the same time, a slightly smaller part of the constitutions of European countries continues to straightforwardly and directly refer the court to one of the branches of state power. This is directly stated, in particular, in the Constitution of the Republic of Ireland, the Constitution of Spain, the Constitution of the Republic of Lithuania, the Constitution of the Principality of Liechtenstein and in the constitutions of a number of other European states. Naturally, their scholars more insistent and open advocate the assignment of the court to one of the branches of state power with all the consequences that follow.

Nevertheless, most European researchers of the court and judiciary, following the paradigm of constitutions of their own states, which attempt to avoid direct assigning the court to one of the branches of the state power, support the same paradigm of interpretation for the institution of court and judiciary. The position of this group of authors was strongly influenced by the direct linking of branches of state power, as well as the state as a whole, with human rights, which became the dominant trend in European constitutionalism since the mid-twentieth century. Nevertheless, these authors do not cease to understand and interpret the judiciary de facto as the institution of state power, which is not deprived of any of the properties for hierarchically (in a publicly authoritative manner) constructed phenomena. Among this cohort, first of all, it is necessary to name such scholars as Karen Alter, Anthony Arnull, Matey Dogan, Francis Jacobs, Ulrich Everling, Piet Eeckhout, Mauro Cappelletti, Paul Craig, Adam Lazowski, Koen Lenaerts, Nanette Neuwahl, Hjalte Rasmussen, Anne-Marie Slaughter, Alec Stone-Sweet, Takis Tridimas, Christopher Harding, Martin Shapiro, Jo Shaw etc.

The public authoritative principle of construction and functioning has been preserved in the European Court of Justice. Its main purpose, similarly to the national courts, as noted by European researchers on this issue, was to determine the winner and loser in a conflict or legal dispute [16]. This directly contradicts the fundamental principles of mediation.

Mediation as a value is also studied in many works of European scientists [17;18;19;20;21;22;23;24]. Apart from the fact that they are united by the phenomenon of mediation, they are very different in terms of worldview, meth-

odological tools used by them, in terms of specific goals and achieved results. In this sea of mediation explorations there are quite common diametrically opposed views on mediation as a value. For example, the classic of modern English family mediation Lisa Parkinson in her preface to the Russian translation of the second edition of «Family Mediation» explicitly states that «family mediation is a part of family justice that is constantly evolving» [25,p.3]. However, such value-based assessments of mediation in the works of European scientists are not as common as it used to be earlier.

Most European scholars who study conflicts in society and methods of resolving them are inclined to believe that «conflict is resolved rarely by acknowledging of someone's rightness. It is achieved through respect and recognition of differences» [26, p.49] of its parties. And this is no longer the judiciary, but a field of mediation. For example, Liz Trinder and other representatives of this cohort of researchers of conflicts and ways to resolve them note that «existing legal (judicial) methods of intervening in the conflict do not allow to organize communication between its parties, and in some cases only worsen their relationship…» [27,p.4]. It is true that there are much more tolerant assessments of the ability of justice to resolve conflicts in the scientific literature, but they are less common. In particular, Joan Hunt argues that a court decision on a conflict «allows to renew the interaction between the conflicting parties, but, obviously, it is not able to improve relations between former partners...» [28, p.122].

The vast majority of European scholars in the field of mediation consider the latter as a clear alternative to judicial proceedings. «The experience of participating in a judicial process… - in their opinion, -… teaches ex-partners to argue and despair of each other, and to do so too actively… mediation gives them a chance… to build new, more constructive relationships…» [29, p.9]. This is possible because, according to John Haynes, in the process of mediation «positions are changed, options are clarified and mutual concessions are made» [30, p.4]. The latter allows the parties to the conflict to overcome their own prejudices and change themselves. After all, as Jane Robbie writes, people who are in a state of conflict believe that «they do not need therapy. Each of them is sure that the problem would not have arisen, if the other side had behaved more intelligently and accepted his point of view» [31].

The modern scientific European literature on mediation is permeated by an idea that mediation is transformative in its nature. At its centre is «the moral development of human, which is carried out simultaneously in two directions – gaining inner strength and improving relationships with others» [32, p.230]. And the first direction is dominant, because it allows the individual who is most often a party to the conflict, to maintain his own subjectivity in resolving the conflict, rather than becoming the object of state judicial proceedings, and ultimately to preserve his own dignity.

In the modern scientific European literature on mediation works devoted to the research, presentation and popularization of mediation techniques and technologies significantly predominate. This is the conscious position of these authors. Kenneth Klock helps the reader to better understand it. Describing various mediation techniques, he notes that «for a deeper transformative approach, it is necessary to have special methods, that include not only mediation techniques, that allow us to better focus on the problem, become more compassionate to people, better understand ourselves and others, but also those that help us to hear others better, be open in communication, establish a constructive dialogue, be creative in solving problems, learn to work and achieve reconciliation» [33].

It is noteworthy, that among European researchers of mediation there is also a clear position that the mechanical transfer of mediation values to another cultural environment will not give the expected results, but can only cast a shadow on mediation as a phenomenon. After all, the «Western individualistic model of mediation, aimed at solving specific problems, was developed taking into account the needs of Western culture and is not entirely suitable for application in the context» [34, p.19] of another culture. We fully support this position.

Some ideological and methodological principles of judiciary were studied by domestic authors. However, in any of them, as well as in the works of other domestic scholars, a comparative analysis of the value matrices of judiciary and mediation was not carried out. Moreover, mediation as a value in the domestic scientific and philosophical literature still remains terra incognito. That is

why its quintessence is usually reduced to a set of techniques and technologies for conflict resolution, which is an one-sided and erroneous approach [35;36;37].

Aims

The purpose of the article is to clarify the value matrix of mediation and compare it with a similar matrix of judiciary. It is specified in its following tasks: revealing the value-based opposition of judiciary and mediation; clarifying the anthroposociocultural code of mediation as a value; substantiation of incompatibility of methodological tools for knowledge of judiciary and mediation.

Methods

The subject of research, its purpose and specific tasks determined its methodological principles, namely the anthroposociocultural approach.

Results

1. Tree-likeness (hierarchical nature) of judiciary.

Judiciary is one of the most difficult cognitive problems of jurisprudence. This is crucially due to the fact that it is attributively one of the aspects of state power as an extremely complex and contradictory phenomenon, and therefore has absorbed many of its essential properties, including the hierarchy of structural construction and functional order. In particular, in accordance with Article 125 of the Constitution of Ukraine «in Ukraine the system of courts is formed in accordance with the principles of territoriality and specialization and is determined by law» [1]. And in Article 17 of the Law of Ukraine «On the Judiciary and the Status of Judges» the constitutional principles of the judicial system of territoriality and specialization is supplemented by another principle of the judicial system – the principle of instance hierarchy [38]. Part 3 of the same article states: «The system of the judiciary shall include: 1) local courts; 2) courts of appeal; 3) Supreme Court. To consider some categories of cases in line with this Law high specialized courts shall operate in the system of the judiciary» [38].

Such a hierarchical structure of the judicial system of the state is familiar to all modern civilizations. Even in the classical cognitive tradition, which reached the apogee of its development in Modern times, it was called tree-like. This cognitive tradition is an inevitable consequence of a similar to it tree-like worldview of the same and a number of previous historical epochs. The most important property and feature of all these historical epochs at the same time was the hierarchy of values. Their origins go back to the early antique – ancient Greek – era, whose worldview discourse was completely captivated by the mythological consciousness with its ideas about the universum (cosmos), created on the principle of «tree of the world».

According to the above mythological consciousness the tree has an attributive root, which symbolizes the depth of ingrowth of this phenomenon into being, and in this depth, in turn, hidden substance, quintessence, basis – the determinant of the whole visible and invisible world. The tree –is a symbol of hierarchical, vertically authoritative organization of existence. It contains the patterns of the centre (trunk) and periphery (side branches). The pattern of the centre in this mythological worldview grows even more in its meaning on the other hand – from the rings of the tree trunk, which multiply and increase every year. The tree with its vector of sap movement and growth from root to top represents a linear-through, genetic and coretype vision and perception of the world. It with its continuous and unrestrained dichotomous growth up and around the centre – the trunk in the imagination of the supporters of this worldview constitutes binarism, the logic of binary oppositions: top – bottom, main – subordinate, winner – defeated, etc.

Even the change of historical epochs of modernism to postmodernism, which began in the world in the middle of the XX century and continues today, still leaves the huge layers of social being in the captivity of classical hierarchical values, models of its organization and principles of activity. Article 18 «Specialization of Courts» of the Law of Ukraine «On the Judiciary and the Status of Judges» is expressive in this aspect. In particular, it states that courts is specialized on the consideration of civil, criminal, commercial and administrative cases, as well as cases of administrative offenses. In cases stipulated by law and upon decision of a meeting of judges of a relevant court, under the above Law of Ukraine, specialization of judges for consideration of specific categories of cases may be introduced. Local general courts and appellate courts apply specialization of judges for criminal proceedings in regard of juveniles [38].

Article 26 «Types and composition of ap-

pellate courts» of the Law of Ukraine «On the Judiciary and the Status of Judges» gives an even fuller and more convincing idea of the hierarchy (tree-likeness) of the judiciary. It states that appellate courts shall operate as courts of appeals and in cases determined by procedural law – as courts of first instance for consideration of civil, criminal, commercial, administrative cases and cases of administrative offenses. In turn, the appellate courts formed in the appellate circuits shall be the appellate courts for consideration of civil and criminal cases and cases of administrative offenses. The appellate courts for consideration of commercial cases, and the appellate courts for consideration of administrative cases shall be, respectively, the appellate commercial courts and the appellate administrative courts formed in relevant appellate districts. Besides that, an appellate court may establish, according to national legislation, judicial chambers for consideration of different categories of cases. Isn't all this taken together a magnificent judicial tree? [38]

Higher specialized courts continue and supplement the hierarchical row of judiciary in Ukraine. Their types and composition are prescribed in Article 31 of the Law of Ukraine «On the Judiciary and the Status of Judges». In particular, it states that within the system of the judiciary, high specialized courts shall function as courts of first instance for consideration of some categories of cases. Thus, the high specialized courts are as follows: the High Court on Intellectual Issues; the High Anti-Corruption Court. High specialized courts shall consider cases which are under their jurisdiction according to procedural law of the state. Court chambers may be established within a high specialized court. The decision on establishment of the judicial chamber, its composition and on election of the Secretary of the Chamber shall be adopted by the meeting of judges of the relevant high specialized court, upon the proposal of the highest official in the hierarchical system of the highest specialized court – the Chief Judge [38].

The tree-like structure of the judiciary in Ukraine is crowned by the Supreme Court, which according to Article 36 of the Law of Ukraine «On the Judiciary and the Status of Judges» administer justice as a court of cassation instance and in cases stipulated by procedural law – as a court of first or appellate instance within the procedure established by procedural law. This court also: analyze judicial statistics and generalize case law; issue conclusions on draft laws concerning the judicial system, legal proceedings, the status of judges, enforcement of judgments and other issues related to the functioning of the system of the judiciary; issue an opinion on presence or absence in actions charged against the President of Ukraine of signs of treason or other crimes; upon request of the Verkhovna Rada of Ukraine present a written motion on incapability of the President of Ukraine to exercise their powers for health reasons; address the Constitutional Court of Ukraine regarding constitutionality of laws and other legal acts, as well as regarding the official interpretation of the Constitution of Ukraine; ensure uniform application of the law provisions by courts of different specializations following the procedure and in the manner stipulated by the procedural law; exercise other powers envisaged by the law [38].

Within the Supreme Court there shall be: 1) Grand Chamber of the Supreme Court; 2) Administrative Cassation Court; 3) Commercial Cassation Court; 4) Criminal Cassation Court; and 5) Civil Cassation Court. In each cassation court chambers on the adjudication of certain case categories shall be established taking into account specialization of judges. The number and specialization of court chambers shall be determined by decision of the meeting of judges of a cassation court taking into account requirements of paragraphs five – six of Article 36 of the Law of Ukraine «On the Judiciary and the Status of Judges» and judicial workload. In the Administrative Cassation Court separate court chambers must be established. These chambers shall adjudicate cases on: 1) taxes, fees and other mandatory payments; 2) protection of social rights; and 3) election process and referendum and protection of political rights of citizens. In the Commercial Cassation Court separate court chambers must be established. These chambers shall adjudicate cases on: 1) bankruptcy; 2) protection of intellectual property rights and rights related to anticorruption and competition law; and 3) corporate disputes, corporate rights and securities. Other chambers shall be established in cassation courts upon a decision of the meeting of judges of a cassation court. The Supreme Court shall have the Plenum of the Supreme Court to address issues, stipulated by the Constitution of Ukraine and the Law of Ukraine «On the Judiciary and the Status

of Judges» [38].

According to the Constitution of Ukraine and the Law of Ukraine «On the Judiciary and the Status of Judges» a judgment that ends consideration of a case in a court shall be approved in the name of Ukraine and judgments that have become effective shall be binding on all state authorities, bodies of local self-government and their officials and employees, private individuals and legal entities and associations throughout Ukraine, including lower courts in the hierarchical structure of judiciary. In the official language the latter phenomenon is called prejudiciality (praejudicialis) and is governed by the laws of Ukraine [38].

From the above, it is obvious that the judiciary inevitably acquires and maintains a tree-like configuration as a natural way of its existence. It is based on the values and mentality of the respective societies. As the French postmodernists of the last century Gilles Deleuze and Felix Guattari aptly remarked by «the whole Western culture is permeated by the tree», which considerably limits the spontaneity of its development, creativity and freedom and that generally «in many of people the tree sprouted in the brains». They set out this observation in their joint work «Rhizome», first published in 1976 [39].

2. Rhizomaticity of mediation.

Gilles Deleuze and Felix Guattari the term rhizome borrowed from botany. In the latter, it specifies the way of life of perennial herbaceous plants such as iris. Rhizome – is a crop that spreads on the ground, sprouting through certain branches of the stem into the ground and in the same places with new stems up. According to the observations of scientist-botanists there is such a stable correlation between the branching of stems, their germination in the ground and in the same places the leaves on top, that their graphical topology can be considered interdependent. As the rhizome plant spreads in all directions, its previous groundings and stems gradually die off, but the rhizome plant itself continues its life in the new rooted vertical stems.

Thus, the rhizome, in contrast with the tree, develops horizontally, without any predetermined order, but spontaneously in space and time, it does not have a single predetermined grounding place for all its stems. On this basis botanists call rhizome a non-classical evolution of self-sufficient formations. This evolution occurs not at the expense of other species of the plant world and not due to differentiation of the rhizome itself, but contrary to them, due to the amazing ability of the rhizome to move from one line of development to another such lines to endlessness due to internal conditionality.

Gilles Deleuze and Felix Guattari considered in the way of being of rhizome a lot of common features with the existence of civil society. According to them, rhizome can teach us to move through the endless "territory with obstacles", which is our existence. Rhizome – is a philosophy of coordination, coexistence, apology for avoiding extremes, not opposing oneself to the Other. The quintessence of rhizomatic values and worldview is that they are paradigmatically opposite to tree-like (hierarchical) values and worldview.

Paradigm matrices of rhizome and mediation are of the same type. Like rhizome, mediation is also a way of life for the whole biological species of nature, namely humans. Like rhizome, mediation is conditioned by the own nature of appropriate species and by the properties of its environment for existence. With regard to the latter (mediation) – it is the attributively contradictory nature of the individual, which constantly requires from him both self-affirmation, autonomy, and at the same time coexistence with the Other, as well as the attributively contradictory nature of the beingness construction of the human world. As in the rhizome, the quintessence of its existence is the spontaneity, so in the mediation matrix the spontaneity plays a key role.

The rhizome – is a symbol of heterogeneity, actually heterogeneity by itself, it is always in the process of formation. It has no orientation on the culmination point or a certain vital finish. Mediation is also a symbol and an instrument for reconciliation of society by its creators – individuals directly through the coordination of their needs with each other. In order to understand and master mediation as a way of life of individuals in society, it is necessary above all to understand the quintessence of the rhizomatic way of life of perennial herbaceous plants such as iris. After all, the nature and ways of life of both just mentioned species of nature are paradigmatically opposite to the tree and unexceptionally to all other tree-like structures of society as part of nature.

That is why any projects to integrate the institution of mediation into the national legal system as a component of the judiciary are unrealizable in principle. These are opposite values by their nature, despite the fact that the individual functional properties of judiciary and mediation are close or even coincide. For example, both judiciary and mediation belong to the category of public goods, and therefore access to each of them should be provided by the state. But not through the deformation of the true nature of one or another of the above institutions, in particular, mediation, but in accordance with their internal nature. In mediation, it is dual, and therefore it can be fulfilled (provided) as a social service. Judiciary as a social service, that is paid court proceedings for the parties to the conflict, is impossible in principle.

There is a similarity or even coincidence of some other functional properties of judiciary and mediation, primarily their purpose as the reconciliation of society. However, from the above they do not cease to be value antipodes. The fundamental value difference between the judiciary and mediation is that the system-forming subject in the judiciary is the state, and the individual is assigned the role of the object for state influence, an instrument for achieving state goals. Conversely, in mediation, the system-forming subject is the individual, and the state – is one of the tools, means of achieving the life goals of the individual, meeting his interests and needs.

Only in the second case it is not violated the most fundamental value of civilization – human dignity. Almost a quarter of a millennium ago Immanuel Kant in his second formula of the categorical imperative – the formula of personality – substantiated the need to prohibit the utilization of human by human: «… human is not a thing, that is, something that can only be used as a means; – he wrote; – they must be seen in all their actions simultaneously as an end in itself» [40, p.169]. In the middle of the XX century another German humanist Günther Dürig, based on the cognitive matrix of Immanuel Kant, formulated the so-called object formula, which almost immediately became famous and acquired remarkable criterial importance in determining the state of presence or absence of human utilization by anyone: «Human dignity is affected when a person becomes an object, that is a simple means, variable and expendable value», he wrote. In such a case he meant that «humiliation of a person to the status of a thing, that is completely catalogued, destroyed, registered, liquidated, brainwashed, which can be replaced, used and disposed of» [41, p.41]. As the quintessence of the value matrix of his object formula, Günther Dürig states: «A violation, which is contrary to human dignity as such, is the transformation of a particular person into an object of state procedure» [41, p.121]. That is what judiciary does to a person.

Discussion. Mediation as an alternative to state judiciary way of resolving conflicts enables the preservation and protection of human dignity, which are in fact an anthroposociocultural code of mediation. That is why at the turn of the XX-XXI centuries it became a typical phenomenon for the developed countries of Europe and other countries not only in the West, but also in other civilizations. In these societies it has become, as a social practice, for each and every one at the same time a universally recognized norm of social being, has acquired the status of a qualitatively separated social culture. In all the above countries mediation the most effectively among all other instruments of this type allows to reconcile societies, to increase the synergy of their individuals.

In Ukraine, on the contrary, mediation has not yet become a common, typical phenomenon. Here it only declares itself, exists in a state of prenatal development, is invisible to the naked eye, and therefore for the vast majority of the Ukrainian community, which does not belong to a narrow circle of mediation specialists, mediation is perceived at the level of everyday consciousness as a UFO-type phenomenon, or, in the terminology of the classics of Ukrainian literature, as fata morgana. One of the most important reasons for this state of mediation in Ukraine is the acute deficit of public trust, which, in turn, is the fundamental paradigm of mediation, its basic setting, the basis of social partnership.

It is also perceived and described by most national mediation specialists in terms of modern (classical) scientific worldview, which are inadequate for mediation. This happens, because this worldview and its categorical-conceptual apparatus for most theoretically thinking individuals of national society is a common tool of cognition and fixation of the received scientific information. But let's try, for example, to clearly explore, record and

explain in the generally accepted in the scientific world forms of scientific information the geometric parameters of the flame or its mass by means of the above categorical-conceptual apparatus. No one will be able to do this, because the type of object for cognition and the type of cognition tools mentioned above are different and moreover – they are incompatible with each other. The true nature of mediation can be adequately explored, described and explained only through the use of the corresponding categorical-conceptual apparatus of non-classical standards of scholarship, from the worldview and methodological approaches of postmodernism.

Conclusions

Mediation is a qualitatively isolated self-sufficient value (culture) of a developed civil society. Its quintessence is the preservation and protection of human dignity in resolving conflicts by their participants with the assistance of professional mediators. The basic principles of mediation are anthropocentrism, denial of violent order in society and paternalism. Mediation has a complex nature – it is dialogical, acts both as a public good and a social service, it is a form of freedom, justice and social partnership. The trust of the parties to the conflict and social optimism are attributes of mediation. The assertion of mediation as a value (culture of mediation) in society is a real Copernican revolution in public views on methods of conflict resolution and is one of the most important manifestations of the subjectivity of the individual. Mediation embodies the postmodern way of being and thinking, and therefore can be adequately known through the corresponding categorical-conceptual apparatus of non-classical standards of science, from the worldview and methodological approaches of postmodernism.

The paradigmatic opposite value is judiciary. It and mediation are two total differences, because the principle of existence of judiciary is its hierarchy (tree-likeness). The hierarchical structure of the judicial system of the state and its functioning is familiar to all modern civilizations. It was called tree-like even in the classical cognitive tradition. This cognitive tradition is an inevitable consequence of the worldview of the same and a number of previous historical epochs, the worldview discourse of which was completely captivated by the mythological consciousness with its ideas about the universum (cosmos), created on the principle of «tree of the world». The tree with its vector of sap movement and growth from root to top represents a linear-through, genetic and coretype vision and perception of the world, constitutes the logic of binary oppositions: top - bottom, main - subordinate, winner - defeated, etc. The judiciary exactly is built and functions on this matrix. Mediation for it – is not an organic component, but an extraneous substance.

Acknowledgements

Provisions, assessments and conclusions, practical recommendations contained in the article can be used in the process of developing a domestic concept of mediation, the need for which is becoming increasingly apparent. They can also be useful to the legislator of Ukraine in resolving the basic principles of the Law of Ukraine «On Mediation». This article to some extent fills the vacuum on worldview and methodological aspects of mediation, which are the most controversial among Ukrainian mediators. Finally, this article can be the basis for the development of a special course «Mediation as a value», which should become a system-forming discipline for the training of future mediators in higher education institutions within the educational program «Mediation».

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MEDIATS Mediation: Training and Society Transformation

MMEDIATION IN CRIMINAL CASES: COMPARATIVE LEGAL ANALYSIS

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Abstract. *The article is devoted to the comparative analysis of mediation in criminal cases in particular countries. The article analyzes the approaches of researchers to the understanding of mediation in criminal cases and restorative justice. The international standards in the field of mediation in criminal cases and restorative justice, which are applied by states and implemented in national legislation, are considered. It has been studied that mediation is a form of restorative justice. It was found that in most countries, mediation in criminal cases was introduced through the implementation of pilot projects, and over time, relevant laws on mediation were adopted or legislation was amended. The current state of development of mediation as a restorative justice in Ukraine is analyzed.*

Keywords: *mediation, restorative justice, mediation in criminal cases, victim-offender mediation*

K10, K19, K49, D74

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Introduction

In European countries, such an alternative way of resolving disputes as mediation is becoming more and more developed, somewhere it is already quite developed, improved, and somewhere it is only developing. If we talk about civil, family, labor disputes, the approach to this phenomenon is more or less unambiguous in most countries. However, the issue of mediation in criminal cases deserves attention and is more problematic, as the understanding of this phenomenon is ambiguous. There are different concepts in the literature; mediation in criminal cases, mediation between the victim and the offender, criminal mediation, victim-offender mediation, mediation in penal matters etc. In addition, there are different views on the understanding of mediation. In our study, we will focus on mediation as a form of restorative justice, without distinguishing between these categories.

Mediation consider as a form of restorative justice that emerged in the late 1970s in Canada, the United States, and Europe in the early 1980s. It has become especially active in the field of justice for juveniles. The United Kingdom was the first European country to initiate such a form of restorative justice as mediation. To one degree or another, mediation in criminal cases exists in a large number of countries. In Belgium, Germany, Norway, Finland, Great Britain, France, Switzerland, and Austria, it functions as an effective component of the criminal process, which is enshrined in the national legislation of these countries. Relatively recently, mediation has found its normative consolidation in Italy, Sweden, Denmark, the Netherlands, and Spain. Mediation as a form of restorative justice and a component of the criminal process was introduced by the countries of Central and Eastern Europe. This institution was enshrined, for example, in the legislation of the Czech Republic, Poland, Slovenia, Hungary, Romania, and Moldova [1, pp.373-374].

Theoretical Basis

Tony Marshall regards restorative justice as a process in which the parties to a crime decide how to deal with the consequences of the crime and its consequences for the future [2, p.5]. Victim mediation is one of the most well-known and widespread modern rehabilitation programs. In its typical form, it combines the victim and the person who committed a criminal offense, who uses a trained mediator to coordinate the meeting. Both parties express their views and the mediator helps to consider their choices in order to choose the right one [3, p.31].

According to Zehr, both mediation programs and many restorative justice programs are designed around the possibility of meeting or meeting between victims, offenders, and possibly members of the community. He believes that first and foremost, restorative justice is an invitation to engage in dialogue so that everyone can support and learn from each other. It is a reminder that people are all truly interconnected [4]. Niels Christie has made an important contribution to the development of conflict resolution, restorative justice. He believes that the ability to resolve conflicts is not only a right practically usurped by the justice system today, but also an urgent need of both the parties to the conflict

and the community as a whole, as it allows to form an idea not only of order and morality. sensory understanding of what is good and what is not [5, pp.1–15]. According to V. Zemlyanska, mediation between victims and offenders is mainly aimed at achieving reconciliation through dialogue, emphasizing the restoration of the proper emotional and physical condition of the victim, the responsibility of the offender and compensation [6, p.28].

According to Anna Mestitz, mediation of victims of crime, is a very old strategy adopted in tribal or rural societies to resolve conflicts, compensate for damage and restore social peace. Technically, in the "mediation continuum", the mediator is the ancestor of the judge [7].

Victim-offender mediation "allow for victims' voices to be heard and for their humanity and worth to be recognized and realized by the offender and within the legal system and community, which serves to heal the trauma of the initial victimization" [8, pp. 1-5].

Aims

Works have been devoted to the study of mediation in criminal cases and have been the subject of research by a large cohort of scientists. However, many aspects prevail debatable and need further research. Therefore, the aim of the article is to analyze mediation as a form of restorative justice, a comparative analysis of the institution of mediation in criminal cases in separate countries.

Results

Mediation in criminal cases in Europe appeared in the 1980s. However, at first it developed slowly, despite the fact that the experiments were positive for victims and offenders. This approach was completely new for culture, so it took more than one year to develop it in the countries. But over time, mediation programs in criminal cases began to develop and became a good practice. In some countries, volunteers play a significant role, and in some countries there are high requirements for mediators in criminal cases. Until now, in some European countries, mediation in criminal cases is used between the victim and the juvenile offender, less often between the victim and the adult offender. However, the experience of mediation in criminal cases is growing [9].

In the late 1990s, criminal mediation reached a new level of development, as international organizations began to further promote criminal mediation. One of the fundamental international acts in the field of mediation became Recommendation NR (99) 19 of the Committee of Ministers of the Council of Europe to member States concerning mediation in penal matters, adopted by the Committee of Ministers on 15 September 1999 at the 679th meeting of the Ministers' Deputies. This document considers mediation in criminal matters as flexible, comprehensive, aimed at solving the problems of supplementation, or as an alternative to traditional litigation [10].

Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters CEPEJ (2007) 13, approved by the European Commission for the Efficiency of Justice (CEPEJ) on 7 December 2007. According to this document judges, prosecutors and other criminal justice authorities play an important role in the development of mediation. They should be able to provide information, conduct special information activities on mediation and, where possible, invite victims and/or offenders to use mediation and/or refer cases to mediation. Member States are encouraged to establish and/or strengthen cooperation between criminal justice authorities and mediation services in order to better cover victims and offenders with mediation services. Mediation requires the free and conscious consent of both victims and offenders, and should never be used if there is a risk that mediation will put one party at a disadvantage. Not only the potential benefits but also the potential risks of mediation for both parties, in particular the victim, must be duly taken into account [11].

As stated in the Recommendation CM/Rec (2018)8 of the Committee of Ministers to member States concerning restorative justice in criminal matters, adopted by the Committee of Ministers on 3 October 2018 at the 1326th meeting of the Ministers' Deputies "restorative justice may be referred to as victim-offender mediation, penal mediation, restorative conferencing, family group conferencing, sentencing circles or peacemaking circles, inter alia". Restorative justice is a form of dialogue between the victim and the offender. This Recommendation enshrines the principles of restorative justice, which are similar to the principles of mediation. Restorative justice ensures neutrality, does not promote the interests of the victim or the offender, in order to keep the parties as satisfied as

possible. The recommendations also highlight such principles as: voluntariness, respect for dialogue, equal care for the needs and interests of each party, an agreement based on consensus. Discussions in restorative justice should be confidential. However, there is an exception: except with the agreement of the parties concerned [12].

According to the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA) "mediation in criminal cases" shall be understood as the search, prior to or during criminal proceedings, for a negotiated solution between the victim and the author of the offence, mediated by a competent person. Article 10 of this Decision specify that each Member State shall seek to promote mediation in criminal cases for offences which it considers appropriate for this sort of measure. Each Member State shall ensure that any agreement between the victim and the offender reached in the course of such mediation in criminal cases can be taken into account" [13].

Recovery procedures can be applied at any stage of the criminal process. There is an opinion that the lower the stages of the criminal process, the more the case will be referred to mediation, the more likely it is that it will be resolved sooner. Mediation can be used in the following stages: regardless of the criminal justice system, when referred by the prosecutor's office or the police at the pre-trial stage or by a judge before the trial on the merits, in parallel with the prosecution, after conviction and before execution as part of or in addition to punishment not related to imprisonment [14, p.21].

The first mediation in criminal cases and compensation service for damages and offenders in the Western Hemisphere took place in Kitchener, Ontario, Canada in May 1974. The Mennonite probation service took two young men to apologize to the 22 victims whose homes they despised. This idea has been widely used in Canada and the United States, which has led to several reconciliation programs for victims and offenders.

In the UK, the number of mediator services began to grow in the 1990s, resulting in a cessation of the growth in the number of victims and offenders. Mediation in criminal cases is not part of the criminal justice system [15, p. 37,46]. One of the main reasons for the emergence of mediation was the desire to fully involve the victim in solving criminal legal conflicts, because in the traditional system of criminal justice it is almost completely eliminated from the active participation in the process and his opinion is almost not taken into account when making criminal proceedings, including those which are related to compensation for damage and elimination damage [16, pp.61-71].

Mediation in criminal cases in Germany is an alternative to criminal prosecution. The goal of the victim-mediation program is to emphasize the process of dispute resolution and reconciliation, as well as to see restitution and compensation to the victim as a (symbolic) end to the conflict resolution process. Unlike restitution schemes, such a program has broader goals, making the mediation process itself as important as any concrete outcome. For juvenile offenders, the court may order mediation as part of educational measures. In the case of a successful resolution of a case of a minor crime committed by a juvenile, such a criminal case may be closed. The importance is that mediation between a juvenile offender and a victim can be conducted in the case of a crime of any gravity, even serious crimes. Instead, mediation between an adult offender and a victim can only take place if the crime is minor or moderate [17, p.28].

As for Poland, mediation was formally introduced into the Polish criminal system in 1997. The Polish Mediation Center is currently a key non-governmental organization in the field of mediation, restorative justice in Poland. Initially, mediation was conducted only at the stage of preparatory court proceedings within the stage of preliminary consideration of the case by the court. Every year the number of criminal cases referred to mediation increased. And already in 2003, the Code of Criminal Procedure was supplemented by an article that allowed mediation at each stage of a criminal case.

In France, the practice of using mediation in criminal cases is not standardized nationwide. There are two types of mediation by the subject of its conduct: "judicial" mediation (mediation retenue), according to which the prosecutor independently tries to take real measures to reconcile the parties without the help of third parties and "delegated" mediation (delegate mediation), according to which the prosecutor does not reconcile the parties independently, but only initiates the rel-

evant decision, delegating authority to a specially designated for this purpose competent person who provides such services. In France, there are no restrictions on mediation, so it can be applied to any case, regardless of the severity of the offense.

In Latvia, victim-offender mediation in criminal cases is regulated under the Criminal Procedure Law and State Probation Service Law. Mediation of the victim-offender in criminal cases is carried out by the State Probation Service. The Criminal Procedure Code stipulates that in the event of a settlement, a mediator trained by the State Probation Service may facilitate the reconciliation of the victim and those who have committed a criminal offense [18].

Regarding the development of restorative justice in the Netherlands, legislation, projects and pilot projects have been launched in that country; government experts, non-governmental organizations and experts on restorative justice in close cooperation, and restorative justice is gradually evolving in many regions. There are three main areas: restorative practices within civil society, restorative justice in criminal cases and restorative detention. As to the the national mediation policy in the Netherlands. then the current trend is to focus on one type of restorative justice - mediation in criminal proceedings [19, pp.117-133].

Victim-offender mediation is a process that provides an opportunity for the victim and the offender to meet safely and in a structured manner. Mediation can be direct or indirect. Indirect mediation, common in Flanders, is a process where information is transmitted by a mediator between the victim and the perpetrator. In direct mediation, the victim and the perpetrator meet in the presence of a mediator. When establishing adult mediation in Flanders, it was important that the initiators of these projects saw mediation as an introduction to a new paradigm of justice, the response to the crime should be focused on resolving the offense and supporting the victim. Importantly, adult mediation also involved serious crime in Flanders [20, pp.181-193].

If we discuss not only about European countries, but about Asian countries, then, for example, in Kazakhstan, the possibility is defined at the legislative level to use mediation in criminal cases. The Law “On Mediation” defines the features of mediation, which is conducted in the course of criminal proceedings: the conclusion of a mediation agreement by the parties does not suspend the proceedings in a criminal case; the fact of participation in mediation cannot serve as proof of a guilty plea by a party to the proceedings who is a party to mediation; if one of the parties to the mediation is a minor, the participation of a teacher, psychologist or legal representative of such a person is mandatory; mediation in the course of criminal proceedings must be carried out within the time limits of pre-trial and court proceedings established by the criminal procedure law; refusal to sign an agreement on the settlement of the conflict may not worsen the position of the party to the proceedings who is a party to mediation; At the end of mediation conducted in the framework of criminal proceedings, the parties are obliged to immediately send to the body in charge of the criminal case, a signed agreement on the settlement of the conflict or a written notice of termination of mediation [16, pp.102-107].

The study of criminal mediation in African countries is also important for comparative analysis. The culture of African countries is unusual otherwise for European mentality. However, it is appropriate to note the phenomenon of restorative justice, mediation in this aspect. In African philosophy, there is the phenomenon of rebellion, which is combined with restorative justice and both aim to restore the victim and reintegrate the perpetrator into society. The African philosophy of ubuntu is about human dignity and respect for individual humanity. Dignity and respect are seen as central values of rebellion and restorative justice [21, pp.131-132].

Discussion

If we analyze the experience of using mediation in criminal cases, we can see the dynamics that this kind of mediation originated in countries without a special law, primarily through pilot projects. And after years of practice, amendments to legislation or appropriate laws were passed. In addition, in the vast majority of countries, such pilot projects concerned juvenile offenders, and only then was mediation introduced between an adult offender and a victim. And this is expedient, because juvenile as a result of mediation have a chance to resocialize, to get on the right track, it also reduces the risk of recidivism.

According to research, offenders believe

that the following factors can prevent recidivism: the disclosure of a crime (for example, informing parents and the offence was reported to the authorities), the understanding that the crime is wrong, and the occurrence of police interrogation. Juvenile offenders mostly benefit from mediation, as it results in a sense of security, a sense of resolving the issue through discussion, and taking responsibility for the wrongdoing. In this way, mediation helps to prevent further crimes [7].

The study of foreign experience in the use of mediation as a form of restorative justice is important not only theoretically but also practically for countries that are just beginning to develop in this direction, such as Ukraine. Ukraine, like other European countries, is pursuing the implementation of mediation in criminal cases through the implementation of pilot projects in this area. A clear example is the pilot project "Recovery Program for Juveniles Suspected of Committing a Criminal Offense". The procedure for implementing the pilot project approved by joint order of the Ministry of Justice of Ukraine and the Prosecutor

General's Office of Ukraine (№172/5/10 of January 21, 2019), defines mediation in criminal cases is a voluntary, out-of-court procedure in which a juvenile suspected of committing a criminal offense and a victim, with the help of a mediator trying to resolve the conflict by concluding an agreement on the application of the Juvenile Recovery Program. in committing a criminal offense. The program is applied under four conditions: the presence of the injured party; committing a juvenile criminal offense or a felony for the first time; recognition of the fact of committing a criminal offense by a juvenile; consent of the juvenile and the victim to participate. If the juvenile compensates the damage and reconciles with the victim, he has a chance to be released from criminal liability. Such a decision is made by the court at the request of the prosecutor.

In Ukraine, mediators in the mediation process between a juvenile offender and a victim are lawyers who is included in the Register of Advocates Providing Free Secondary Legal Aid and who has been trained. Lawyers were selected on a competitive basis. The lawyers who passed the competition were trained on the topic "Basic skills of a mediator in criminal cases". The mediator assists the parties in the so-called reconciliation and helps to find out what kind of compensation the victim wants. These lawyers must first be trained. The program is based on the principles of restorative justice and uses mediation to reconcile juvenile offenders with victims. An intermediary is involved. Initially, such a project was implemented in six regions, and from 2020 - throughout Ukraine, which will allow to bring thousands of children out of criminal prosecution.

Conclusion

The implementation of comparative legal analysis is important for the study of world experience, knowledge of the phenomenon of mediation in criminal cases. The study of the development of mediation in criminal cases in a particular country provides an opportunity to learn from experience and develop recommendations for improving the legal regulation and practical application of mediation in dispute resolution. arising from the commission of a criminal offense. The dynamism and flexibility of the development of mediation in criminal cases in countries in the world makes it possible to understand that this institution is important, but its implementation depends on a number of factors: legal, cultural, political, etc.

From our analysis of mediation in criminal cases, it can be concluded that mediation in criminal cases operates where the state aims not only to punish the person who committed the crime without worrying about his human personality, but also to take into account the interests of individuals, who committed the criminal offense, and the victim, to promote resocialization, correction and prevention of repeated criminal offenses.

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MEDIATS Mediation: Training and Society Transformation

NEGOTIATIONS AND MEDIATION: FROM DIFFERENTIATION TO MUTUAL COMPLEMENTARITY

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Abstract. *Due to the permanent crisis in the judicial system Ukraine is constantly reforming the organization of courts, improving the legal regulation of the administration of justice. On the other hand, from the society itself, like mushrooms after the rain, there emerge alternative ways of resolving disputes, including negotiations and mediation. The purpose of this article is to study the variants for understanding by the scientific community of such concepts as «negotiation» and «mediation» through the use of methods of comparison, analysis and synthesis. The article demonstrates the existence of several approaches to the definition of negotiation and mediation, which are characterized by the differentiation of these phenomena or their complementarity by each other. The models for understanding of negotiation and mediation, that proposed in the article, will help all those, who are interested in these ways of alternative disputes resolution, to better understand their essence and purpose, to successfully apply negotiation techniques during mediation sessions.*

Keywords: *negotiations, mediation, alternative dispute resolution, conflict, mediation techniques.*

JEL Classification: *D74, F51, J52, K00.*

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Introduction

Western European countries and many other developed countries are characterized by diversity in ways of resolving certain interpersonal or intergroup conflicts. As well as litigation, alternative methods of dispute resolution, especially negotiation and mediation, are used successfully there.

Instead, nowadays, Ukrainian society remains quite conservative in the use of means for alternative dispute resolution and traditionally prefers to resolve the vast majority of conflicts through the application to the courts.

The Ukrainian legislator is still looking for the optimal configuration for the legislative regulation of mediation, so that the latter meets the needs of society and, in particular, the professional community of practicing mediators. Thus, as of September 2020, the Verkhovna Rada of Ukraine (the parliament of Ukraine) of the IX convocation registered three bills on mediation for № 2706 from 28.12.2019, for № 3504 from 19.05.2020 and for № 3504-1 from 04.06.2020. One of them, namely the draft law of Ukraine «On Mediation» № 3504 of 19.05.2020 was adopted on 15.07.2020 by the Ukrainian Parliament in the first reading.

As for the actual use of mediation in Ukraine to resolve disputes, it must be argued that, firstly, mediation is beginning to be heard by the general public through the educational work of associations of mediators and universities, and secondly, more and more mediation sessions are being held by the mediators, who received professional training, both theoretical and practical, mostly in universities and professional associations of mediators.

On the other hand, the negotiations in Ukraine are still outside the field of view of legislators. They are also recognized as an alternative way of resolving disputes. In Ukrainian society it is generally accepted, that negotiation is a self-evident phenomenon, and negotiation skills are acquired by themselves and depend on the ability and talent of the lawyer or other negotiator. Only a small number of Ukrainian universities offer specialized training programs in negotiations.

In connection with the above there is a need to clarify the boundaries of the phenomena of mediation and negotiation, their significance for alternative dispute resolution and, ultimately, to define models for understanding negotiation and mediation in the scientific community.

Literature Review

It should be noted, that in Ukraine there are no large number of scientific works on mediation and negotiation, which indicates that these phenomena are at the initial stage of their development by domestic scientists.

Mykhaylo Tsyurupa in his work «Fundamentals of Conflictology and Negotiation Theory» explores negotiations in the field of business relations [1, p. 115]. Also, Tetyana Yakhno and Iryna Kurevina in the joint work «Conflictology and Negotiation Theory» consider the psychological, organizational features of business negotiations [2, p. 8].

In the work «Mediation in the Professional Activity of a Lawyer» edited by Natalia Krestovska and Louisa Romanadze the team of authors defines negotiations as the simplest way of alternative dispute resolution, in which the parties do not involve a third neutral person (mediator) but try to resolve the dispute themselves [3, p. 87].

Oleksandra Karmaza in the scientific article «Mediation and Negotiations as Alternative Ways of Resolving Disputes» points out, that negotiations and mediation have common and distinctive features, that relate them to alternative dispute resolution procedures, namely: the principle of dispositiveness, plurality of parties, confidentiality, universal nature, voluntary fulfilment of agreements, etc [4, p. 16-17]. However, according to her, negotiations take place without a third party, without a mediator, while during mediation a mediator participates, which does not make decisions for parties, but works within the mediation procedure with the interests of the parties, takes into account the balance of forces, etc [4, p. 17].

As for scientific achievements on negotiations and mediation in the Western world, their number is much greater, than the works of domestic scholars.

For the most part, negotiation and arbitration are considered here as ways of alternative disputes resolution. The most common is the following triad of methods for alternative dispute resolution: negotiation - mediation - arbitration.

Such works include, for example, the scientific research by Maria Goltsman and Johannes Hörner and others named «Mediation, Arbitration and Negotiation», where the authors determine that under arbitration, the two parties commit to conform to the decision of a neutral third party. Under mediation instead, compliance with the third party's suggested settlement is voluntary. Finally, under unfacilitated negotiation, the two parties engage in (possibly arbitrarily long) face-to-face cheap talk [5, p. 20].

In the work «Using Negotiation, Mediation, and Arbitration to Resolve IRS-Taxpayer Disputes» Gregory P. Mathews reveals the specific features of negotiation, mediation and arbitration in the disputes of taxpayers with Internal Revenue Service in USA. It is interesting, that Gregory P. Mathews refers mediation and arbitration to the formal ADR initiatives [6, p. 716].

The research «Dispute Resolution: Negotiation, Mediation, Arbitration, and Other Processes» edited by Stephen B. Goldberg, Frank E. A. Sander and others points out, that the most common form of dispute resolution is negotiation: «Compared to processes using neutral «third parties» negotiation has the advantage of allowing the parties themselves to control the process and the solution. If the parties cannot settle the dispute themselves and bring in a third party, they cede some control over the process, but not necessarily over the solution. In fact, a critical distinguishing factor among the third-party processes is whether the neutral has power to impose a solution or simply to assist the disputants in arriving at their own solution. The most common example of the latter is mediation; the former is commonly called adjudication, whether performed by a court or by a private adjudicator known as an arbitrator» [7, p. 42].

Authors of the above book emphasize that, elements of these three primary processes – negotiation, mediation, and adjudication – have been combined in a number of ways in a rich variety of «hybrid» dispute resolution processes [7, p. 42].

Another feature of Western scientific literature is its accent on certain types of negotiations depending on the specific scope of their conduct.

For example, Stefanie Jung and Peter Krebs in work «The Essentials of Contract Negotiation» pay attention to the business contract negotiations, i.e. B2B (business to business) negotiations. Their work is dedicated to the explanation of tactics, strategies, overall concepts as well as framework conditions, that can apply to negotiations between companies as well to negotiations held within the company [8, p. 1].

Wytze van der Gaast in scientific investigation «International Climate Negotiation Factors Design, Process, Tactics» unfold the peculiarities of international climate negotiations that are complex as they address a global environmental problem which affects and requires collaboration between all countries [9, p. 1].

Thomas Strentz in research «Psychological Aspects of Crisis Negotiation» shows methods and strategies of hostage/crisis negotiations in the practice of police and FBI. As Thomas Strentz argues, the goal of crisis anti-terrorism negotiations is the preservation of human life, trying to bring peace and termination of a conflict without injury to an-

yone [10, p. 6].

Despite the large number of English-language scientific investigations on negotiation, mediation, scientists have not yet conducted a comprehensive classification of approaches to understanding negotiation and mediation. That is, this problem was not put on the agenda by scholars and, accordingly, was not solved by the scientific community.

Aims

The aim of this article is the searching, demonstration and comparison of different approaches of scientists to understanding such social phenomena as negotiation and mediation.

Methods

To achieve the aims of the article, the following scientific methods were used: the method of comparison – to identify common and distinctive features in phenomena of mediation and negotiation; the method of analysis – to identify the features of negotiations and mediation, their nature; the method of synthesis – for the classification of approaches to understanding negotiation and mediation, generalization of the obtained results and formulation of conclusions.

Results

Taking into account the existing scientific developments in Ukraine and the Western world, a number of approaches to understanding negotiation and mediation can be identified. As a rule, each of these approaches is already characterized by specific thematic scientific elaborations, that improve and detail it.

Firstly, negotiation and mediation are considered as separate ways of alternative disputes resolution.

A large number of scientific papers are based on the differentiation of negotiations and mediation and their joint typology as ways of alternative disputes resolution.

Thus, Carrie Menkel-Meadow notes, that in an era characterized by a wide variety of processes for resolving disputes among individuals, organizations, and nations, process pluralism has become the norm in both formal disputing systems, like legal systems and courts, and in more informal, private settings, as in private contracts and transactions, family disputes, and internal organizational grievance systems [11, p. 3]. She states: «There are a number of factors, that delimit the kinds of processes which parties may choose or may be ordered to use under rules of law, court, or contract. The «primary» processes consist of individual action (self-help, avoidance), dyadic bargaining (negotiation), and third party facilitated approaches (mediation), or third party decisional formats (arbitration and adjudication)» [11, p. 3].

The authors of the above-mentioned Ukrainian research «Mediation in the Professional Activity of a Lawyer» make the differentiation between negotiation and mediation. They indicate, that negotiation is a procedure in which two or more parties participate without the involvement of other persons in order to reach the agreements on issues of their interest and to develop ways to resolve disputes between them, mediation is the negotiation between the parties with participation of a third party, a mediator, who, carrying out the general management of the procedure, helps the parties to establish communication with each other and independently reach the most effective agreements on disputed issues, but has no authority to resolve the dispute [3, p. 89-90].

Finnish researcher Emmi E. Lehtinen identifies general, procedural and resulting differences between negotiation and mediation. According to her, the general distinguishing features between mediation and negotiation are the next: negotiation is not official, and mediation is more formal because of the presence of a mediator; negotiation does not require a conflict, even though it can be used as a soft dispute resolution method (negotiating is normal communication), but mediation requires a conflict, which will be mediated [12].

To the procedural differences of negotiation and mediation Emmi E. Lehtinen includes, the following: in negotiation parties decide on everything on procedure like time, place, logistics and they take care of everything themselves, but in the process of mediation mediator decides on all things on the procedure such as time, space, logistics and arranging them; negotiation usually happens at the premises of one party and in mediation parties meet mediator in a neural place; if negotiation has outsiders, they side with one the parties, in negotiation everybody is focused on what they are getting out of the deal, but mediation procedure includes a mediator, who has no personal agenda; no one decides on the procession of negotiation as it is based on the quality of communication skills of the parties,

instead mediator leads discussion, gives out turns to speak and decides on breaks; negotiation does not have formula and mediation has more structure than negotiation [12].

As for the resulting differences, according to Emmi E. Lehtinen, in negotiation parties decide on the outcome of the resolution together. Settlement after negotiation is a new contract, which is confirmed by the court usually only when the parties successfully negotiate during court procedure. Then in mediation parties decide on the outcome of the resolution together and mediator does not decide the matter. Settlement after mediation is a new contract, which can be confirmed to be enforced at national court [12].

Secondly, negotiation is considered as one of the mediation procedures (stages).

Negotiation can take place between the parties in mediation, most often at the stages of storytelling and the development of options, because these stages themselves at most require direct communication between the parties with the assistance of a mediator. In addition, negotiations between the parties of mediation lead to the conclusion of a mediation agreement between them.

Negotiations during mediation can also take place between mediators (e.g. in co-mediation), between representatives of the parties or their lawyers.

In this case, negotiations are no longer an independent way of alternative disputes resolution, but a structural element of the mediation procedure.

Well-known mediator and negotiator Jeffrey Krivis identifies negotiation as one of the stages of mediation. He indicates, that it was the right time to move into the negotiation stage when the parties were starting to repeat themselves and he could see, that the attorneys were anxious to work on what they came to the table for the deal. To accomplish this, the task was to begin the bargaining dance between the parties [13].

As Jeffrey Krivis argues the important action of mediator on this stage is the suggestion to the parties, that he and his attorney start considering other options, that would require courageous thinking on his part, including significantly reducing his expectations so that other party could start figuring out some ways to get to the agreement[13]. Then Jeffrey Krivis states: «… the result on the negotiation stage, we were trying to achieve was «flexibility and innovation». This would allow us to close the gap in the negotiation and ultimately come together» [13].

Trey Bergman in his work «How to «Win» Every Mediation» reveals features of the negotiation procedure in the framework of mediation and gives recommendations to the participants of mediation on its successful conducting. The author notes: «Whether it is face to face negotiations with your opposing counsel or through the assistance of a mediator, the basic rules are the same. Just remember that the key to a successful win-win result is preparation and commitment to a cooperative mutual problem solving style. There is nothing more empowering and enjoyable then when the parties successfully conclude a mediation or a negotiation feeling like they have both won» [14].

Thirdly, negotiation is considered as one of the techniques, skills of a mediator.

Quite often practicing mediators and scholars perceive negotiation as one of the strategies for successful mediation. The mediators themselves use different styles of these negotiation, their techniques at the appropriate stages of mediation.

Mediator Alexander Polsky identify mediation as the facilitated negotiation. In his opinion, one of the stages of mediation is the negotiation stage [15].

Alexander Polsky distinguishes a number of mediator styles in negotiation:

«The competitive bargainer is often referred to as a «hard» bargainer or a «positional» bargainer. This negotiator wants to «win» and often at all costs. Winning is defined in a unilateral sense and may often come without full regard to the costs. Arguing over «positions» endangers relationships, increases costs in litigation and often produces inferior results.

The cooperative negotiator, sometimes thought of as «soft» wants to get along with everyone and produce an easy outcome in what is often a difficult situation. This technique often succeeds, but frequently leaves the cooperative negotiator asking the question «What did I leave on the table?».

Then there is interest-based negotiation. The Harvard Negotiation Project deserves credit for coining this concept. In actuality, smart negotiators have been doing it throughout history. This process focuses on basic interests, mutually satis-

fying options and fair standards wherever possible.

In this process there are four key points: (1) separate the people from the problem (2) focus on interests and not positions (3) create a variety of possibilities before negotiation or deciding what to do (4) focus on objective standards» [15].

As Alexander Polsky resumes, the negotiator's style might be distributive (offer followed by counter offer, etc.) or facilitative (mediator talks privately and facilitates movement of issues, terms and numbers until agreement is reached.): «The back-and-forth of distributive negotiation is hard on the parties. Emotional experiences tend to feel as impersonal as negotiating for a commodity. In a facilitative negotiation, the mediator does not deliver offers as much as concepts, wrapping into the discussion an interest-based analysis through the use of open-ended questions. In this way, the parties themselves can come to their conclusions in an objective manner. It's not who is right or wrong, it's what the jury says, and how the process impacts one's life or business. This is well used in emotional cases. It is driven by issues, and can be much easier and softer on the parties» [15].

Most often, the skills of negotiation in mediation are used by the mediator during, in particular, but not exclusively, caucuses, «shuttle mediation». It should be noted, that the purpose of using any style of negotiation by a mediator should not be to convince the party or to reach an agreement with him or her, as it is in the classical negotiation as a method of alternative dispute resolution. The purpose of the use of negotiation techniques in mediation is to bring the parties closer to resolving their conflict, to remove the confrontation, to shift the communication of the parties in a non-aggressive, productive direction.

David Goldwich points out, that the mediator's skill in negotiation and dispute resolution, combined with his people skills, can often help the parties overcome their differences and reach an acceptable solution [16].

He argues: «The beauty of mediation is its win-win philosophy. The parties are usually emotional and looking to beat their counterpart. (Remember, they may have been on their way to court a few minutes earlier.) Their attorneys are trained to be adversarial and are looking to justify their fees by giving their client a resounding victory, perhaps destroying their opponent in the process. However, the mediator is trained to look for win-win solutions that others may overlook. She is often able to help the parties reach a win-win agreement, or at least an acceptable compromise... Of the three methods of dispute resolution, mediation is most useful in keeping with the spirit of a win-win negotiation. In fact, mediation is a form of negotiation, with the guidance of an expert» [16].

Fourthly, negotiation is considered as an independent phenomenon, that may or may not be relevant to alternative dispute resolution.

The latter approach is characterized by great diversity. This includes all types of negotiations, where their participants first of all establish cooperation, achieve mutually beneficial results. In these types of negotiations, the existence of a dispute between the negotiators is not a mandatory attribute.

Fourth approach includes international (diplomatic) negotiation, political negotiation, business (commercial) negotiation, and so on.

According to Roman Shypka, international negotiation is a special type of interaction between participants in international relations in order to resolve conflicts, settle disputes or establish cooperation in various fields, coordinate foreign policy actions through mutual discussion by representatives of states on bilateral and multilateral levels [17, p. 87].

Yulia Sekunova points out that political negotiation is the most effective method of overcoming political conflicts, as negotiation leads to the solution of problems peacefully and take into account the interests of the parties [18]. She states: «Negotiation is first and foremost a dialogue that helps people with different views, nationalities, religions, desires to find common ground, reach consensus and coexist in the complex conditions of the modern world. And most importantly, political negotiation is the main component of diplomatic protocol and etiquette of current international politics» [18].

Mykhaylo Tsyurupa in his work «Fundamentals of Conflictology and Negotiation Theory» notes that negotiation in the field of business relations – is an active process of effective communication and discussion of positions in the business by the parties, which is aimed to reconcile common interests [1, p. 115].

The same researcher, based on the analysis of the American professional literature, identifies the following types of business negotiations: distributive (negotiation, the slogan of which is the traditional dilemma of the result «win-lose»), integrative (joint solution of problems in order to achieve the desired results for both parties on the principle «win-win»), negotiations on structuring relations (held to create desirable situations of interaction between different organizational structures, for stable cooperative relations), internal organizational negotiation (negotiation of groups, conducted through representatives to resolve conflicts in the production cycle), international negotiation (a form of formal communication between governments and peoples) [1, p. 116-119].

Therefore, business negotiations can include the participation of lawyers as representatives of legal entities or individuals in negotiations with private (e.g. adjustment and conclusion of contracts) and public (e.g. obtaining a license) sectors.

Discussion

Each of the above approaches to understanding negotiation and mediation complements each other. All of them coexist, leaving their impress on the perception of negotiations in a particular community.

What they all have in common is that both negotiation and mediation are aimed at non-conflicting communication between stakeholders in order to reach joint decisions, agree on issues etc.

We can trace a certain tendency in the understanding of negotiations among Ukrainian scholars. Negotiation until the mid-2000s were mostly considered by them in the framework of business negotiations, diplomacy (including international negotiations), political negotiations, but with the rooting of the idea of alternative dispute resolution, mediation in particular, into the social matrix Ukrainian researchers began to look at negotiation as a method of ADR. That is why national investigations of negotiation as a method of alternative disputes resolution, comparing them with litigation, arbitration and mediation have significantly multiplied.

Conclusion

In the course of research on the question of scientific understanding of the negotiation and mediation, we identified four approaches:

- an approach in which negotiation and mediation are differentiated as separate ways of alternative disputes resolution with their own peculiarities;

- an approach in which negotiation is considered as one of the integral elements of the mediation procedure, when the parties communicate directly with each other to reach a consensus on the phases of storytelling, developing options, formation of the text for the mediation agreement. Some scholars even single out a separate stage of mediation – the stage of negotiation;

- an approach in which negotiation is considered as the necessary skill of the mediator, his technique. The success of mediation itself depends on the success of the mediator's mastery of the negotiation technique. The mediator uses the technique of negotiation during joint sessions or caucuses. His goal is not to convince the party in his rightness, but to establish non-conflicting communication between the parties and to reach «win-win» solution for them;

- an approach in which negotiations are considered as an independent way of communication, often not even related to the emergence of a dispute. Under this perspective, the broad concept of negotiation includes international (diplomatic) negotiation, political negotiation, business (including commercial) negotiation, etc.

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MEDIATS Mediation: Training and Society Transformation

MEDIATION IN FAMILY BUSINESS: FINDING A SOLUTION IN FAMILY AND COMMERCIAL ISSUES

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Abstract. *This article is about the aspects of mediation in family business disputes. Nowadays, all developed countries of the world are considered the recognition mediation as one of the most efficient methods to resolve a dispute. A mediator is a professional who acts as a third party to resolve a dispute and helps opponents to communicate with one another, to guide the parties in their finding a solution that satisfies the interests and needs of both parties. In the article we discover a correlation between a family and business interests, analyze the meaning of the "family business conflict" concept, and discover a detailed and structured procedure of mediation in family business disputes. Moreover, it was compared the basic pros and cons of the family business mediation, which helps us to find out the strong and weak sides of such brand new type of mediation.*

Keywords: *mediation, family business, family and commercial issues, conflict, family business conflict, mediation process.*

JEL Classification: *K10, K22, K36, K38, K49, D74*

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Introduction

The essence of our social nature requires us to communicate with other people. Interpersonal communication reflects a common need to establish contacts and get together efforts to achieve a common goal. For productive communication, it must be conflict-free. But each of us is unique in his vision of the world, manifestations of emotions, behavior. Therefore, a clash of opposing opinions and views is simply inevitable.

In our civilized world, we should follow some rules for the realization of personal needs and interests. Such kinds of rules must be regulated by governments and corresponded to the realities of today. Every human being is considered as the main social value. We suppose that family and business, as basic human needs can lead us to various kinds of conflicts.

Nowadays, we cannot imagine our life without a happy family and accomplished business, especially, when they complement each other. That is why mediation in the family business is one of the best alternative ways for resolving conflicts. It could help to save both kinds of interests: a peaceful family life and running a successful business.

This article is focused on the concept and special features of the mediation process in family business cases. In Ukraine, mediation has been slowly but steadily spreading in the family and business mediation separately. Mediation in the family business is out of the academic community, due to the lack of legal regulation of mediation in general and the established practice of the Ukrainian judicial system in resolving disputes.

Theoretical basis

The issue of proper formation and development of existing alternative methods of resolving disputes, the need to legislatively consolidate the globally recognized mediation procedure, the creation of a qualitatively new mechanism for protecting human and civil rights and freedoms covered by the subject of this publication, are attracting more and more attention of scientists. But currently, the family business mediation is almost out of the attention of the academic community in Ukraine and in the developed countries. That is why it determines the relevance of our research.

It was made a significant contribution to the study of mediation in family business by a few Ukrainian researchers as N. Krestovska, L. Romanadze, R. Havrylyuk, N. Kovalko, D. Kostya and others, and foreign scientists as Blair Trippe, Churchill N., Lewis. V., Ortín García, Martín Castejón, Pérez Pérez, Michelle Jernigan, Richard B. Lord, Christopher W. Moore, John J. Upchurch, Rodney A. Max, Stephen G. Fischer, and others.

Aims

The purpose of this article is to study the nature of mediation in a family business, to determine a connection between family and business interests, and to explore the specifics of the mediation process in this field.

Methods

To study the mediation in family business

disputes, we used a few methods of scientific research. The following methods were used: the dialectical method, with the help of which the specifics of mediation in a family business are analyzed in dynamics and interdependence; a comparative method, for disclosing the essence of mediation in a family business by comparing its basic categories. However, the basis of our research is the anthropo-sociocultural approach, which allows us to consider a mediation in family business in a new way as a natural human right as a single creator of society and its full-fledged subject with the help of the social code of public needs.

Results

1. Family versus Business: correlation of the interests

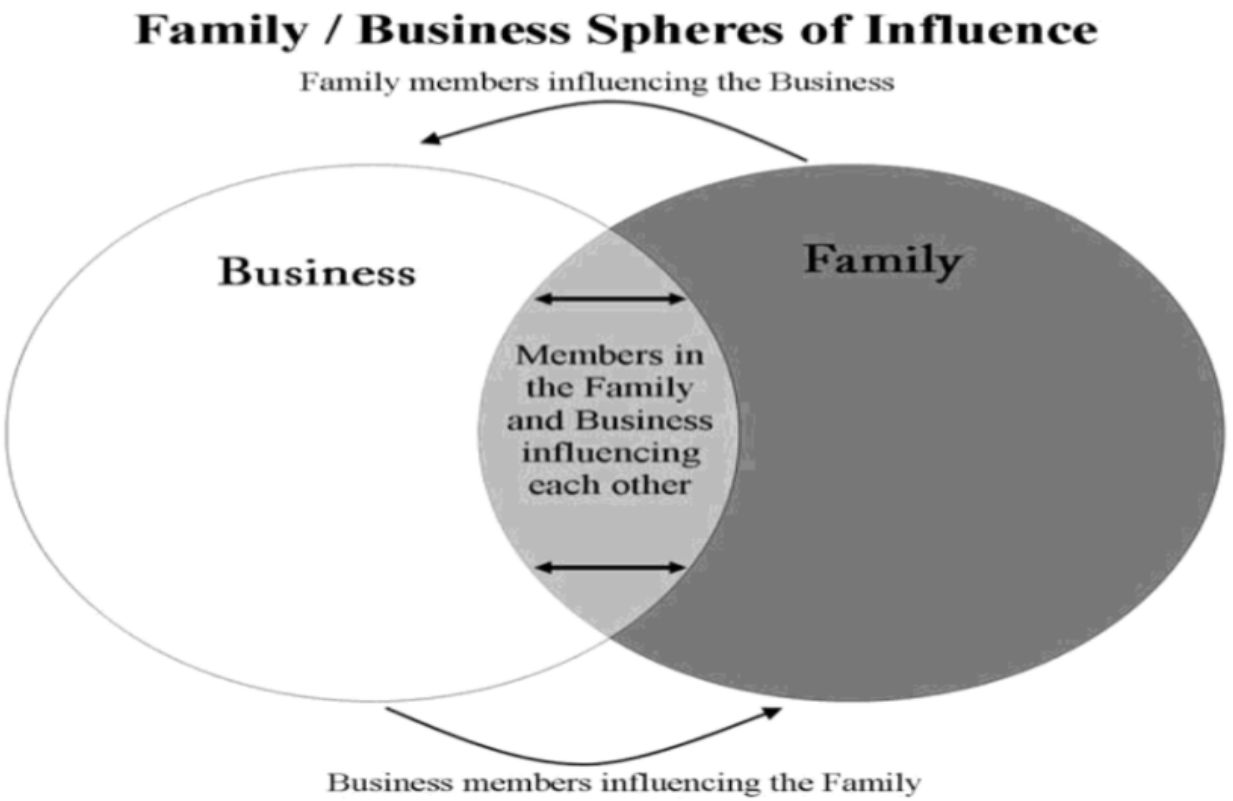
Family support and stable financial independence are the most important requirements for emotional stability and well-being. Frequently when family and employment come together in the form of a family business, they cause each other instability. There are a lot of ways to find a solution in such type of cases as negotiation, arbitration, facilitation, mediation, judicial procedure, etc. Mediation can play a crucial role in resolving such family business dispute, allowing cohesion to move forward.

Conflicts occur in approximately half of the family businesses, and relatives are more concerned with the management of the company and the distribution of profits. Among all employees, relatives are less likely to break discipline, but when they do, it is more difficult for family business owners to resolve the conflict so as not to spoil family relationships.

Above picture shows us the possible process of arising some conflicts between family and business, which makes the family business so sensitive to an argument. Moreover, the consequences might be unpredictable for both business and family. In the business context, unmanaged or unresolved conflict can create devastation in the work environment, waste resources, and prevent the realization of goals. In the family context, unmanaged or unresolved conflict can cause strife, tension, and competition for power – leading ultimately to fractured relationships, resentment, and distrust.

One of the features of a family business is the long term - such companies do not have a goal of earning quick income. The main goal of family business owners is to stay on the market for as long as possible and to inherit the business. Family business owners are reluctant to take big risks that would jeopardize what was achieved by previous generations.

In addition to profit, a family business can



bring many intangible rewards. For example, employees who work in a non-family business have struggled for years to build strong trusting relationships with colleagues, whereas in a family business there is no such problem. Here everyone is focused on one common result that allows you to achieve success.

As we found out, Family Business Center of Ukrainian Catholic University of Lviv Business School together with the Sociological Agency "Fama" during the spring-summer of 2019 studied the peculiarities of the functioning of the family business in Ukraine. The most widespread is a family business, created by several family members and relatives are involved in the work and management of which (30%); every tenth business is founded using a family loan. The depth and breadth of family ties involved in setting up, running, and operating a family business make the network quite spacious. However, most often parents (74%), brothers / sisters [hereinafter in the report - siblings, 44%] and husband / wife (36%) are involved in the development of a family business, they also mainly occupy leadership positions. Most often, it is the parents who own the share of ownership in the business (51% of cases). Family leaders tend not to invite outside managers: most do not have collective governing bodies and do not involve an outside executive director [1, p.6].

The main problem of a family business can be safely called the transfer of work issues and problems in the family and vice versa. Work difficulties affect family life, and conflicts that arise in the family are reflected in the work process.

In those companies where the number of relatives significantly exceeds the optimal indicators (from 3 to 5 percent), there is a risk of losing important key specialists who are not relatives. Therefore, business owners should be careful about recruiting.

The situation when "everyone does everything" or "nobody does anything" also often arises in the family business. At the heart of any properly functioning business is a clear hierarchical system with written job descriptions. This is what makes the business more "working" and less "family".

The application of the family business mediation in Ukraine would be an extremely effective and convenient technique if to consider a high percentage of existing family business corporations. For businesses, especially with relatives, speed and flexibility are the key factors for resolving a dispute.

2. Family Business Conflict: meaning and significance.

Before going into more details about family business mediation, we must define a concept of conflict, its common features for a better understanding of the conflict sources and finding a possible solution.

Conflict (from Lat. Conflictus - collision) is a clash of opposing goals, interests, positions, or views of opponents - subjects of social interaction. Each side does everything to make its point of view or goal accepted and prevents the other side from doing the same.

It is extremely important to recognize conflicts and be able to distinguish them from other phenomena that are similar in their manifestations to conflict. In conflicts, as a rule, there is always a tension between the parties and mutual exclusion of interests. On the other hand, such phenomena as a competition or trials, although they are characterized by the presence of confrontation between the parties, do not tend to turn into hostile behavior, which distinguishes them from conflict in character and nature. For the most complete understanding of the differences between these phenomena, the features of conflict can be distinguished, which are:

• the presence of a situation perceived by the participants as a conflict;

• indivisibility of the object of the conflict, i.e. subject cannot be divided fairly between the participants in the conflict interaction;

• the activity of the parties and the desire to continue conflict interaction to achieve their goals, and not to search for ways to resolve the conflict;

• uncertainty of the result, the difference in goals and behavior of each of the parties [2, p. 11-13].

As Blair Trippe mentioned, "mediation works best when the issues can be well articulated and are fixed in time. Conflicts in family business are not well bounded by circumstance because they typically involve many stakeholders whose issues are very intertwined and commingled. In addition, these issues are not static; they change as the family changes and develops" [3, p.16]. That is why

family matters are indeed always very emotional, and the causes of such conflicts usually have hidden components. Those same components could be the "keys" for a peaceful settlement of a dispute.

Each family has a special and unique structure. Family businesses often are usually flexible when it comes to innovations. Each owner knows every part of his business from personal experience. Today no less important is a correct setup of communication in the team. "The fact that many family members spend a long time together does not imply that there is good communication between them. Good communication within the company depends on several factors [4], among which are, in first place, one called "active listening", in that to establish good communication one must first be a good listener. Secondly, the appropriate means of communication must be chosen. In family businesses, verbal communication is overused; although effective, this form of communication is sometimes vague. Written communication can clarify points and is durable; it also achieves compromise between family members. It is important to know when to use written communication and when to use other forms of communication. Finally, in third place, is the need to establish an open, honest communication with sensitivity. That is to say, one should always speak with clarity and honesty, but weighing words carefully, which is particularly important when it comes to family matters" [5, p. 27], as Ortín García, Martín Castejón and Pérez Pérez said.

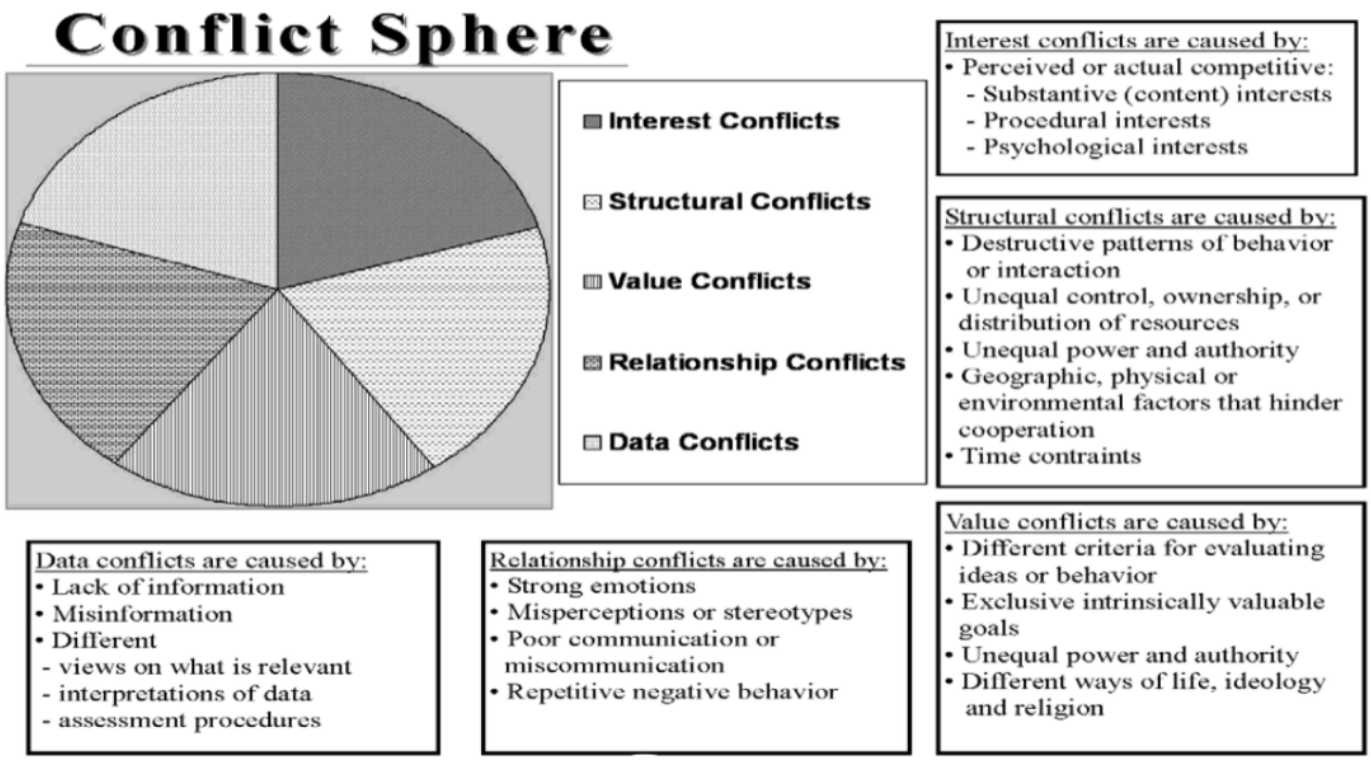
We agree with Christopher Moore [6] that "the conflict sphere" plays an important role in various aspects of the family business. The next illustration demonstrates conflict into five basic causes, with each category containing a few specific sub-causes.

3. Mediation procedure in family business cases

Family business conflicts are a complicated process that lasts for years and could be resolved by courts at different stages of judicial procedure. As we know, there are a lot of distinct alternative ways to resolve a dispute, where one of them is mediation – an entirely effective method to find a solution.

Currently, mediation is a relatively new thing, but a quite promising trend of legal services in Ukraine. At the legislative level in Ukraine, the mediation procedure still is not established, which complicates its development and dissemination. Despite this, mediation is used successfully in Ukrainian society.

The mediation in family-business conflicts is more than just involving a neutral third party (mediator) to guide the parties to settle. As we mentioned above, such conflicts are always very



emotional, and the causes of them often have hidden components. We share Michelle Jernigan's and Richard B. Lord's opinions who wrote: "While statutes, case law, or procedural rules throughout the country may define mediation differently, it is generally thought of in the family business context as a confidential process whereby a trained professional neutral helps promote healthy family communications and negotiations for the purpose of resolving conflict. In this same context, the mediator is a neutral, impartial facilitator who: 1) develops procedures for problem solving, communication and solution implementation, 2) serves as a translator of family and business members' communications, promoting empathy and understanding 3) educates family and business members on how to negotiate and communicate more effectively, 4) serves as a reality-tester, exploring the validity of members' views and positions, 5) assists the members in reconciling differing interests, diminishing hostility and establishing trust, and 6) assists the members in drafting action plans for solution implementation" [7, p. 6]. Thus, the role of the mediator is to manage the process for the parties so that they can speak, he must help them better to understand the problems and help them to reach a solution that satisfies their needs.

Family business mediation is a significant example of resolving a dispute with a neutral mediator, which is based on the work and interests of the parties, not their position. We propose to characterize some advantages and disadvantages of mediation in the family business.

Mediation in family business	
Pros	**Cons**
Confidentiality. Every mediator must keep all information that he possesses in secret.	In the process of mediation, it could be defined that the parties do not have any business argue, but it is only a family issue. That is why it stops to be family business mediation.
Real-time economy. The process of mediation is much faster than judicial procedure, which can last for years or even decades.	It is almost impossible to put yourself in other's shoes. For mediator it is a specific dimension to combine business and personal interests.
Save money. It is a cheaper way to resolve a family business dispute, especially for a small one.	Inequality of the parties in power. The side that has more wealth will feel the advantage.
Mediation helps to prevent the arising of common conflicts in the future.	Big number of participants in the process. Despite the relatives, such disputes can affect business partners, stakeholders, etc.
Guarantee of a decision's fulfillment. If it were a successful mediation procedure, the parties would reach the agreement. If someone breaks the agreement, there will be a responsibility for him.	During resolving a family business dispute, there is a high probability of losing a business or even a family itself.

Every kind of process has some stages and periods. Mediation is not an exception. The process of mediation (even in family business cases) consists of phases (stages), each of which has its purpose and structure.

It is necessary for every successful mediation process, that each phase is coming after reaching all aims and tasks in the previous one.

We believe there are three main stages (phases) of family business mediation. Let us to describe every of them.

1. Preparing for mediation.

Preparation is a crucial step in the mediation

process. At this stage, the mediator has the opportunity to lay a solid foundation for a successful mediation. The preparation stage for a joint meeting involves working with two important components: establishing contacts with the parties and organizing space for mediation.

The mediator first talks to each participant in the conflict separately. Such a conversation is conducted in order to: inform the participants about the mediation procedure, the role of the mediator and participants in it and obtain consent to participate in mediation; explain the principles and rules of mediation and obtain the consent of the parties to adhere to these rules; make sure the meeting time is convenient for everyone; answer the questions of the parties to the conflict.

"The importance of this "introduction" by the mediator may be greater in the family business mediation context than in other types of mediations. This is due to the complexity of the interrelationships of the participants. The mediator will also make any disclosures that may be relevant to the members' perception of her neutrality, as well as any clear or potential conflicts of interest" [7, p. 8], as Michelle Jernigan and Richard B. Lord said.

Before mediation, it is necessary to prepare the room for the general meeting: arrange chairs (better - around), bring all the documents and writing materials necessary for work, and the like.

2. Mediation process

First, the mediation starts with the introductory part. At this stage, the mediator introduces the participants to the mediation procedure and its principles, discusses the mediation rules with the parties, and answers the parties' questions. Before proceeding directly to the discussion of the content of the conflict situation, it is necessary to make sure that the parties understand the essence of the procedure, its principles and agree to abide by the rules and participate in mediation.

Secondly, the next part of the mediation process is a storytelling and identification of the problem. We agree with John J. Upchurch, Rodney A. Max and Stephen G. Fischer that "the central part of the mediation is the development of procedural and substantive solutions both long-range and short-range. As to procedure, the family participants will attempt to establish the following: protocols for communications; means of dealing with one another; means of making decisions; allocation (of whatever the subject matter or issue is); alternative dispute resolution mechanism to resolve future disputes" [8, p. 6].

The final part of the mediation process is the solving of the problem. Here the parties are allowed to put forward possible options for resolving the conflict, discussing these options with a mediator, and making a final decision. If passions heat up during the discussion and it turns into a skirmish or the parties evade constructive dialogue under various pretexts, the mediator announces the need for caucuses to the parties.

3. Ending of the mediation

Unlike litigation, mediation is informal. But for the solution of the conflict to be effective and there are few positive consequences, it is necessary to draw up an agreement between the parties. The agreement clearly defines the ways of resolving the disputable situation, enshrines the rights and obligations of all participants.

The mediator at the stage of concluding the transaction helps the parties:

- determine in detail the solution (way of solving) each of the problems indicated by the parties that arose because of the conflict;
- check the agreements for realism (the parties' ability to complete the specified amount of work within a certain time frame);
- prepare the parties to the dispute to present the agreement they have reached to third parties (parents, head teacher, psychologist, and others), if there is such a need;
- determine the future relationships (interaction, communication) of the parties to the dispute.

The task of this stage is to receive feedback on the results of the work by the mediator. The parties assess, first, how satisfied they are with the agreement reached; secondly, how satisfied are they with the very procedure of negotiations with the participation of a mediator; and, finally, they assess their emotional state: it became easier for them after the mediation session, the psychological stress has dropped or, conversely, increased, etc. "

The mediator organizes the preparation of the plan, clarifies the wording, and writes down the decisions taken. When developing an agreement, attention is focused primarily on those points that require implementation in the first place, which are mandatory. This prepares the foundation for moving on to the next, more challenging issues. Often

the parties agree on the essence points, but they are not satisfied with the words recorded in the document, therefore the mediator must pay special attention to the fact that the agreement is acceptable and according to the stylistic aspect.

Discussions by the parties on the possible consequences of non-implementation of the agreement play a vital role at this stage. The parties should imagine the implications and actions of each other if one of them fails to implement the agreement.

Conclusions

Today, mediation is one of the most popular alternative ways of settling disputes (conflicts) in the developed countries of the world. It provides for the involvement of a conciliator (mediator) who helps the parties of the conflict to establish the communication process, to analyze the conflict situation in such a way that the parties can independently choose the solution that will satisfy the interests and needs of both parties of the dispute.

When we talk about conflicts in the family business, we mean three levels: family interests, business interests, and property interests. And a dispute that has arisen at one level can quickly move to others. Every family business is unique and complex in its way, so standard solutions do not always work.

Mediation in the family business is that universal method of alternative dispute resolution, with the help of which it is possible to establish relationships both within the family and within the business, as interrelated and complementary categories.

Mediation is the best way to resolve this type of conflict, as it allows you to restore trust and relationships, and thus preserve the strength, assets, and values of the family and the company.

Unfortunately, nowadays mediation in Ukraine, in contrast to other European countries, is not regulated by law, which significantly reduces the effectiveness of its dissemination in our country. For example, there is no clear mechanism for training and certification of mediators, which is a consequence of the emergence in the Ukrainian mediation space of many entities that position themselves as professional mediators, but, unfortunately, do not have the appropriate profession to conduct mediation at the appropriate professional level. All this requires legal regulation at the legislative level.

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MEDIATS Mediation: Training and Society Transformation

MEDIATION IN CONFLICT MANAGEMENT: GENERAL APPROACHES AND PRACTICES IN UKRAINE AND EU

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Abstract. *In the context of global changes and the intensification of conflict situations in society, the problem of their effective resolution becomes especially relevant. The experience of leading countries confirms the high effectiveness of mediation in this area. The purpose of this paper is to study the general approaches in mediation, its role in conflict management based on the analysis of best EU practices. Using a set of general scientific cognition methods (analysis, synthesis, comparison, etc.), the main approaches to defining the concept and components of the mediation process in Ukraine and European countries are analyzed. The key principles and stages of the mediation procedure are summarized too. Quantitative and qualitative indicators of mediation implementation for a number of countries have been identified on the basis of comparative analysis. The peculiarities of the spread of mediation in Ukraine are considered, the main obstacles to the active spread of alternative conflict resolution in the state are identified. With the method of generalization, the results of the implementation of a number of projects in the field of law and mediation in Ukraine are presented, which made it possible to determine the further trajectory of dissemination of mediation practices in the Ukrainian reality. As a result of the study, the proposals to increase public awareness and trust in the mediation procedure are provided too. The results of the study may have the practical interest to scientists in the field of mediation, conflict, law and management, as well as to NGOs, universities and other stakeholders.*

Keywords: *mediatiom, dispute, conflict, dispute resolution, alternative dispute resolution, conflict management.*

JEL Classification: *J29, J39, J59, K49*

Formulas: Fig.: 1; tabl.: 1; bibl.: 16.

Introduction

In the conditions of transformation of all spheres of life, people's ability to effectively communicate and resolve conflicts becomes important. The consequences of conflicts are always different and quite contradictory. They, on the one hand, destroy social structures and create a lot of problems and not rational expenses, and on the other - conflicts have creative, integrative character. The second means that the resolution of the conflict triggers a mechanism that is the impetus for solving many problems and ultimately for achieving social justice.

Only such society can consider itself democratic, when it sees in each person a unique personality, seeks to harmonize social relations. Such an emphasis is made in Ukrainian legislation, in particular, the Constitution of Ukraine enshrines the provision that human, its rights and freedoms are recognized as the highest social value [3]. At the same time, the realities of modern life show that Ukrainian society is full of various, large-scale conflicts at different levels, which necessitates the search for effective ways to resolve and prevent them, to avoid sharp confrontation between the parties.

Congestion of courts, duration and high cost, inflexibility and over-regulation of the judicial method of resolving conflicts in the field of civil, family, labour and other areas of law necessitates looking for alternative approaches to dispute resolution (ADR). Particular importance has the possibility of using mediation procedures - an informal and flexible dispute resolution process.

In Ukraine, the use of mediation as a tool for conflict resolution has not yet become widespread among the country's population due to a number of certain obstacles and lack of awareness. That is why it will be expedient to pay additional attention to the study of the essence and role of mediation in conflict management, as well as to consider the prospects of using the best European mediation practices in Ukraine.

Literature Review

Many works of modern scientists and practitioners in the field of mediation, conflict management, jurisprudence, organization management, etc. are devoted to the study of alternative conflict resolution methods. It is proved that the implementation of mediation takes the interaction between the parties of the conflict to a new level and can significantly reduce the cost of resources to resolve them.

Scientists Julian Bergmann, Toni Haastrup,

Arne Niemann and Richard Whitman (2018) "Introduction: The EU as International Mediator – Theoretical and Empirical Perspectives" represent key achievments of European Union mediation practice and identify different conceptual and empirical perspectives from which it can be analyzed, including conceptual clarification of EU mediation practice and institutional architecture for EU mediation activities. Their research devoted to ex-amining the drivers of EU mediation, EU mediation roles and strategies, and EU mediation effectiveness [1]. Reseacher Natalie C. Brandenburg (2017) "EU Media-tion as an Assemblage of Practices: Introducing a New Approach to the Study of EU Conflict Resolution" introduces a new approach to the study of EU mediation and conflict resolution. The study advocates a practice turn and develops a framework for studying EU mediation as an assemblage of practices [2]. Yu.V. Prykhodko (2018) "Mediation as an alternative method of resolution of conflicts and its per-spectives in Ukraine" paid additional attention on the issue of mediation, its role in resolving disputes, principles and stage, and also whether it needs to be consolidated at the legislative level [15]. Reseacher and mediator Nataliia Mazaraki (2016) "Me-diation in Ukraine: problems of theory and practice" investigates Ukrainian and in-ternational experience of mediation. She belives that the introduction of alternative ways of dispute resolution along with the justice system is the most effective pre-requisite for resolving legal conflicts and disputes [7]. T.O. Podovenko (2016) "Me-diation Institute: international experience and Ukrainian prospects" describes the legal nature and main point of mediation as an institute of alternative resolution of the private-legal disputes based on the worldwide experience of developed countries [13].

Despite the research available in the field mediation and conflict resolution, it remains a problem to adapt of the experience of leading countries for implementation in Ukraine. The direction of the increasing public awareness of the mediation procedure and the implementation of the necessary legislative changes in the field of conflict resolution also needs further consideration.

Aims

The purpose of this study is to consider and analyze the mediation procedure as one of the alternative ways to resolve conflicts and identify areas for implementation of the experience of European countries in Ukrainian practice of conflict management.

Methods

To study the quantitative and qualitative indicators of mediation development in some European countries, we used the data provided in the report of the Chairman of the European Center for Dispute Resolution for 2018.The following methods were used: a comparative analysis method to compare dissemination of mediation in different countries and evaluation of its success; general scientific methods of comparison, analysis and synthesis of information to determine the features of mediation in Ukraine and EU countries; abstract logical method - for analytical generalization and formulation of conclusions.

Results

The crisis of the stereotyped understanding of the essence of the conflicts, their role and ways of resolving them has affected the public consciousness. In recent years, the intensification of conflicts between different social groups and the crisis in the economy have led to a significant overload of the judicial system (particularly in Ukraine), the dis-satisfaction of the parties with the cost, complexity and timing of the dispute resolution process. That is, the need for a new, more effective tool for resolving the conflict was gradually formed.

In European practice, the tools of mediation have been used for this purpose for many years as a method ADR. Mediation is a type of alternative dispute resolution, a method of resolving disputes with the involvement of a mediator, which helps the parties of the conflict to resolve the situation. So that they can choose the solution that would meet the interests and needs of all parties to the conflict.

The term "mediation" comes from the Latin "mediatio". Analysis of the legal literature suggests that there is no single approach to the definition of mediation. Regarding the legislative definition of mediation, the draft law of Ukraine "On Mediation" (adopted in the first reading by the Verkhovna Rada of Ukraine on 15.07.2020) proposes to define mediation as a voluntary, extrajudicial, confidential, structured procedure, during which the parties with the help of a mediator (mediators) try to resolve the conflict (dispute) through negotiations [6]. The legal definition of this term is given in the UNCITRAL Model Law on International

Commercial Conciliation with Guidelines for Its Implementation and Application [11], according to which mediation is a process where the parties involve a third party or persons to assist in peaceful settlement disputes arising in connection with a contract or other legal relationship, or related to them [5].

It is believed that mediation can resolve any conflict in which the parties really want to resolve the issue because mediation poses minimal risk. At worst, it's just a waste of time. If no agreement is reached in the mediation process, the parties may apply or return to court or other proceedings.

In most countries of the world, mediation is a recognized and widely used method of resolving conflicts between people. In the United States, only 5% of cases filed in court are not sent for a peaceful settlement [13]. Logically, that an agreement reached in the process of resolving the conflict, and not a solution - in accordance with the will of, for example, an arbitrator or a judge, is accepted and recognized by the parties. It is diffi-cult to disagree and disrespect the decision in which they personally took an active part, it is much easier not to recognize and appeal the judge's decision. Indeed, as defined by Martin Wright, the Council of Europe's expert on mediation and restorative justice, me-diation is a human process, not a judicial one, which modernizes the criminal process and creates respect for justice [14].

In order to properly understand the process of mediation, it is necessary to focus on its principles, which are based on this whole method, and which reveal all the benefits of mediation:

1. Voluntariness or Willingness. All parties of the conflict voluntarily choose the decision to participate in the negotiations and realize that a compromise can only be reached through cooperation. It also makes it possible to stop the settlement process at any stage, which does not entail negative consequences. This is the first advantage of mediation over a court decision.

2. Confidentiality. The clearness of the mediation procedure is ensured by the obli-gation of the mediator and the parties not to disclose to third parties information that be-came known in the conciliation process. A mediator may not disclose the course and re-sults of mediation if there is a direct prohibition of the parties or it is against the law.

3. Impartiality and neutrality. One of the most important principles of mediation is that a mediator is an independent party that has nothing to do with any party of the con-flict. The mediator must possess itself so as not to take anyone's side of the dispute. After all, the mediator only helps the parties to reach a consensus, not to find the culprits and the right. Mediator has to avoid conduct that would give rise bias against one of the par-ties.

Mediation is also characterized by such principles as the sincerity of intentions to resolve conflicts, division of responsibilities, the competence of the parties, informality and flexibility of the procedure. The principles and features of mediation make it possi-ble to feel that, along with the ease and transparency of the procedure, it is a rather diffi-cult and serious process, which has its own specific requirements, especially those relat-ed to clarity and consistency. In order for mediation to be successful, it is necessary to clearly follow its stages, it has five of them (Fig. 1).

Noteworthy to mention, that in recent decades, mediation has been successfully de-veloped in many countries. The United States, Canada, Austria, Great Britain, the Neth-erlands, Spain, Germany, Norway, Finland, France, Poland, Latvia and other European countries have adopted special laws that protect the mediator's right not to disclose information obtained from parties in mediation [13]. Some countries have adopted special legal norms, according to which the parties must try to resolve their dispute through me-diation before participating in the trial. The practice of mediation is spreading in the countries of Eastern Europe and the former republics of the Soviet Union. Significant experience is already available in Poland, Albania, Russia and other countries.

The effectiveness of mediation, proven in practice, is becoming more widespread in the world. For example, EU Member States are required to comply with and report on the application of 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. Ukraine, as a member of the Council of Europe, also has obligations to use mediation. In general, countries that use mediation use it to resolve family, administrative, criminal, labor, commercial, and other disputes. There may be some differences in the number of appeals to mediation procedures depending on the specifics of individu-

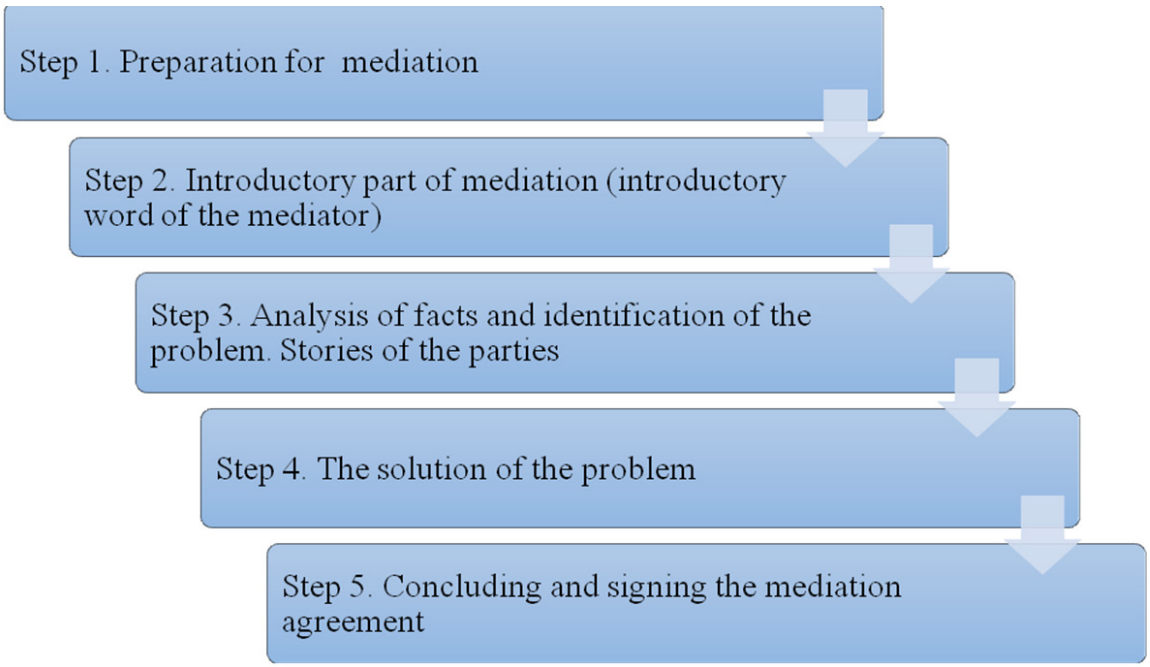

Figure 1.Key steps of successful mediation*

** Compiled by the authors based on the source [15].*

al countries (Table 1).

From table 1 we see that, for example, Turkey has significant indicators of conduct-ed and successful mediations compared to other countries in the field of civil and crimi-nal mediation, and the number of family mediations is very small, although all of them were successful. Poland, having a significant number of appeals to mediation procedures, has average indicators of their success. Against this background, Ukraine middle indica-tors, although given the population of our country and the low prevalence of mediation practices, it has great potential for a significant increase in the popularity of mediationpractices. Thus, mediation as an essential component of conflict management in organi-zations is becoming increasingly popular due to its effectiveness.

If we consider specific examples, according to the CPP Global Human Capital Report-2008 [4], the cost of conflict is primarily affected by the following factors: more than 50% of HR managers spend more than eight hours a week dealing with conflicts; more than 50% of top managers - more than four hours a week; the working capacity of people involved in the conflict is reduced by more than 40%; up to 30% of working time is spent on resolving the conflict; every fourth employee admits that he or she avoids participating in the conflict using a sick leave; the work of project groups in 70% of cases is not completed due to team conflicts; the cost of replacing and adapting a new employee is 150% of his annual salary.

Note that the spread of the practice of mediation in Ukraine is complicated by the presence in our culture of the attitude to solve the problem from the standpoint of force or power and avoid personal responsibility for what is happening, the tendency to look for the culprit from the outside.

At the same time, mediation came to modern Ukraine in the mid-1990s, as an es-tablished technology. Since 1997 (in Odessa) first mediation centers began to work [10].

The largest public associations currently operating in Ukraine, which provide train-ing for mediators and provide mediation services, are:

- National Association of Mediators of Ukraine (established in 2014);
- Ukrainian Academy of Mediation in Odessa (established in 2014);
- Center for Law and Mediation in Kharkiv (established in 2016);
- Podolsk Mediation Center in Vinnytsia (established in 2016);
- League of Mediators of Ukraine (established in 2017).

Also in 2020, within the framework of the

Table 1

Quantity and quality of mediations in some European countries and associate members of the European Union

County	Civil Mediation		Family Mediation		Criminal Mediation		Administrative Mediation	
	Amount of conduted mediatios	% of successful mediations	Amount of conduted mediatios	% of successful mediations	Amount of conduted mediatios	% of successful mediations	Amount of conduted mediatios	% of successful mediations
Finland	1870	64,7	807	89,2	n/d	n/d	n/d	n/d
Norway	2037	63,9	2100	82,9	n/d	n/d	n/d	n/d
Italy	183977	42,2	н/д	н/д	n/d	n/d	n/d	n/d
Latvia	135	80,0	135	80,0	1265	47,8	n/d	n/d
Slovenia	970	11,9	130	11,5	722	65,8	n/d	n/d
Poland	6638	6,6	4316	44,4	4176	55,9	54	55,5
Turkey	4097	94,6	36	100	12261	63,7	n/d	n/d
Georgia	24	45,8	7	57,1	720	39,9	n/d	n/d
Republic of Moldova	149	62,4	33	33,3	16	68,8	6	66,7
Ukraine	600	66,7	2000	95,0	175	42,9	240	83,3

Erasmus + project "Mediation: Training and Society Transformation / MEDIATS", the Federation of Mediation of Ukraine [9] (KROK University, Kyiv) was established too.

According to the Ministry of Justice of Ukraine, experiments in courts have been actively conducted in Ukraine for the last 10 years. In 2011-2014, within the framework of the Council of Europe's program "Transparency and Efficiency of the Judiciary" in four pilot courts of the country (Bila Tserkva City Court of Kyiv Region, Vinnytsia District Administrative Court, Administrative Court of Appeal of Donetsk Region and Ivano-Frankivsk City Court) an experiment was performed [16].

A similar initiative was implemented in 2014-2016 by the NGO Legal Aid Center with the support of the USAID New Justice Program and in cooperation with eight local courts in Volyn Oblast and the Volyn Oblast Appeal Court. [8].

In 2018, a large-scale project "Erasmus +" "Mediation: Learning and Society Transformation (MEDIATS)" was launched, aimed at enabling Universities to be one of the key players in facilitating the processes of mediation in Azerbaijan, Georgia and Ukraine to enhance democracy and objective problem resolution by acquiring best Euro-pean practices [9]. Within the project, with the support of leading mediators from the Netherlands, Spain and Latvia, representatives of Ukrainian universities underwent a comprehensive training on the preparation of mediators. An active promotion campaign is also planned to spread the values of mediation among the population of the country, to raise awareness of the possibilities and benefits of using mediation as an alternative method of conflict resolution.

It should be noted that the study of the results of previous projects, as well as communication with stakeholders within the existing MEDIATS project, revealed that many people are willing to try the procedure of alternative conflict resolution. But there is a significant share of those who refuse further participation at the stage of entering the mediation because they do not want or are not ready to seek a solution of their dispute with the help of a mediator. Voluntary execution of the decision without outside control is also questioned. Accordingly, in Ukraine, mediation is recognized as quite effective in resolving conflicts, but citizens are not ready to use this method of resolving the dispute, due to its lack of settlement and ignorance of the population about the benefits of mediation.

Discussion

Of course, out-of-court dispute resolution cannot completely replace the judici-ary, but it can help them and partially relieve them of the burden. For example, in many countries, any case (commercial, civil, family) must be referred to mediation before being tried in court. Only when the parties do not agree, the judge will con-sider the

case in court. But even if the case is heard in court, the parties will be less emotional and will allow the judge to focus on the case rather than working with their emotions.

Thus, our society, various organizations, institutions and all levels of govern-ment must develop, study and use new, more advanced systems for conflict preven-tion, management and resolution. That is why it is time to turn to alternative ways of resolving disputes, which will be able to partially relieve the courts and restore pub-lic confidence in them. In addition, alternative methods allow the parties to use the methods that are most appropriate for resolving a particular dispute and meet the interests and requirements of the parties.

High efficiency of mediation is determined, first of all, by its basic principles as neutrality, voluntariness, confidentiality, competence, privacy, speed and effi-ciency. The legislative definition is required by the following issues: consolidation of the range of cases in which the appointment of mediation is possible; settlement of requirements for mediators and procedures for their election; determination of the basic principles and forms of mediation, conditions for mediators to receive infor-mation on the case and other important procedural issues. In our opinion, it is expe-dient to use the experience of the Netherlands, Latvia, Poland, Bulgaria and other European countries.

Conclusions

Based on the results of the study of European countries experience , we can coclude that Ukraine should focus on addressing the following issues for the effective implementation of mediation procedures: increase confidence in forms of alternative dispute resolution, including mediation, and public awareness of the opportunities provided in the process of alternative dispute resolution; ensure the availability of alternative dispute resolution services, for example, through the introduction of the practice of free legal aid to participation in free mediation; ensure the availability of qualified providers of these services. The first step in this direction could be the creation of accessible training programs and their scaling (master programs in mediation; the second step - the formation of a sustainable quality assurance system (creation of registers of mediators, development of standards for licensing, accreditation, certification, monitoring of the activities of service providers for alternative dispute resolution). It is also important to provide appropriate incentives for stakeholders to apply alternative dispute resolution practices: lawyers still perceive mediators as competitors; judges, in general, do not understand the importance of integrating mediation into litigation and their balanced ratio and do not see the benefits for themselves in implementing such a system; the parties of the conflict are limited by the lack of information on the possibility of using alternative dispute resolution procedures instead of the court, weak quality guarantees and low awareness of available specialists.

The implementation of mediation methods to resolve disputes and master mediation techniques will help to resolve conflicts more effectively, starting with small disputes, which very often cause more serious conflicts and lead to significant losses for both citizens and organizations.

Acknowledgements

These studies will be relevant for scientists in the field of conflict management and dispute resolution, if they have interests in the study of state alternative dispure resolution and mediation, as well as implemention of international practicies of mediation. In addition to this research, they will help to find new directions for the implementation mediation in Ukraine and increasing aware-ness about mediation in the society.

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MEDIATS Mediation: Training and Society Transformation

THE PLACE OF MEDIATION IN THE SYSTEM OF SOCIAL SCIENCES

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Abstract. *In modern conditions, mediation has been increasingly becoming the subject of discussion to determine its place in the social sciences. In this regard, the need for an analysis of the social sciences, which are most closely related to mediation, will be updated. The aim of the article was to determine the structural components of the concept of "mediation" and to determine the place of mediation in the system of social sciences. The main problem in determining the place of mediation in the social sciences is the lack of a unified approach to this issue. Used the content analysis, the following components of the concept of "Mediation" have been identified: process, conflict, mediator, parties. It was found that mediation is an interdisciplinary science, which is at the junction of a number of social sciences: law, economics, sociology, and psychology. Based on the results of the study was made conclusions: today, mediation does not have its definite and fixed place in the system of social sciences. It has been established that at present mediation cannot be considered only within the framework of one science. The scientific results obtained in the study could serve as the basis for the development of the conceptual foundations of mediation and the disclosure of the practical potential of this process in conflict resolution.*

Keywords: *mediation, system of social sciences, jurisprudence, economy, sociology, psychiatry, conflictology.*

JEL Classification: *K49, I23, M19, Z13, K40*

Formulas: 3; fig.: 1; tabl.: 1; bibl.: 39.

Introduction

Today, mediation is increasingly the subject of debate over its place in the social sciences. The development of society creates the need for a more civilized and effective resolution of new conflicts. Today's old institutions of conflict resolution are no longer relevant and do not cope with new challenges. Society needs an effective and rapid resolution of emerging conflicts. It is to solve this problem and there are alternative ways to resolve conflicts. Traditionally, they include: mediation, expert determination, negotiation, facilitated negotiation, conciliation, arbitration, med-arb, adjudication, mini-trial, fact-finding, dispute review boards, private judging, early neutral evaluation, multi-door courthouse, settlement conference, summary jury trial, etc. As we can see, mediation is only one of the types of alternative dispute resolution. Mediation occupies a special place in this system because it is characterized by the participation of a third neutral, impartial, and uninterested in this conflict party - the mediator. The benefits of using mediation are that disputes can be resolved quickly, thus lessening the strain on relationships. As the process of mediation is much faster, the cost is much lower than the costs of litigation. The process is entirely confidential. Thus the conflict is not exposed to public view and information is kept private. Mediation is conducted in an informal setting (García-Raga, Grau & López-Martín, 2017; Lezak, Ahearn, McConnell & Sternberg, 2019; Li, Li & Lin, 2019; Agapiou, 2015). The parties can be more relaxed. Since the emphasis is on problem-solving, mediation is non-confrontational. The parties find their own solutions through the facilitation of the mediator and therefore, the solutions are usually more workable and permanent.

Establishing a concept of mediation is not an easy task. This is because mediation is not viewed consistently by the various countries using it to resolve domestic conflicts. As a result, depending on the view taken for this supplementary mechanism of conflict resolution, there will be a dissonance as to the enumeration of its core elements, the mediator's performance, the description of its actual objectives, its informative sources – in short, an understanding of its basic structure, which will invariably give rise to an array of different concepts (World Bank Group, 2017; Agapiou, 2015; Bogdanoski, 2009; Ebner & Zeleznikow, 2015; Feasley, 2011). The task of the mediator is to assist the parties in concluding a certain agreement on the dispute, while the parties fully control the decision-making process on the settlement of the dispute and the conditions of its resolution. Thus, mediation is aimed at resolving a certain social conflict. This, in turn, has generated a lot of controversy in the scientific literature regarding the practical

field of mediation. (Rubinson, 2017; Schulz, 2020; Kammerhoff, Lauenstein & Schütz, 2019; Radulescu, 2012; Gendron, 2011; Vinyamata, 2010). In this regard, the question arises of clarifying the substantive elements of the concept of Mediation, as well as determining its place in the social sciences. This concept combines the elements of law, psychology, conflict, sociology, management, and economics. These provisions have become the scientific priority of our study.

Literature Review

Based on a terminological analysis of the concept of mediation, it can be argued that mediation can be understood as the process through which a third party, called a mediator, intervenes technically and impartially in the conflict or even in the existing relationship between the parties, so that they may be able to voluntarily reach a conciliation agreement (Bogdanoski, 2009; Piren & Lozhkina, 1995; García-Raga et al., 2017; Lezak et al., 2019; Li et al., 2019; Ruhe, 2015; Gendron, 2011; Shamlikashvili, 2014; Carrasco, 2016; Gartner, 2013). Thus, without prejudice to the differences and similarities between the most varied concepts of mediation, as shown above, it is worth pointing out that it is possible to extract from these statements a common core, without which, in our view, one cannot even discuss such matters. These are the key elements of mediation: the parties (Piren & Lozhkina, 1995; Lezak et al., 2019; Li et al., 2019; Ruhe, 2015; Neskorodieva et al., 2019; Radulescu, 2012; Gendron, 2011; Shamlikashvili, 2014; Carrasco, 2016; Atkinson, 2018); the mediator (Feasley, 2011; Neskorodieva et al., 2019; Bogdanoski, 2009; Li et al., 2019; Ruhe, 2015; Radulescu, 2012; Shamlikashvili, 2014; Atkinson, 2018); the dispute (Radulescu, 2012; Ebner & Zeleznikow, 2015; Polishchuk, 2014; Carrasco, 2016; Association of Family and Conciliation Courts, 2012; Gartner, 2013) and the intention (Radulescu, 2012; Ruhe, 2015; Korinnyy, 2019; Sereda, 2017; Gendron, 2011) to promote the agreement to end the litigation (Bogdanoski, 2009; Korinnyy, 2019; Sereda, 2017; Gartner, 2013). However, we tend to disagree with this view. This is because, in this hypothesis, it could not be said that there was mediation between the parties when the volitional intention of one party to achieve a mutually agreeable solution, capable of resolving a dispute, arises only during the course of the mediation process. Such an array of concepts as to what constitutes this body of mediation has become an obstacle to the application of mediation in different countries, inasmuch as it remains a little-used process nationally. The dogmatic imprecision around mediation only reinforces insecure and hesitant attitudes towards the potential of this process.

The study of mediation is becoming increasingly popular today, but the question of determining its place in the social sciences still remains open. This process demonstrates the technical and structured nature of the legal relationship between the parties during the course of the mediation – which, like the traditional system of dispute resolution, is designed to provide solutions for people in dispute. In this respect, one can perceive the point of contact between mediation and the traditional system, which tends to promote local dispute resolution habits. Dispute resolution is marked by the traces of its unquestionable instrumentality, which gives rise to the emergence of a unified methodological vision that must prevail over procedural law. It is for this reason that mediation is currently linked to the branch of procedural science. Professor Shamlikashvili Ts.A. (2014) “Mediation as an interdisciplinary science and a socially significant institution” emphasizes that media is based on different fields of knowledge, which ensures its effectiveness. Consideration of mediation as an interdisciplinary science and the formation of its scientific base is a necessary condition for its further successful integration into various spheres of society of the XXI century (Shamlikashvili, 2014). Researchers Neskorodieva I., Rodchenko V., Parkhomenko O., Kvitka Y., Kvitka A. (2019) "Determination of the system of factors developing commercial mediation in Ukraine" consider mediation through the prism of business conflicts, economics and market relations. They note, therefore, the threat of adverse effects of commercial conflicts, the issue of implementation and development of business mediation is relevant as a rapid method of conflict resolution on terms of mutual agreement of the parties' interests in view of the lengthy terms of court proceedings (Neskorodieva et al., 2019). Scientist Korinnyy S.O. (2019), in the dissertation research "Introduction of mediation in the administrative process of Ukraine" examines mediation from the standpoint of administrative law. In turn, the scientist Sereda O.G. (2017) "Me-

diation (mediation) as an alternative way to resolve labor disputes" analyzes mediation within the employment relationship. Researchers Krestovska N. and Romanadze L. (2019) "Mediation in the professional activity of a lawyer" conducted a very in-depth study of mediation, considered the theory of conflict, types of alternative dispute resolution, the concept and nature of mediation, mediation participants, mediator skills, mediation procedures and others question. However, even such an in-depth study does not provide an answer as to the place of mediation in the social sciences.

Aims

The main purpose of this scientific article is to determine the place of mediation in the system of social sciences. It is necessary to analyze the social sciences that are most closely related to mediation. The main problem has been determining the place of mediation in the social sciences is the lack of a unified approach to highlighting the content elements of mediation.

Methods

As a methodological basis of the study to clarify the content of the concept of Mediation was used content analysis, which allowed us to analyze the content of the concept of mediation in the modern scientific literature. This is the method of complete-textual data, what alive to dismember out the textual data into the structural elements, highlight keywords in the documents with the specified frequency. This method is leading in the study of the essence of concepts, the content of media reports, answers to questions of sociological research (Graneheim, Lindgren & Lundman 2017). Content analysis was implemented in the software product TextAnalyst. Used semantic analysis as a tool of text mining, a semantic network has been formed as a set of terms that were selected from the analyzed concept (words and phrases), interconnected in content. In the process of semantic analysis, the assumption was used that the structure (S) of the set of definitions of one concept can be represented as follows (Barseghyan, 2014):

$$S = \{M, F\} \quad (1)$$

where M - the set of all have studied definitions;

F - the ratio of "semantic connection".

$$G = (E, V) \quad (2)$$

where E - the set of vertices, which corresponds to a set of related concepts;

V - the set of arcs. This must fulfill the condition:

$$v = (M, F) \in V, M \in E \wedge F \in E \quad (3)$$

The vector V comes from the vertex, which corresponds to the basic concept of a and enters the vertex, which corresponds to the concept, which in content in the text was often used in combination with the concept of a. Each element of the semantic network of the category is characterized by a numerical assessment - "semantic connection". Relationships between pairs of concepts are also characterized by weights that allow us to compare the relative importance of the term (Barseghyan, 2014).

In the semantic graph, the quantitative indicator that stands next to the concept characterizes its semantic weight. Its value in the range from 1 to 100 reflects the meaning of the term for the essence of the whole concept. Thus, a maximum value of 100 indicates that the term is key and defines the meaning of the concept. The number that put on the arcs of the semantic network characterizes the weight of the connection between the corresponding terms. The high importance of the connection between the concepts means that the terms are significantly related (Barseghyan, 2014).

Also, in the study we used general and special scientific methods of cognition of legal phenomena, namely: comparative law, historical, formal-logical, system-structural, dialectical, and other methods. These methods helped us to determine the place of mediation in the system of social sciences.

Results

Definition of the elements of the concept of Mediation

The terminological analysis of the approaches to the formulation of the concepts of "Mediation" and the application of content analysis has allowed us to form a semantic graph of the structural elements of this definition (Fig. 1).

Thus, it can be argued that the elements of mediation are: an impartial process, conflict, mediator, parties of the conflict. Having clarified this point, it is necessary to briefly explore those elements that are considered to be at the core of mediation as a concept.As far as the parties are con-

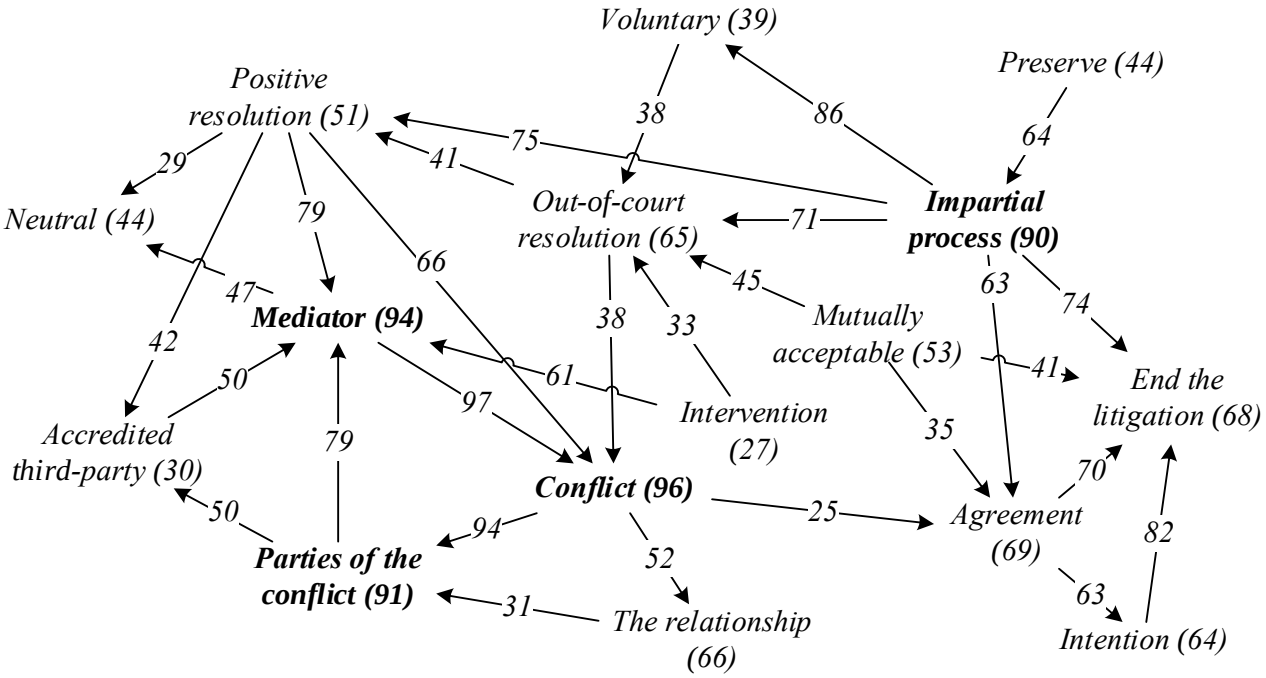

Fig. 1 - Semantic graph of the essential components of the concept of "Mediation"

cerned, they are the subjects in dispute and they may use the mediation to resolve their conflict. Any natural or legal person can be a party to a mediation process.

The dispute consists of the need to satisfy a claim made to the other party, and not reciprocated, and which must be addressed by both parties.

The mediator is the disinterested third party who intervenes in the process of mediation in a technical and impartial manner, in order to foster dialogue between the parties and help them to reach mutual agreement on the dispute. The mediator's function at this point resembles that of a catalyst. Its authority is limited to the process itself, not to the merits of the dispute.

This process demonstrates the technical nature of the legal relationship between the parties during the course of the mediation – which, like the traditional system of dispute resolution, is designed to provide solutions for people in dispute. But, the intention to resolve the conflict cannot be considered an element of mediation. In fact there is a lack of perspective in this argument, since the ultimate intention to reach an agreement would be within the objectives, and not elements, of a mediation. Moreover, it would appear that verification of this intention-based element would, in practice, be difficult to obtain; this would only lead to further complications, which would contribute nothing to the development of this new approach to dispute resolution. The Central Goals of Mediation are to:

- Reduce obstacles to communication between participants;
- Address the needs of everyone involved;
- Maximize the discovery of alternatives;

Help participants to achieve their own resolution;

- Provide a proven model for future conflict resolution;

Based on the foregoing, in the framework of this study, mediation was understood as the voluntary resolution (settlement) of conflicts between the parties with the help of an accredited professional, impartial third party (mediator) with the intention to promote an agreement to terminate the trial.

Substantiation of the place of mediation in the social sciences.

Traditionally, the social sciences are understood as any discipline or branch of science that deals with human behavior in its social and cultural aspects (Nisbet, 2020). The social sciences include sociology, social psychology, law, political science, economic theory, history, demography, social statistics, social philosophy and more (Shynkaruk, 2002; Ruhe, 2015; García-Raga et al., 2017; Lezak et al., 2019). Where do scientists generally refer to the social sciences more than 40 branches and subsectors of science (Wilson, 1998; Li et al., 2019). However, mediation is not mentioned directly as part of the social sciences.

Usually, mediation is considered only as one of the technologies of alternative dispute resolution. For example, Polishchuk M.Ya. (2014) defines mediation as an alternative way of resolving a dispute, under which the parties voluntarily participate in negotiations and, with the help of an independent and qualified third party (mediator), try to reach consensus and resolve their own dispute taking into account the interests of each (Polishchuk, 2014). But today, mediation has already gone beyond just the technology of alternative dispute resolution. Mediation has been the subject of in-depth research, conferences and debates. Mediation has started to be taught in higher educational institutions, it is becoming a separate specialty and may already be becoming a full-fledged scientific discipline.

We agree that a scientific discipline is a basic form of organization of professional science, which unites on a substantive basis the field of scientific knowledge into a community engaged in its production, processing and translation, as well as mechanisms for development and reproduction of science as a profession. When it comes to established scientific disciplines, membership in professional societies and reading scientific publications are sufficient signs of such affiliation (Lezak et al., 2019; Philosophy and methodology of science, 2012).

In our opinion, mediation can be attributed to an integral part of one of the classical sciences: jurisprudence, sociology, psychology or economic theory. Consider each of these options.

Mediation and jurisprudence. Traditionally, mediation is seen as a technology for alternative dispute resolution. Therefore, it is logical to assume that mediation is an integral part of jurisprudence. We can assume that mediation is an institution of law. However, if we consider mediation as a legal institution, it is not clear to which branch of law it should be attributed.

Depending on the sphere of public relations, the following types of mediation are distinguished: family mediation, business mediation, mediation in labor relations, mediation in administrative and legal disputes, mediation as a form of restorative justice, mediation in the field of international relations (Rubinson, 2017; Schulz, 2020).

Depending on the field of legal practice, the following types of mediation are distinguished: mediation in the activity of a judge, mediation in the activity of a lawyer, mediation in the activity of a notary, mediation in the activity of a prosecutor, mediation in the activity of a state executor and private executor (Schulz, 2020).

Thus, mediation cannot be considered as an institution of only one branch of law. Mediation can be used in various fields of law. Because of this, we can assume two options. The first option is that mediation is an institution of law that is duplicated in different areas of law. The second option is that mediation is a larger concept than the institution of law. We lean towards the second option. This is due to the fact that mediation is not only a larger concept than the institution of a particular branch of law, but also the fact that it goes beyond any one science.

The connection between mediation and jurisprudence can be seen in historical essays. Mediation has existed and developed since the time of ancient civilizations. This period is the beginning of the formation of the institution of mediation as a means of resolving disputes and conflicts with the participation of a neutral third party, which is recognized by all parties. Initially, mediation was used as a private trial, which was the only form of conflict resolution, but with the formation of statehood and its institutions, it acquires a legal form. Mediation was first enshrined in law during the Roman Empire in the Justinian Code (530–533 AD), where it was officially recognized as a legal instrument for resolving a dispute through a mediator who had a legal obligation not only to advise the parties. dispute, but also to help them resolve the conflict by finding a compromise solution to prevent destabilization of relations between the parties to the conflict and minimize threats to their security (Korinnyy, 2019).

Today, mediation is also part of the legal system of certain countries. For example, in 1947, as part of this task, a special federal body was created - the Federal Mediation Conciliation Service, FMCS. In Germany, the Bundesverband Mediation in Wirtschaft und Arbeitswelt is active and developing, in Finland a so-called state conciliator is appointed, and in Great Britain the Asac Codes of Practice is in force. According to the South Korean Labor Dispute Settlement Act, the settlement system includes conciliation, mediation, arbitration, emergency settlement, and voluntary settlement

based on an agreement between the parties to the dispute or a collective agreement (Sereda, 2017; OECD, 2020).

Legal science as a system of knowledge is the science of the laws of the process of development of the state and law and, most importantly, the essence of the state and law. It explores their place and role in public life (Schulz, 2020). PM Rabinovych rightly defines the subject of legal science specific laws of law and the state as objective, necessary, essential and permanent links of state and legal phenomena among themselves, as well as with other phenomena that determine the qualitative certainty of these phenomena, which is in their legal properties (Rabinovich, 2007). We understand that mediation is in the realm of jurisprudence, as it serves as an alternative to judicial resolution of the conflict. However, it can be applied even when there are no grounds for litigation. In this case, the parties will not resolve the legal conflict. For example, a couple has a personal family conflict and they want to resolve it. If they go to a lawyer, their conflict can be attributed to the legal field. If the lawyer says that there is no legal conflict in this situation and the parties go to a family psychologist, the conflict remains outside the legal settlement. Similarly, non-legal conflict can be resolved through mediation. Thus, mediation does not always resolve legal conflicts, which means that it can go beyond legal science.

The issue of mediation training deserves special attention. To date, there is no official curriculum that enshrines the possibility of teaching mediation only within a specific specialty. Because of this, mediation training takes place in three areas: law schools, business schools, private training centers (courses, trainings, etc.). Thus, in higher education, mediators are taught within the legal or economic specialty.

This experience is typical of most countries. For example, at Harvard there is a Harvard mediation program within the Faculty of Law (Harvard Mediation Program, 2020). Mediation is also taught at the Faculty of Law at the University of Potsdam in Germany. At the same time, for example, in the Netherlands Buisiness Academy, mediation is taught as a master's program in business education (The Master program for (future) mediators, 2020).

Thus, each university independently chooses within which specialty to teach mediation. In V.N. Karazin Kharkiv National University (Ukraine) we has experience teaching mediation in a variety of specialties. The first experience of teaching mediation took place at the Faculty of Law with the support of ERASMUS program. Thus, a master's program in alternative dispute resolution was created. Within this program, students were also taught mediation. Upon completion of the master's program, students received a master's degree in law, which indicated the specialization "alternative dispute resolution". Today this program is completed.

A master's program in mediation is currently being developed at the Karazin Business School in the V.N. Karazin Kharkiv National University (Ukraine). The program should launch in the fall of 2020. After completing the master's program, students must receive diplomas in management. This approach can be seen in other educational institutions of Ukraine. For example, KROK Business School also teaches a master's program in mediation (KROK Business School, 2020).

This allows us to conclude that established practice perceives mediation as an integral part of legal science and education. At the same time, mediation is more than a legal institution or a legal technique. Mediation is increasingly going beyond law and is taught for non-legal specialties.

Mediation and economics (entrepreneurship and management). Economics, social science that seeks to analyze and describe the production, distribution, and consumption of wealth (Kammerhoff et al., 2019; Radulescu, 2012). t is known that economics (economic theory) is a science that studies the fundamental laws and categories of economic life of society. Economics is a great social science and its system can find a place for mediation. The most appropriate is the consideration of mediation within management as a science.

From the Oxford Advanced Learner's Dictionary you can get the following interpretations of management: the way, manner of communicating with people; power and the art of management; special skills and administrative skills; governing body, administrative unit (Turnbull, 2013). These characteristics of management are relevant to mediation. Thus, mediation is a way of communicating with people and is based on administrative skills to manage the reconciliation process. However, to consider mediation as an integral element

of management is considered erroneous. Of course, effective management is about managing and resolving conflicts, and a conciliation procedure is important for it. In this context, mediation can be seen as a mechanism and a set of knowledge and skills necessary for effective management.

As mentioned earlier, mediation training in business schools is gaining popularity today. It is known that business-schools provide specialized economic education for line or top business management, as well as for future entrepreneurs and managers. The classic programs of study in business school include such areas as: accounting; finances; management; Information Technology; marketing; business administration; business modeling; HR; logistics; PR; business processes; outsourcing; organizational behavior. These areas are closely related to mediation. The relevance of the relationship between mediation and economics and business education has several arguments. First, a professional mediator must have economic and business knowledge. The professional activity of a mediator is entrepreneurship. Second, mediation, as a mediation in conflict resolution, is relevant for entrepreneurs and managers in their daily work.

Thus, we believe that mediation may well be part of the business education system and taught in business schools. At the same time, we do not consider it appropriate to define mediation as a component of economics.

Mediation and conflictology (sociology and psychology). Conflictology is the study of conflict, its genesis, course and consequences. It is known that conflictology is a branch of sociology and psychology (social psychology).

Conflictology - a science in many dimensions: it covers man, his place in nature, human society and the specifics of psychological assessments. Conflictology is an interdisciplinary field of knowledge. It contains concepts and categories of many sciences, which to some extent are related to the problems of life and development (Piren & Lozhkina, 1995; Gendron, 2011; Vinyamata, 2010). It is worth recognizing that conflictology is the basis of mediation.

Conflictology can be considered in two perspectives: from the standpoint of sociology and from the standpoint of psychology. The study of the differences between conflictology in these two aspects is not the subject of this article. Because of this, we will talk about conflictology as an interdisciplinary field of knowledge.

The subject of conflict studies is the causes, consequences, methods of conflict regulation and prevention. All these elements are relevant for mediation, but the most important is the way of resolving conflicts.

Knowledge of how to resolve a conflict is the basis for mediation. The resolution of the conflict itself is the goal of mediation.

We believe that conflictology provides mediation with a basic knowledge of the nature of conflicts and certain mechanics of dispute resolution. Psychology deserves special attention. Enormous empirical experience has been gained in this direction and a number of concepts are discussed in connection with the phenomenon of dispute. Its statics and dynamics are considered in detail, the set of the most various factors influencing origin and the decision of dispute is investigated. The following topics deserve special attention within this area of research: attitude and its influence on human behavior; features of human response depending on his current functional state; the influence of motivation on the interpretation of actions and statements of another person; cognitive mechanisms and patterns of learning; and some others. Much attention is paid to creating a basis for access to internal resources of autonomy and self-determination of the individual based on phenomenology (Ruhe, 2015; Shamlikashvili, 2014).

Thus, mediation uses knowledge of conflict studies, psychology and sociology but is not purely part of them.

It should be noted that we have not found any precedent for teaching mediation within a psychological or sociological specialty.

Discussion and conclusions

Thus, in the framework of this study, the concept of Mediation has been formulated, which, unlike other approaches (Bogdanoski, 2009; Korinnyy, 2019; Sereda, 2017; Gartner, 2013), was based on the substantive part of the definition and reflects such elements as process, parties, mediator, and conflict. The proposed approach to the formulation clearly separates the elements of the concept and purpose of the mediation process, which in turn allows us to most accurately formulate the paradigm of the mediation process in theory and science, and also to fully reveal the practical potential

Table 1 - Conflictological competencies of the mediator (García-Raga et al., 2017; Schulz, 2020; Gendron, 2011; Vinyamata, 2010; Krestovska & Romanadze, 2019)

Competence	Knowledge	Understanding	Skills
Conflict identification (cognitive)	Signs of conflict as a resource	The nature, causes and functions of conflict	Explain to the parties the possibilities of transforming the conflict into constructive interaction
Conflict analysis and intervention opportunities (analytical)	Methods of conflict analysis by their types, species, subject composition, dynamics, etc.	Correspondence of methods of analysis to the purpose of analysis. Dynamics of conflict development	Determine the level of escalation of the conflict. Determine the possibility of intervention in the conflict and choose its method
Influence on style (strategy) of behavior in conflict (behaviorist)	Styles (strategies) of behavior in conflict	Influence of ways of behavior in the conflict on its course, possibility of its decision or transformation	Ensure a balance of power / authority of the parties to the conflict for their effective interaction
Determining the method and design of intervention in the conflict (interventionist)	Ways to intervene in the conflict	The essence, purpose, limits of possible consequences of the intervention	Choose the appropriate method of intervention and its design

Today there is some discussion about determining the place of mediation in the social sciences. Mediation is at the intersection of a number of social sciences: law, economics, sociology and psychology. Scientific doctrine has not developed a unanimous and well-established position on this issue. However, more scholars have traditionally attributed mediation to legal science. In addition, it can be seen that in different countries mediation is researched and taught at different faculties, within different specialties. Mediation is usually researched and taught in law schools or business-schools. Based on the results of the study, we can draw the following conclusions: today mediation does not have its definite and fixed place in the system of social sciences. Mediation is at the stage of active development and actualization. It is a classic understanding of mediation through the prism of legal science, but to consider it only a legal technique or legal institution is not correct. Mediation is a much broader institution than legal technology or legal institute.

In Ukraine, the active implementation of mediation in society begins. More and more people are starting to use mediation to resolve conflicts. In this context, the professional education of mediators is becoming more relevant. Today in Ukraine mediation is taught at law faculties, business schools and private organizations (associations, training centers, etc.). As a result of the study, we concluded that mediation is an interdisciplinary science that is at the intersection of a number of social sciences: jurisprudence, economics, sociology and psychology.

The place of mediation in the social sciences needs further research. Today, mediation cannot be considered within a single science. We believe that over time, mediation will become a major scientific discipline.

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These studies will be relevant to researchers in the field of interest in the study of mediation.

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MEDIATS Mediation: Training and Society Transformation

COMPARATIVE ANALYSIS OF EXPERIENCE OF GEORGIA AND UKRAINE IN IMPLEMENTATION OF MEDIATION IN COMMERCIAL DISPUTES

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Abstract. *This article is devoted to the analysis of the practical experience of mediation application in commercial disputes. A comparative analysis of the historical development of mediation in Georgia and Ukraine has been made. In the past in Georgia, mediators were found to be individuals, who enjoyed authority and trust among the members of society and who knew laws very well. In Ukraine, mediation has developed as a part of negotiations between the disputing parties. It is determined that current mediation in Georgia and Ukraine is developing in different ways. The starting point of the mediation development in Georgia can be considered a creation of a mediation clinic at the university. Thereafter, an institution that was focused on social dialogue was created in Georgia in 2008. Further development of mediation in Georgia was accompanied by the introduction of pilot projects and the active development of the training system for the new profession, namely a mediator. The result of pilot projects in Georgia was the adoption of amendments to the Civil Procedure Code, which established two forms of mediation. Mediation has become a must in family disputes and in settling disputes between neighbours. For other types of disputes, including commercial disputes, mediation was a recommendation. It was researched that financial incentives and accountability have been also applied to encourage mediation in Georgia. For parties, who have used mediation before applying to the court but have not reached an agreement, a lower court fee is set. If the parties have waived the obligatory mediation, the defaulting party shall pay a fine. Georgian law also stipulates the possibility of enforcement of a decision made in the mediation process if one of the parties fails to comply with it. The author analysed that the draft law on mediation in Georgia will stimulate the state and all its bodies and businesses to actively use mediation in any disputes. In Ukraine, the development of mediation began in the 1990s. It is researched that Ukraine and Georgia have a similar start in the introduction of mediation into the legal system. An authority that is engaged in social dialogue has also been set up in Ukraine. However, in the absence of effort consolidation of all stakeholders in the legal definition of the mediation process in Ukraine, paths of mediation development in Ukraine and Georgia had split. It is concluded that the criterion of the success in implementation of mediation in legal terms is the need to introduce mediation disciplines in higher education institutions and to carry out educational work among the population on the effectiveness of this method of dispute resolution.*

Key words: *mediation, mediator, commercial disputes, mediation agreement, alternative dispute resolution*

JEL Classification: *K2, K10, K29.*

Formulas: 0; fig.: 0; tabl.: 0; bibl.: 28.

Introduction

On August 07, 2019, mediation obtains the international legal status and recognition by the entire international community. The United Nations Convention on Mediation was adopted in Singapore on that day, which gave mediation an international status as a way of resolving any sort of disputes, both between states and within a particular state. In this context, a Singaporean researcher, Nadja Alexander, states that this UN document reflects real needs of modern societies that are interested in expediting their dispute resolution and implementing mediation agreements [4]. In this regard, Ukrainian researcher Tetiana Kyselova states quite objectively that mediation has become a traditional part of reforming the judicial branch and ways of resolving disputes in many countries [8]. However,

the UN Convention on Mediation requires far more than just a willingness to implement mediation in the legal system and to recognize this alternative way of resolving disputes as a full-fledged mean of conflict resolution. The UN Convention implies that changes in the consciousness of citizens, government, businesses and state authorities shall take place. The implementation of the UN Convention is the responsibility of a society to learn how to make decisions independently. In all countries, this requires coordination of the efforts of all those involved in the active implementation and application of mediation. According to the researcher John Sturrock, in such relations mediators should be not just service providers but the driving force behind changes in dispute resolution [10].

Georgia and Ukraine are among 46 countries that acceded to the United Nations Convention on Mediation on August 07, 2019, thereby taking responsibility for updating domestic mediation legislation and promoting the effectiveness of this dispute resolution method. John Sturrock, an

Irish researcher, believes that knowing our neighbours' experiences makes us wiser [11]. Thus, a study of the historical development and legislative consolidation of mediation in Georgia and Ukraine through comparative studies enables both countries to understand challenges in further mediation development in the light of the new UN Convention on Mediation. Also, the study of the experience of Georgia and Ukraine aims to determine the criteria for the successful functioning of mediation in commercial disputes in every country.

Literature Review

Disputes are an integral part of organization and conduct of economic activities of business entities. Reputation, profit and market positioning depend on the speed and efficiency of resolving any contradictions. Modern scholars are increasingly focusing on alternative methods of dispute resolution, which would guarantee a higher percentage of proper conflict resolution in compliance with the principles of confidentiality. One of these types of alternative dispute resolution is mediation involving a third neutral and impartial individual. Scientist Sophie Tkemaladze (2019) "Courts Should Be The Alternative! – Georgia Soon To Adopt The Law On Mediation", suggests that the first factor of successful implementation of mediation in Georgia is that lawyers are not afraid of mediation. Lawyers offer their clients the ability to resolve disputes effectively not only by appealing to the court but through the use of a mediation procedure as well. Researcher Nadja Alexander (2019) "It's DONE: The Singapore Convention on Mediation", states that UN document reflects real needs of modern societies that are interested in expediting their dispute resolution and implementing mediation agreements. Researcher Greg Bond (2018) "Why Train Mediation at Universities? From Communication and Life Skills to Mediation Use and Mediation Advocacy", argues that teaching mediation at the university is becoming a common practice in all universities in the world. Scientists Tatiana Kyselova and Maryna Omelynska (2017) "Will Ukraine Have A Law on Mediation in 2017? ", states quite objectively that mediation has become a traditional part of reforming the judicial branch and ways of resolving disputes in many countries.

Aims

The purpose of the article is to analyse the practical experience of Georgia and Ukraine in the implementation of mediation in commercial disputes, to determine the nature of mediation, the principles, by which mediation is carried out in both countries, and the features of existing legal regulation of mediation.

Methods

To prepare this article, the historical and comparative methods were used when analysing the development of historical prerequisites for the formation of mediation in economic disputes in Georgia and Ukraine; formal-logical method when analysing the concept of mediation in terms of law within social and legal phenomena and determining its specific features distinguishing it from related concepts; systemic-structural method when establishing the necessary components of the mediation process as a way to resolve economic disputes in Georgia and Ukraine.

Results

In today's world of information technologies, meaningful and open communication between people is shrinking. Deficit in communication is one of the most important factors in conflicts. According to Georgian researcher, Sophie Tkemaladze, there are three ways to resolve conflicts [17]. First, it can be called imperious way or, in other words, a coercive way, when the parties use physical force to achieve their desired result. The parties exercise an imperious or coercive method through wars or other armed conflicts. The second way is to apply rules of law to address disputes in order find who has what rights under law and to what. In practice, this method is implemented through courts or arbitration. The third way is an agreement between parties or a negotiation between the parties, which are aimed at dispute settlement by conflicting parties on their own. Moreover, such a decision, which is executed as an agreement or made on the basis of the negotiations, reflects the true interests of the parties. It can be exemplified by a negotiation of parties or mediation, where a third party is involved, which helps the parties to understand each other and make a decision that would satisfy all parties of the dispute [17]. Ukrainian researchers, N. Krestovska, T. Barabash, L. Romanadze, argue that a mediation cannot be defined simply as a negotiation with the help of a mediator. Distinctive features of mediation are the structure of its procedure and the existence of clear principles [18]. Sophie Tkemalaladze is of the opinion

that the main asset of mediation is that it helps individuals, as well as companies, if the parties of the dispute are legal entities, to restore their relationships [17]. According to the head of the UN Development Program in Georgia, Louise Winton, mediation is a way to widen an access to justice by making it more accessible to citizens [12]. Mediation is not a guarantee for decision making, but rather an out-of-court dispute resolution and an attempt to resolve the dispute taking into account the interests of each party.

The Georgian Association of Mediators defines mediation as a flexible way of dispute resolution, held privately and confidentially, where a mediator acts as a neutral facilitator to help the parties to resolve their disputes [15]. The parties have control over both the dispute resolution and the terms of its settlement.

The Ukrainian Mediation Centre provides a definition of mediation as a method of dispute resolution involving a mediator, which helps the parties of the conflict to establish a communication process and to analyse the conflict situation, so that they themselves can choose a solution that would satisfy the interests and needs of all the parties of the conflict. Unlike formal litigation or arbitration, during mediation process the parties reach an agreement by themselves, the mediator does not make a decision for them [23].

Both Georgian and Ukrainian Mediation Centres define the concept of mediation through the principles of flexibility and confidentiality of the process, neutrality of the mediator, commitment to the interests of the parties and control of parties over decision-making. The difference in the understanding of the mediation process between the two countries lies that the Georgia consider that it is important to control the implementation of the decision made during the mediation process, which is not the case for Ukrainian mediation practice. In addition, Georgian mediators shall have facilitation skills, while Ukrainian colleagues do not consider facilitation skills as a criterion for professionalism in mediation. According to the National Association of Facilitators of Ukraine, facilitation skills assist in group work on problem solving or in reaching an agreement among the participants of the discussion [24]. One should agree with this opinion, because the ability to work with a group of people, who are at odds with each other, is a sign that mediation can be successful in disputes resolution.

Historical prerequisites for the development of mediation in Georgia and Ukraine may be the reason for the different approaches in understanding mediation. Mediation in Georgia has been practiced for centuries, and for a long time the population prefers alternative methods of dispute resolution [15]. According to Sophie Tkemalaladze, the difference between historical mediation and the modern mediation in Georgia is that the mediator in the past had made decisions. To do this, the mediator studied the case in detail, listened to the parties and examined the evidence. His role was somewhat similar to that of a modern arbitrator [17]. However, in general, it may indicate that alternative methods of conflict resolution have always been used in all regions of Georgia. Sophia Tkemalaladze gives historical examples of the mediation development in Georgia. In Svaneti, for example, mediators settled civil and criminal cases. A number of mediators-judges were formed in the province of Khevsureti based on moral virtues, authority, intelligence and knowledge of the laws of the region. In Pshavi ethnographic group, the parties first had to agree on the reconciliation process itself and only then to choose a mediator. Sophie Tkemalaladze notes that it happened quite often that mediators, who had to settle a dispute with the family of wronged people, were the ones, who had previously been granted forgiveness for the same offense. In Abkhazia, the mediation court was based on customary law.

In the 18th century, Abkhazian community suffered severely from the institute of revenge and therefore mediation became an effective way of resolving criminal cases peacefully. All these historical backgrounds make it possible to conclude that the whole process of dispute resolution was around a mediator, who enjoyed some authority in the community at the time, and who was able to handle complex cases, and had the skills to work with a group of people, and knew the laws of his region.

In Ukraine, according to the Ukrainian researcher V. Demochko, there had been mediators in dispute resolution since ancient times [25]. Ukrainian researcher Yu. Mykytyn states that in the days of primitive community formation there was a principle of “blood revenge” in the territory of

Ukraine. Over time, the Slavonic people began to think of other alternative and non-violent form of conflict resolution. The function of mediator was carried out by a senior, who ensured the peaceful coexistence of clan and family communities. The mediator was true to high religious and moral principles [27]. In the period of Kievan Rus, the main source of law was a so-called "Ruska Pravda" (Rus' Justice), which was based on the customary law of the Slavonic people under the influence of Byzantine law [27]. As V. Demochko notes, in particular, during this period the higher clergy representatives often took a lead of diplomatic missions, performed the duty of ambassadors and mediators in the relations between the warring princely coalitions of Kievan Rus [25, p. 5]. According to the Ukrainian researcher V. Kryvosheia, in later times, namely, during the Hetman era, the military elite acted as mediators in conflict resolution. V. Kryvosheia exemplified it by a former secretary of Hetman Vyhovsky's secretariat, Vasyl Kropyvnytsky, who was the mediator during the Treaty of Hadiach between Hetman of Ukraine and the governor of Poznan, Jan Leszczynski. Vasyl Kropyvnytsky had the rank of a colonel [26, p. 169]. Having analysed the historical development of mediation in Ukraine, the author thinks that mediation on the territory of Ukraine displayed more of a negotiation function between the conflicting parties than a facilitator function in the search for common interests. Herewith, various historical communities gave the mediator such features as authority, high moral and religious principles, knowledge of the negotiation principles. Despite the different historical development of Georgia and Ukraine, the mediation institute was present in both countries and the public was aware of the functions of so-called mediators in conflicts.

The current legislative development of mediation in Georgia and Ukraine is also being done in different ways. According to the Bulletin of the Federal Mediation Institute, there are two periods in the current stage of mediation development can be seen in Georgia. The first period is the creation of the tripartite Social Dialogue Development Committee in 2008. This period became the basis for the future legislative development of mediation. The second period falls on 2010, when a mediation clinic was opened at Tbilisi State University [22]. Just after the mediation clinic was created, in 2011, thanks to the USAID project in Georgia, the first attempt to introduce mediation into the justice system was made [3]. Later, the first pilot mediation project was implemented at the Tbilisi City Court and the curricula for mediation at Georgian universities were developed [3]. In 2012, according to Georgian judge, Lasha Kalandadze, Georgia decided to amend the Civil Procedure Code in order to introduce a mandatory mediation in family disputes and conflicts resolutions between neighbours. In other cases, the law encouraged the use of voluntary mediation before going to court or at any stage of the case hearing in the court. According to Lasha Kalandadze, the introduction of compulsory mediation is a prerequisite for the effective development of voluntary mediation [1]. In addition, Georgia has chosen the path of providing financial incentive to those, who use a mediation process. According to the rules of the Civil Procedure Code of Georgia, the court fee for filing a claim is 3% of the disputed subject cost, while the cost of a claim, where a mediation procedure had been applied but an agreement had not been reached, is only 1% [1]. Equally important is the existence of a financial penalty for a party's refusal to participate in a mandatory mediation procedure or delaying the mediation process. A party that does not wish to use compulsory mediation pays a fine of GEL 150 and a court fee regardless of the outcome of the court hearing [1]. It is also worth noting that in Georgia the parties can take advantage of the function to enforce the decision implementation made during the mediation process [1]. This factor provided a guarantee for implementation of the decision made during the mediation.

Increasing mediation development in Georgia was supported by the European Union and the United Nations Development Program. This support has been demonstrated in cooperation with the Georgian Government, the judiciary sector, the private sector and educational institutions. All of these actions were aimed at improving the business and investment environment of Georgia, which were identified as one of the priorities in the Association Agenda between the European Union and Georgia. In 2016-2018, support for mediation in Georgia was provided by the EU-UN Program "Equal Justice for All". The project will be underway in 2019-2020, furthering Georgia's progress in achieving the goals of sustainable mediation [13].

Sophie Tkemalaladze quite objectively states that due to external support and internal consolidation, the country has succeeded in launching new pilot mediation projects in two courts outside Tbilisi and in mediation of land disputes and disputes between neighbours, and in implementing of mediation in criminal cases [3]. Moreover, the Minister of Justice of Georgia has put forth the idea that courts should be an alternative in dispute resolution, and mediation should be the main way of conflicts resolution. The adoption of the Law on Mediation reinforced this position [2]. The law on mediation in Georgia consists of two parts, namely, the main regulation on mediation and the institutional changes in a state governed by the rule of law. The law defines the concept of mediation, establishes the principles of mediation, regulates limitation periods and determines the procedure for enforcing agreements that were reached within the mediation procedure and are not performed by one of the parties. All these rules apply both to agreements that were reached in pre-trial or extrajudicial order, and to agreements that were adopted during trials in courts [2]. Moreover, it is not a matter of amicable agreement in court, but of the use of mediation by the parties when their case is already being considered by a judge. One or more mediators may participate in the mediation process. The parties themselves choose a mediator. In the case of judicial mediation, the mediator may be chosen from the register of mediators [16].

To deal with the issue of training of mediation specialists under the new legislation, a legal entity of public law, the Georgian Association of Mediators, shall be established in Georgia, which shall set the standards for mediator accreditation and maintain a register of accredited mediators [2]. All these changes shall stimulate a high level of professionalism among mediators and reliability of services provided by mediators.

According to Sophia Tkemalaladze, in addition to adopting the Law on Mediation, Georgia is undergoing changes in the conflict management system within the Civil Service. The Civil Service Bureau of Georgia is developing a new way of managing and resolving labour disputes within government agencies [3].

What is the development of mediation in Ukraine and does Ukraine have a similar view on the development of mediation in the country?

Modern Ukraine has been familiar with the mediation process since the mid-1990s. The first voluntary associations of mediators appeared in Luhansk and Donetsk in 1995 [22]. The Donetsk Mediators Group was a pioneer in the implementation of the pilot project funded by USAID during 1997-1999. The purpose of this project was to establish local mediation centres throughout Ukraine, to prepare mediators, to register the Ukrainian Association of Mediators and to provide services to the public [20]. The creation of a National Mediation and Reconciliation Service is also currently underway. A corresponding decree was signed in 1998 by the President of Ukraine [22]. In this case, it can be stated that the very fact of establishing the National Mediation and Reconciliation Service, as well as the determination of the functions of this body, are somewhat similar to Georgia's experience in establishing the Social Dialogue Development Committee. It can be said so because the National Mediation and Reconciliation Service is guided by the provisions of the Law of Ukraine "On Social Dialogue in Ukraine" [28].

Furthermore, during 2006-2011, the development of mediation in Ukraine advanced due to the grants provided by the European Commission and the Council of Europe. According to T. Kyselova, the purpose of these projects was to export a European model of judicial mediation, developed by Dutch and German experts, to Ukraine. In 2012, the Canadian Project on Judicial Mediation Development was implemented in Ukraine. In 2014-2015, with the support of USAID and the Renaissance Foundation, mediation was initiated in eight courts in Volyn region [20]. All of the above gives grounds for claiming that Ukraine, like Georgia, also enjoyed the financial support of international organizations. At the same time, T. Kyselova states that, unlike other countries, this financial support was allegedly not sufficient for the further active development of mediation in Ukraine [20]. In our opinion, the assessment of the adequacy or sufficiency of funding is a quite subjective concept, and one shall speak here of the general external support for the implementation of mediation in Ukrainian society.

Assessing the current state of development of mediation in Ukraine, as of 2019, N. Krestovska, L. Romanadze, and T. Barabash note that mediation in Ukraine is carried out without legal sup-

port, but mediators manage to use masterfully the limited possibilities of dispute resolution within the current legislation [18]. At the same time, according to researcher O. Azarov, Ukrainians are interested in alternative ways of dispute resolution. Ways of mediation, not supported by law, exist in the field of business, school and family relations [5]. Ukrainian researchers T. Kyselova and M. Omelynska note that Ukraine needs a Law on Mediation that shall improve Ukraine's position in the World Bank's ranking "Doing Business" [7], and generally shall promote an effective and legal way of disputes resolution without bringing the matter before the court.

T. Kyselova states that one of the reasons for the delay in adopting the law is corruption [9]. The American researcher Ethan S. Burger also shares T. Kyselova's opinion and states that the presence of the so-called "roof (backing)" in solving all conflicts does not stimulate the adoption of the Law on Mediation [19]. According to T. Kyselova, another issue of legal definition of mediation is the lack of desire of Ukrainian mediators to study the experience of other countries [9]. The legal regulation of mediation requires considerable efforts and needs to develop a legal infrastructure that would actively promote mediation. However, the analysis of the costs involved in learning such experience and the benefits of mediation remains unclear to the legal community [9]. Georgia's experience demonstrates to Ukraine the need for compulsory internal consolidation on the legal regulation of mediation. The phenomenon of corruption is present in many countries, but the coherence of actions within a single state, aimed at joint performance the same tasks, is an important factor in the successful implementation of mediation. This is confirmed by the opinion of the American researcher Michael D. Blechman, who argues that the key to successful implementation of mediation should be a partnership in the state [14].

Sophie Tkemaladze suggests that another factor of successful implementation of mediation in Georgia is that lawyers are not afraid of mediation. Lawyers offer their clients the ability to resolve disputes effectively not only by appealing to the court but through the use of a mediation procedure as well. This is a consequence of a change in the mindset of the lawyers themselves. Therefore, mediation should be made part of the compulsory curriculum in educational institutions [3]. German researcher Greg Bond also argues that teaching mediation at the university is becoming a common practice in all universities in the world. These can be both compulsory and optional disciplines [6]. However, it is important for students to form a mindset that would not bind the dispute resolution solely to the judiciary system. According to Greg Bond, knowledge of the basic mediator skills provides everyone with the ability to make decisions in their own interests [6]. Knowledge and skills of mediation in lawyers should change the understanding and value of mediation, which further changes the development of society itself. Experts of Council of Europe, M. Oliveira, A. Kinnunen, K. Karia, argue that mediation should be a common phenomenon in 21st century society [21].

Discussion

Today in Ukraine, the development of mediation is hampered by irregular legislation and absence of any statutory instrument that would regulate mediation as an alternative way of resolving disputes; lack of mutual assistance among entrepreneurs; lack of sufficient knowledge about mediation; lack of communication culture; lack of certification and accreditation of mediators, lack of a unified body or institution authorized to develop mediation in Ukraine; lack of a unified register of mediators accepted at the legislative level. In addition, there are no prerequisites for the development of mediation in economic disputes in Ukraine. The Chamber of Commerce and Industry of Ukraine, as a structure that was supposed to share information about mediation, does not concern itself with any activities for the development and support of mediation among entrepreneurs. In 2014–2016, Regional Ukrainian Chambers of Commerce and Industry tried to create their own mediation centres, but they received neither support nor development.

Conclusions

Based on the results of the study, we can draw the following conclusions: in various periods of social development in Georgia and Ukraine there were mediators who assumed the function of conflict resolution. Mediation in Georgia and Ukraine is carried out on the principles of process flexibility and confidentiality, neutrality of the mediator, focusing to the interests of the parties, control over decision making. The difference in the understanding of the mediation process between these two

countries is that Georgia considers it important to monitor the implementation of the decisions made within the mediation process, which is not the case in Ukrainian mediation practice. The Civil Procedure Code was amended in Georgia ensure such monitoring. Also, mediation in Georgia differs from mediation in Ukraine by the professional skills of mediators. In Georgia, a mediator must be a facilitator, while in Ukraine such requirements are imposed on a third party.

As international experts point out the mediation must be done on the basis of law. This conclusion was reached by countries that have implemented mediation and acceded to the UN Convention on Mediation signed in Singapore as of August 07, 2019. The existence of a law on mediation is already the key to success in terms of a state support for the mediation institute development and in a change of the procedure of all disputes settlement of in the country. In June 2019, Georgia drafted and submitted its draft law on mediation that fully reflects the needs of Georgian society and the priority areas of business development in Georgia. In Ukraine, there is a problem of internal efforts consolidation to adopt a law on mediation. In addition, Ukraine, unlike Georgia, cannot demonstrate the broad experience of pilot mediation projects. Therefore, a careful and gradual legal regulation of mediation is required for Ukraine, which requires experimentation with pilot projects and further revision of all Ukrainian legislation.

Acknowledgements

These studies will be relevant for scientists dealing with mediation in economic disputes. In addition, these studies will help to develop a regulatory framework, practical measures and tools in future. In turn, it will be aimed at developing a strategy for the development of mediation in economic disputes in Ukraine. At the same time, even today, the main provisions and conclusions of the thesis can be used in educational work to teach a mediation course to students of the first (bachelor's) and second (master's) level of higher education, specialty 081 Law Science.

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MEDIATS Mediation: Training and Society Transformation

PROSPECTS OF DEVELOPMENT OF THE MEDIATION MODEL IN UKRAINE ON THE EXAMPLE OF SOME POST-SOVIET UNION REPUBLICS (BELARUS, MOLDOVA, GEORGIA)

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Abstract. *Alternative dispute resolution (ADR) is a group of processes through which disputes and conflicts are resolved without recourse to the formal judicial system. These include: negotiation, arbitration and mediation. Mediation is an alternative method of resolving disputes with the involvement of a neutral third party - a mediator. Mediation has been used successfully in many European countries and has proven to be an effective method of settling disputes. However, each country has taken its own authentic path to the introduction and promotion of mediation. Despite the fact that mediation has existed in Ukraine for more than twenty years, we remain at the beginning of the path of development and implementation of this alternative method of dispute resolution. Mediation has not yet become a common method of resolving conflicts in our society, moreover, some participants in conflicts are unaware of the existence of such a method or have a misconception about where and when mediation can be used. Like many countries where mediation is already a mandatory pre-trial procedure, Ukraine has faced a number of challenges in implementing this alternative method of conflict resolution. Research on these issues and obstacles to the implementation of mediation in Ukraine will facilitate its rapid implementation. A comprehensive and in-depth study of all the positive and negative factors that have accompanied the introduction of alternative dispute resolution methods in other countries will allow to avoid mistakes, strengthen the positive aspects and influence the negative factors. Therefore, the article will consider models of mediation development in some post-Soviet countries to find the most optimal way of development in this direction for Ukraine.*

Key words: *mediation model, mediation process, development of mediation in Ukraine.*

JEL Classification: *K10; K30; K40; K41.*

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Introduction

Mediation… More than a decade before, the notion "mediation" was completely new to most of ordinary citizens and was just known in narrow professional communities, mainly among moderators, judges, lawyers, academicians etc. But in recent years, the application of mediation procedures becomes more and more popular, this notion became known and raises less questions about its essence.

The notion "Mediation" is of English origin and means "intermediary, inbetweening, reconciliation". In other words, this is the process of settlement or resolving of conflict situation between the parties. Mediation is also part of the culture of Alternative Dispute Resolution (ADR). In addition to mediation, dispute resolution procedures are negotiation, arbitration, conciliation, and neutral assessment. [1].

Although, as we have already noted, the notion "mediation" is popularized every year in our society, the process of its application in Ukraine dates back to the early 2000s.

According to the Ministry of Justice of Ukraine, experiments have been actively conducted in courts since 2003 (in particular, in Kyiv, Kharkiv, Ivano-Frankivsk, etc.). There are also a number of Regional Mediation Groups in Ukraine, which have merged into the Association of Mediation Groups of Ukraine and the Ukrainian Center for Understanding, which is actively involved in the implementation of reconciliation programs for victims and offenders and educational activities in this area [2].

Literature review

Issues of popularization and legal regulation of mediation are currently of considerable scientific interest. Thus, various issues concerning the genesis and development of mediation in Ukraine, the implementation of norms regarding the legal regulation of aspects of mediation in domestic legislation, raised in the scientific researches of Podkovenko T., Karmaza O., Mazaraki N., Gavryliuk R., Fursa S., Yasynovskyi V., Shynkar T. and others. Particular attention is paid to the efforts of scientists and practitioners to study the experience and path of the former Post-Soviet republics, and now new independent countries in the development and implementation of this phenomenon in public life.

Thus, some issues of comparing mediation

in commercial disputes in Ukraine and Georgia are covered in the papers of Frantsuz A. and Polishchuk V. [3]; the experience of the CIS countries in the issues of legal regulation of mediation in commercial disputes was studied by Polishchuk V. [4]; aspects of the mediation development in the countries of the Customs Union were raised in the work of Krasylovska Z. [5, pp.191-192] The dissertation research of Shynkar T. is aimed to improve the application of mediation in the administrative proceedings of Ukraine [6, pp.3-5].

Aims

As can be seen from the above, mediation issues have been and will be of increased scientific and practical interest. The primary source of this interest lies in the opportunities that mediation and other alternative means of resolving conflicts open up to unburden of the national judicial system. At the same time, as for the beginning of 2021, even the relevant law that would regulate the provision of mediation services in the legal field has not yet been adopted in Ukraine. While in our closest neighbors - the former Soviet republics, in particular, Moldova, Belarus, Georgia, mediation is developing in the most active way. This process in these countries is accompanied not only by the adoption of special legislation, but also by number of sub-laws and executive regulations designed to further regulate special issues arising in connection with the provision of mediation services, maintaining a register of mediators, mediation training, etc. (particularly in Belarus).

Meanwhile, the above-mentioned countries not only have a common historical background with Ukraine (as they were formerly part of one big country), but also went through a similar path with us to gaining independence and fighting for a European future. This means not only peoples' revolutions and mass manifestations of distrust to the country's authorities (Georgia, Belarus), but also encroachments on the territorial integrity and existence of the occupied territories (Moldova, Georgia).

The purpose of this study is the authors' attempt to investigate the current situation with the development of the legal framework for the regulation of mediation in the abovementioned countries and the available opportunities to learn international experience in the legal recognition of mediation for Ukraine.

Methods

The methods of this research include the following: the method of analysis was used in the study of the essence of the concept of "mediation" and the nature of this phenomenon; the modeling method was used during the study of models of mediation development in such countries as Belarus, Georgia and Moldova and the possibility of applying a certain model of development of this phenomenon for Ukraine. A review of legislation and scientific literature allowed the authors to clarify the features of the legal framework of mediation in the abovementioned countries, the opinions of researchers on the peculiarities of the mediation development in Ukraine.

Results

Mediation is a new culture of dialogue that needs to be developed not only in business and in our lives, but also to be adopted at the legislative level. T. Sydoryshyna "Mediation - a new feature of communication" [2].

This is what the researchers say about mediation. However, as I.H. Yasynovskyi aptly notes in this regard, "… mediation has not yet become widespread in our society as a new legal institution unusual to Ukraine" [7, pp.261-262.].

Speaking about the development of a culture of alternative disputes resolution (mediation) in the abovementioned countries (Belarus, Georgia, Moldova), it would be logical to start with Belarus. Compared to Georgia and Moldova, this country boasts the fastest implementation of mediation practices in society and legislation.

In general, in Belarus, mediation has been mentioned as a way to resolve conflicts since 2010, when pilot projects were implemented in the commercial litigation system (commercial courts of Minsk and Minsk, Gomel, Brest, Grodno and Mogilev regions) to promote mediation as an effective way to resolve economic and other legal conflicts (CIS). However, as the first stage in the application of alternative means of conciliation the adoption of a new version of the Commercial Procedure Code of the Republic of Belarus in 2004 can be considered. In particular, Chapter 17 "Settlement of disputes through mediation" appeared in the Code, thanks to which the resolution of commercial disputes outside the court session became possible through a neutral mediator (official) of the commercial court. Researchers emphasize that

until 2011 there was no notion of "judicial conciliation" in the legislation of Belarus, but after the amendments to the Commercial Procedure Code of the Republic of Belarus, there was not only the mentioned notion of it, but also a number of new requirements for the conciliation procedure of economic entities: conducting the procedure in accordance with the court decision; court control over this procedure; appointment of a specific judicial "conciliator"; the possibility of involving out-of-court mediators in the conciliation procedure on a contractual basis; preferences for the parties of the conflict which have applied for this procedure in the form of a significant reduction of court fees (mediation in CIS countries). [8]

In 2014, the Law on Mediation came into force in Belarus. Procedural codes are used to supplement this law during court mediations. In addition, there are “Rules for mediation” approved by the Government and a number of acts of the Ministry of Justice, which is the regulatory body of the mediation institute. These are, in particular, the Instruction on the procedure for maintaining the register of mediators and the register of organizations that provide mediation, the Resolution on the establishment of forms of documents in the field of mediation and the Code of Ethics of Mediators [9,10].

The peculiarity of "Belarusian" mediation is the development of facilitative mediation at the legislative level. Accordingly, mediation can be used both out of court and in trial cases.

Mediation in Belarus is not mandatory, unless there is a provision in the agreement between the two parties to settle the dispute through mediation. In addition, the court must notify the parties of the dispute of their right to use mediation. However, there is also a possibility of enforcement of mediation agreements in commercial disputes. In addition, there are benefits of 25% to 50% refund of state duty in case of litigation through mediation.

Legislation does not foresee mediation in conflicts where one of the parties is a state body or an official of a state body, while in general the range of disputes where it can be applied is quite wide: family, labor, civil and economic relations. The impossibility of a mediation agreement in administrative disputes, in our opinion, quite eloquently testifies about the assertive authority of the status of Belarus public authorities in contradiction to «green light» for mediation provided by the mentioned authorities… In general, this example reflects the style of public governing in the country, but this research is not about that…

A person with higher education who has completed training courses for mediators or has experience in judicial conciliation, and obtained a Certificate of Mediator can be the Mediator. All mediators should be listed in the Register of Mediators. Thus, for the beginning of 2020, more than 860 people received a certificate and have the right to conduct thr mediation activities. In total, more than 900 mediations were conducted in Belarus in 2019, 650 of which resulted in the conclusion of mediation agreements [11].

At the end of the review on the development of mediation procedures in Belarus, it should be added that the country has systematized and state-supported measures to promote alternative dispute resolution. Judicial system actively explains the peculiarities of the mediation procedures application, advertising of mediation is carried out by the Ministry of Justice and in the mass media [12]. Thus, the opportunities for potential users at least to learn about this procedure and its features increase continuously. That is why it seems logical that Belarus was one of the first former Soviet countries, which ratified in 2020 United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation).

Moldova has chosen a slightly different path of implementing alternative means of conflicts resolution in its legal and social space. Thus, the first Law on Mediation was adopted in 2007, but it has not been properly implemented. Therefore, a new legislative act was adopted in 2015. A professional environment of mediators has been formed in Moldova and mediation practice is continuously developing. In general, mediation activities in Moldova have many common features with Belarus: the presence of additional regulations of the Ministry of Justice; benefits in the payment of state duties in case of an attempt to resolve the dispute through mediation; state support for the implementation of the mediation agreement. Distinctive features of mediation in Moldova are the following: the main and generally accepted model of mediation in the country is facilitative mediation; in addition to

family, civil and labor disputes, and in some cases in criminal and administrative cases, mediation is also used in disputes concerning consumer rights protection; both a Moldovan citizen and a foreigner can be a mediator; the condition for acquiring the status of a mediator is the completion of special courses and passing the attestation examination at the Ministry of Justice [8].

At the same time, experts say that conciliation procedures, which are confidential and relatively inexpensive compared to court costs, are not expected to gain the real mass demand in Moldova in the nearest time. Thus, according to a survey of 65 companies that work in the sale of goods and services, agriculture and manufacturing, conducted in 2019, it was found out that only 6% of Moldovan entrepreneurs turn to mediation to resolve their conflict situations, while 72% respondents only showed interest in such services [13]. Among the factors contributing to the lack of popularity of mediation are distrust to such a procedure, fears of difficulties in implementing the mediation agreement and lack of basic knowledge about mediation.

However, in our opinion, the Government of Moldova has taken the necessary steps to provide legal background to alternative disputes resolution, and the issue of promoting these tools will be positively resolved over time.

Let us move on to the formation and development of alternative dispute resolution in Georgia. According to researchers [8], this phenomenon has deep historical roots: conciliation procedures for resolving conflicts within the community with the involvement of its authoritative members are still actively used in the highlands of Svaneti, Abkhazia, Adjara, Khevsuretia. This is despite the fact that mediation as a legal institution was not represented in the country's legal system until 2010. In general, the notion "mediation" first appeared in the Criminal Procedure Code of Georgia after amendments made to it in July 2010. In particular, these changes made it possible to develop alternative measures of prosecution in the form of a program, which was later called the "Program of Mediation and Generation (or Advancement) of Minors". The purpose of this program was to develop measures to release juveniles from criminal prosecution without probation and criminal record.

For now Georgia has the Law on Mediation, which was adopted on September 18, 2019 and came into force on January 1, 2020. Mediation in Georgia, as well as in Belarus and Moldova, has many common features, so we consider it is necessary to put an emphasis only to aspects that differ [14].

Thus, the effect of the abovementioned Law (Article 1) expands to: mediation, which is carried out by concluding a mediation agreement; judicial mediation. Moreover, mediation agreements can be concluded even in the field of medical mediation. It is noteworthy that an informal institution the Medical Mediation Service, supported by the Ministry of Health, was established in 2006 to resolve conflicts between the patient/legal representative and the medical institution (and/or insurance company). The aim of this structure is to assist the parties in conflict resolution.

However, the abovementioned Law in Georgia does not cover the notarial mediation. Thus, conflicts in family inheritance, neighborhood and other cases, which are not covered by the Law "On Mediation", are subject to resolution by a notary. This is what Article 38-1 of the Law of Georgia "On Notaries" proclaims. We believe that the existence of this norm in Georgian law is actually very successful: after all, the parties in such conflicts really communicate primarily with the notary and it would be logical to offer to find a way to reconciliation during the notarial acts [16].

The similar situation is also with conflicts in the labor field and in relation to juvenile justice. That is, the Labor Code of Georgia and the Code of Juvenile Justice, respectively provide the resolution of such conflicts. In addition, the Law of Georgia «On Mediation» regulates the mediation procedure itself and its other rules.

Finally, we would like to emphasize on another positive point provided by this Law, namely: the establishment of the Association of Mediators of Georgia on the basis of the Law and granting the right to maintain the Unified Register of Mediators to this Association. This shows a considerable state support for mediation, which contributes to the promotion of this institution. The Association was created with the support of the Ministry of Justice of Georgia and on the website of this Ministry anyone can find the information about the mediator in which they are interested. And since it comes from the state, although the various organizations that provide mediation services and maintain appropri-

ate registers in the country are enough, the trust in the mediator recommended by the state body will be higher.

Discussion

Thus, we have studied the experience of development of mediation as an alternative tool of conflicts resolution in three countries: Belarus, Moldova and Georgia. What and who prevents Ukraine from choosing any model of dissemination and popularization of mediation and implementing it? In the scientific literature, opinions on this subject differ and relate to the development of mediation in two directions: as a legal and as a social phenomenon.

Thus, the authors O. Karmaz, T. Podkovenko, T. Shynkar, A. Frantsuz, V. Polishchuk are convinced on the direction of legal development of the mediation model: it is necessary to adopt the relevant Law of Ukraine "On Mediation". V. Polishchuk clarifies that at the same time it is necessary to adopt a number of accompanying bylaws regarding the maintenance of the register of mediators, mediation procedures, requirements for the profession of mediator, etc. We have already mentioned such a positive experience during the review of the Belarusian model of mediation development. In general, these authors are convinced that mediation will relieve the judiciary system and increase public confidence to the courts, will facilitate the rapid resolution of conflicts in any category of cases [3, 4, 6, 16, 17]..

Regarding the directions of development of mediation as a social phenomenon I.H. Yasynovskyi, for example, believes that mediation in Ukraine has faced a number of moral, ethical and psychological problems, to overcome which it is necessary to increase the legal culture of the population and the level of trust in this service, overcome the information barrier to knowledge of the phenomenon and to draw the attention of the state to provide support for mediation development [7, p.262]. O. Karmaza states that the clear legal position of the state regarding the support of mediation can be perceived by society as a "medicine" that will promote its "recovery" from diseases related to corruption, "telephone law", family quarrels and conflicts between neighbors, relatives, etc [16, pp.25].

Conclusions

In our personal opinion, the successful development of mediation is a balanced combination of social and legal directions of its development. For now, 13 draft laws on mediation are registered in the Parliament of Ukraine, none of which has been adopted as a law. On the other hand, we have a relatively small number of citizens who, thanks to the efforts of public organizations and some educational institutions, have begun to learn about mediation as a phenomenon, a service, an additional competence. But, obviously, it is not enough. A unified coordinated state policy, even political will, is needed to support and develop this institution in Ukraine. Let us agree with I.H. Yasynovskyi that the practical implementation of mediation in Ukraine in comparison with the former Soviet republics, in particular Belarus and Georgia, is carried out at a very slow pace [18, pp.2-3]. But, as our research on mediation models in these countries has shown that it all depends on balanced, effective and joint support from both the legislative and the executive branches. Belarus is a good example of this, but the development of mediation in Georgia and Moldova, although it has certain peculiarities of development, still shows the proper political will of the authorities of these countries.

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MEDIATS Mediation: Training and Society Transformation

CONCEPT OF LIBERAL PEACE MANAGEMENT THROUGH MEDIATION

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Abstract. *Theoretical study of peace as dynamics of life free from violence from perspective of management science reveals instrumental potential of mediation, i.e. organization of peace in communication among people, in liberal peace management, which is process of organization and development of peaceful life by nonviolent means. Liberal peace management through mediation in private and public contexts maintains dialogue, negotiations, and decision-making ensuring maximum autonomy of the parties to achieve agreements between people and voluntary compli-ance with the agreements. As a peaceful way of dispute settlement, liberal peace management through mediation helps to build peace within and between societies ensuring the right of every-one to enjoy just and prosperous peace free from fear and want, as urges 2016 Declaration on the Right to Peace.*

Keywords: *mediation, peace management, peace and conflict studies, amicable settlement, right to peace, peacebuilding.*

JEL Classification: *D74; K30; J52.*

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Introduction

Three profound tendencies of current moment shape our future. Firstly, it is development of communication techniques and skills helping everyone to find common language with anybody. Secondly, it is profound political and economic transformations of world-system, empowerment of global civil society movements and corporations. Thirdly, it is universal competition of two approaches to govern-ance and management, namely, liberal approach based on the inclusive voluntary evidence-based decision-making and illiberal approach based on the old-fashion formula "divide et impera," systemic deception and structural violence.

In categorical terms of political morality (no one should be turned into instru-ment of other's will, in Kantian tradition) and in consequential terms of economic morality (greatest benefit of maximum number, in Benthamite tradition) liberal ap-proach is morally superior over illiberal approach; because of that, liberal approach is natural choice of responsible leaders. Unfortunately, illiberal approach excites short-term thinking; it seemingly proposes cheap way to manipulative and extortive domination over people and markets. Collateral damage of widespread illiberal approach is toxic culture of conflict which distorts human development undermining our plans for peaceful future full of happiness.

Transformations in human communication, management and governance, in particular, development of the science and art of mediation, help to respond the cul-ture of conflict building culture of peace in foundation of new global social contract.

Literature Review

Interdisciplinary research in law, economics, and management today frequently concern with peace and conflict issues. Bielova, Lotariev and Shcherbakova (2020) argue that ethical responsibility can greatly improve the company's operations and reduce the costs of potential conflicts [1]. Liashenko emphasizes fragility of transforming societies during a hybrid world war, in particular, due to lack of legitimate political mediators; Mihus points out that business conflicts increase the risk of cor-porate raiding and, therefore, should be promptly resolved in belligerent business environment [2]. Frantsuz and Salamakhina (2018) argue that children's rights are usually violated in many ways in the context of armed conflict, proposing legal measures for deescalation of conflicts and prevention of engagement of children into the conflict [3]. Alkema, Kirichenko, Litvin et al. (2015) explain importance of timely and high-quality conflict management for organizations, ensuring a friendly, positive, optimistic climate in the team, since non-confrontational social environ-ment should be created in organizations according to quality management system standard ISO 9001:2015 [4]. Koval made a point that the armed conflict in eastern Ukraine is a permanent source of risks for the country and economy [5].

Peacebuilding mediation is essential topic in peace and conflict studies. Rocha (2019) describes mediation as a conflict management tool, a process of assisted ne-gotiations and common decision-making, transforming destructive conflict to a con-structive resolution of problems, creating safe space of communication. Mediation is effec-

tive when distrust between conflicting parties prevents them from direct bar-gaining, so they employ trusted non-conflicting party to facilitate their negotiation. In new realities when power shifts from states to individuals and corporations, from hierarchies to networks, when nature of war changes from interstate to intrastate armed conflict, peace process and mediation as its vital part takes place on four tracks: official relations, unofficial cooperation, public dialogue, and promotion of peace in civil society, including nonviolent education. Contemporary mediator need to reboot the international system with a stronger inclusion of the citizen diplomacy agenda, bringing back breakaway groups to the peace process [6]. Lederach (1997) considers relations building as central component of dealing with contemporary conflict and reconstruction of divided society [7, p. 151].

According to Horowitz (2007), the task of a mediator is creating the condi-tions for an open dialogue and assuring the parties involved in the conflict freedom of speech and, above all, autonomy in decision making. She describes the Harvard method, aimed at the integrative (win-win) solution of disputes at interpersonal and international levels, and explains Johan Galtung's theory of mediation as peace work, seeking transformation of conflict into transcendent peace, towards legiti-mate, positive, and constructive future [8].

Lehti (2019) describes liberal peace as the idea combining democracy promo-tion, respect of human rights and peace, which became a cornerstone of new interna-tional order, and emphasizes the centrality of private peacemakers "as flexible ac-tors whose innovative thinking paves the way for reconsidering and reinventing old practices of mediation." He mentions academic criticism of "the myth of rational management of a peace process" as "conflict management" based on linear causal logic, related to the notorious "divide and rule" approach prevailing in public poli-tics, which is less effective than "adaptive approach" initiated by private actors, for example, in liberal peace interventions, civil crisis management and humanitarian aid projects of NGOs [9].

Sheliazhenko (2020) describes conflict bias as a tendency of people to ignore peace and opportunities for its achievement and argues that mediation as a form of liberal peace management can help people to realize they have a choice whether to participate in conflict or not, and make their choice in favor of peace; schemes ex-posing conflict bias may be used in mediation [10]. The concept of liberal peace management through mediation proposed in this article was developed by the author during the Master's Program in Mediation and Conflict Resolution at KROK Busi-ness School, which is part of the project "Mediation: Training and Society Trans-formation/ MEDIATS" co-funded by the Erasmus+ Programme of the European Union [11].

Aims

This study is aimed to explain and develop theoretical concept of liberal peace management through mediation linking it with well-known theory of conflict man-agement.

Methods

Theoretical and doctrinal survey was conducted to formulate proposals in methodological framework of management science and peace studies, including au-thor's theory of liberal peace management.

Results and Discussion

Changing nature of peace in modern understanding may be explained on example from intellectual history of management science.

Integrative approach to peaceful organization of life is an old idea in management, developed, in particular, by the "mother of modern management" Mary Parker Follett in her 1918 book "The New State: Group Organization the Solution of Popular Government." Explaining how to achieve "industrial peace," she wrote: "Labor unions have long been seeking their rights, have looked on the differences between capital and labor as a fight, and have sought an advantageous position from which to carry on the fight: this attitude has influenced their whole internal organization. They quite as much as capital must recognize that this attitude must be given up. If we want harmony between labor and capital, we must make labor and capital into one group: we must have an integration of interests and motives, of standards and ideals of justice." Also, Mary Parker Follett emphasized on changing the competition-based approach of classic education: "It is at school that children should begin to learn group initiative, group responsibility – in other words, social functioning. The group process must be learnt by practice. We should therefore teach subjects which require a working

together, we should have group recitations, group investigations, and a gradual plan of self-government. Every child must be shown his place in the life that builds and his relation to all others who are building. All the little daily and hourly experiences of his interrelations must be constantly interpreted to him. Individual competition must, of course, disappear. All must see that the test of success is ability to work with others, not to surpass others... Moreover, we should have, and are beginning to have, group recitations. A recitation should not be to test the pupil but to create something. Every pupil shouldbe made to feel that his point of view is slightly different from any one's else, and that, therefore, he has something to contribute" [12].

Transformation of the spirit of "competition" into the spirit of "contribution" is cornerstone of Follett's idea of "integrative" education and conflict management. Follett approached to explanation of what I call fallacy of illiberal peace in her 1924 book "Creative experience," though she used the vague concept of creative conflict which in my view anticipated modern concept of dynamic peace. Insisting that the law should be "based not on the battle of interests with the crown to the victor, but on the uniting of interests," she wrote: "Again we are told that law comes always from struggle; the right conquers. All the errors of this way of thinking come from one: the ignoring of the creative possibilities of conflict. We do not wish to put up with strife for the sake of the peace that follows. Existence should not be an alternation of peace and strife. We should see life as manifold differings inevitably confronting each other, and we should understand that there is no peace for us except within this process. There is no moment when life, the facing of differings, stops for us to enjoy peace in the sense of a cessation of difference. We can learn the nature of peace only through an understanding of the true nature of conflict" [13].

Illiberal peace, based on purely communitarian approach, is self-contradictory concept legitimizing structural violence. It claims supremacy of collective agents over individuals to legitimize agressive competition in authoritarian and manipulative clientellae-gathering. Any collection, collective, or capital of people and things (in Roman law known as "universitas," or association) is organization, basic unit of management having artificial personality; it is collective individual. But proponents of communitarianism refuse to understand that political power in numbers of popular support does not legitimize violence; when they say "it is popular will," it means basically "might is right." Interestingly, they criticize capitalism for immoral attitude to arbitrary use the power of money, but they don't see that the gathering of people and the gathering of money to obtain (and abuse) power are activities very similar in many ways.

I had interesting discussion on that issue with Professor Peter Hallward at Warwick colloquium "The Ends of Autonomy." He thinks that autonomy isn't personal characteristics but only "the mass sovereignty," in particular, organized will of workers and capitalists in class struggle. I said him that any organized mass or class as a political agent is some organization, individual social capital (in modern society possibly even automated, driven by artificial intelligence). Nation states, or sovereign democracies, are political entreprises in debt of bankers, weaker than multinational corporations, high-profitable for holders of sovereign bonds and debts because of predatory taxation, which is legitimate robbery, monopolist privilege of such form of commercial firm as nation state, which tends to wage wars against competitors at the imperialist market of global robbery and create "social pollution" of deprivation, unhappiness, and pain. In that view, I asked him what difference is, in his view, between individual sovereignty and mass sovereignty; aren't masses just corporate individuals? He answered that difference is in power and in different quality of power, namely, the mass is "agent and action simultaneously," like the noun "masses" denote result of action, denoted by the verb "to mass." Of course, this reasoning is flawed because any individual is capable to gain some amount of power by social contacts and material enrichment. And this flawed reasoning is typical for communitarianism, refusing to see individual character of its social constructions and refusing to respect individual rights, seeing in individual just weak single human person which should be crushed or coercively subordinated to "the community" or "the collective," created by amassment of people and things, like all capitalists manage organizations, because it is universal method neutral to ideologies. When we hear these words in this communitarian context, it would be wise to ask, who owner of the clientele we talking about; who

is trying to obtain unjust liberty of despotic power, denying basic liberties of people needed to live peacefully and happily.

Illiberal peace causes structural violence and rebellion in communities depriving people of individual rights, supposedly for the sake of peace, and pose a threat to liberal peace management through mediation, because it allows to cover up violence, injustice, and oppression under disguise of peaceful settlement. Conflict fundamentalism sees conflict in any differences among people and claims the conflict leads to progress, ignoring the red line of nonviolence between constructive exchanges and destructive animosity, and thus legitimizing, perpetuating, escalating violence; it pose a threat to liberal peace management through mediation, because it lowers expectations of participants, their hopes for peace, their trust in process and other participants.

Peace management, unlike conflict management, avoids crossing red lines and infamous "divide and rule" approach, and thus strengthens the dynamic diversity of peaceful life. Sociologist Johan Galtung, father of peace studies, coined a term “dynamic peace” for this diversity. Mother of modern management, Mary Parker Follett, used the term "creative conflict" writing that peaceful life should be founded on integration of diverse differings, not on elimination of difference or victory of the strongest.

Dynamic peace is a factor of economic security that must be created at all levels. Peacebuilding and political mediation should create safe social environment. Business and private mediation, e.g. in labor and family disputes, should be used more widely because it helps to resolve conflicts faster and cheaper than litigation and arbitration.

Liberal peace management is process of organization and development of peaceful life by nonviolent means. In historical development, liberal peace management goes through three stages. The first stage is a moral influence, Ten Commandments and Ahimsa are good examples. The second stage is ethical prescriptions, such as customs of medieval international trade, so-called lex mercatoria, which preceded contemporary business ethics. The third stage is modern scientific methods and technologies of peace process such as mediation, facilitation of dialogue, and Harvard method of principled negotiation [14]; also, traditional adjudication in paradigm of procedural and social justice also is a method of liberal peace management.

Since mediation is organization of peace in communication among people, assistance in achieving agreements between people, the liberal peace management through mediation organizes process of decision-making ensuring maximum autonomy of the parties.

Promising approach to liberal peace management through mediation is conflict coaching (which may be characterized even better as peace leadership). The approach was developed by Jan van Zwieten; it focuses on helping individuals and teams to increase their human potential in energetic, rational, and social capacities, motivating and stimulating people to focuse personal and team energy (i.e. “energy we,” capacity to deal with conflicts together), intelligence and emotions on a “quest,” in search of higher purpose in life according with their identity, values, norms, passion, ambition [15], in other words, transcending themselves.

Jan van Zwieten once told us during his lecture, that there are over a million informal mediators in Netherlands and the nation is in top-10 of happiest countries in the world; this fact proves that peace culture generates prosperity.

Culture of conflict and hatred generates opposite results, as shows current hy-brid multi-layered geopolitical and geoeconomic conflict of neo-imperialist great powers around Ukraine inflaming armed conflict in Eastern Ukraine, caused by aggressive militarism of Russian and Ukrainian nationalists [16].

International mediation in Ukraine-Russia conflict was successful in establishing fragile ceasefire and humanitarian agreements such as prisoners exchange [17], but stuck in political disagreement, because all major stakeholders pursue illiberal peace being more interested to profit from the conflict than to resolve it. Let’s hope that peace leadership and more active peacebuilding efforts of global civil society in future may change this unfortunate belligerent attitude of the stakeholders.

Conclusions

Liberal peace management as permanent process of organization and development of peaceful life by nonviolent means is essential factor for maintaining and development of universal and per-

pertual peace, which is dynamics of life free from violence in all forms and dimensions, including politics and economics. The modern idea of liberal peace management reflects results of historical development of peace culture and organization of peace in different forms, such as moral and spiritual leadership, ethical reasoning in negotiations and decision-making, and mul-titude of scientific technologies of peace process developed in modernity.

Despite conflicts usually draw all our attention (the phenomena which I call conflict bias), there are always deep peace near and under the surface of any con-flict, even if the peace does not reveal itself at a first glance. Peace management is a way to analyse existing peace thorougfully, organize and strengthen the peace to ensure as much as possible minimization of the level of violence, any threats and harms crossing red lines and encroaching the state of peace. Other approach is con-flict management, based on analysis of conflict and organization of interventions seeking different benefits in conflict resolution, control over and transformation of conflict. Proponents of conflict management are usually eager, or not reluctant in negligence, to provoke and escalate conflicts if they feel power to control outcomes of the conflicts, believing that conflict and even violence is inavoidable and neces-sary part of human life, survival of the fittest and evolution. Peace management, un-like conflict management, doesn't neglect realities of peace during conflict analysis, doesn't resort to planned violence, avoids crossing red lines and infamous "divide and rule" approach, and thus strengthens the dynamic diversity of peaceful life.

Mediation is organization of peace in communication among people, assistance in achieving agreements between people. Liberal peace management through media-tion organizes dialog between parties and process of common decision-making en-suring maximum autonomy of the parties. It includes organization of negotiations and dialogue using facilitative, transformative, narrative, and other techniques, based on liberal principles of voluntariness and equal opportunity, leading to win-win type of conflict resolution and fair agreements.

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