



Mediation in progress

*Collection of articles
by participants of the Mediation project:
Training and Society
Transformation / MEDIATS*
599010-EPP-1-2018-1-NL-EPPKA2-CBHE-JP

Mediation in Progress: Collection of articles performed by participants of the Erasmus+ project “Mediation: Training and Society Transformation” / MEDIATS. – Kyiv: KROK Business School, 2022. – 155 c.

This publication contains the academic and practice-oriented articles, which represent achievements in the use, teaching and promotion of mediation in the countries participating in the MEDIATS project (Netherlands, Latvia, Spain, Germany, Georgia, Azerbaijan and Ukraine). The value and uniqueness of this collection of articles is the description of the diversity of approaches to the use of mediation - both legal and managerial backgrounds. The publications are the quintessence of the unique experience of the countries participating in the project, which can be studied and comprehended for the further development of mediation, a culture of conflict resolution, and the organization of dialogues.

The collection will be useful to practicing mediators, lawyers, attorneys, judges, business owners and managers, as well as students of educational programs in the field of mediation and conflict management.

ISBN 978-966-170-071-9

Edited by Olga Karpova, CEO of KROK Business School, and Oksana Sedashova, Associated Professor, Content leader “Mediation and Conflict Resolution” Master’s Program

Publication is the part of framework of Erasmus+ project “Mediation: Training and Society Transformation” / MEDIATS, 599010-EPP-1-NL-EPPKA2-CBHE-JP. The Project is co-funded by the Erasmus+ Program of the European Union.

The European Commission’s support for the production of this publication does not constitute an endorsement of the contents, which reflect the views only of the authors, and the Commission cannot be held responsible for any use which may be made of the information contained therein.

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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, 2022.

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.

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Petro Patsurkivskyy
LLD, Honored Lawyer of Ukraine, Professor,
Professor of Department of Public Law
Yuriy Fedkovych Chernivtsi National University,
ORCID ID <https://orcid.org/0000-0001-5081-7842>
p.patsurkivskyy@chnu.edu.ua

Ruslana Havrylyuk
LLD, Professor, Head of Department of Public Law
Yuriy Fedkovych Chernivtsi National University,
ORCID ID <https://orcid.org/0000-0001-6750-4340>
r.havrylyuk@chnu.edu.ua

MEDIATION AS A WAY OF CONSTRUCTING SOCIAL REALITY

Abstract. The article is devoted to the study of some insufficiently studied properties of mediation in both domestic and foreign science. Its purpose is to understand mediation as a way of constructing social reality. This goal is specified through the analysis of the following specific tasks of the article: spontaneity of mediation; mediation as a form of freedom of its participants; justice of mediation. The methodology of the article corresponds to the purpose and subject of the study. As basic cognitive tools in the process of preparing the article, the authors used the paradigm of dialogicity, axiological and anthroposociocultural approaches, in particular, such components of the latter as the social ontology of P. Berger and T. Lukman and the ontology of social facts and social institutions of J. R. Searle, and the method of structural and functional analysis.

The authors of the article obtained the following new scientific results: 1. Mediation as an extrajudicial way of resolving conflicts (disputes) in society has a spontaneous nature. Its necessity and nature are determined by internal factors for the parties to mediation. 2. Mediation is an effective form of freedom for both its parties and all actors in civil society, especially individuals. It is this freedom that plays the role of the eternal engine of both the development of mediation and one of the factors in the humanization of social space. 3. Mediation is fair both in its institutional nature and as a form of social practice. Its quintessence is a steady transformation of individuals from the objects of state procedure to full-fledged subjects and creators of social space. Mediation has proved to be an effective way of constructing a new social reality. The parties to mediation, solving their own private problems on a daily basis, usually on the same private basis, are constantly changing the entire social space, creating a reconciled social environment free from total antagonisms and permanent conflicts (disputes).

Key words: mediation; way of constructing social reality; spontaneity of mediation; fairness of mediation; mediation as freedom.

JEL Classification: K10, K19, K49, D74

Formulas: 0; fig.: 0; tabl.: 0; bibl.: 9.

Introduction. Mediation belongs to a number of unique civilizational phenomena. Its origins date back to high antiquity. It has undergone many transformations in its evolution. Modern mediation dates back to the 1960s and 1970s, when it was rethought in the United States as a way to overcome the crisis of national justice. Since then, modern mediation has taken root not only on most continents, including Europe, but has evolved meaningfully, becoming a legal extrajudicial procedure for resolving the vast majority of conflicts (disputes) in societies. However, its potential is not exhausted there. Mediation is increasingly proving itself as an effective way of constructing social reality in general, balancing its public and private

sides. However, for science, this aspect of the phenomenon of mediation is still terra incognita.

Literature Review. A notable feature of the development of scientific knowledge about mediation is the growth of their volume and complexity in geometric progression. The defining reason for this is the same explosive development of the phenomenon of mediation in the civilized countries of the world, as well as the number of its researchers. If five to ten years ago in literature on mediation there was a significant predominance of works that studied mainly its techniques and technologies and the authors found an appropriate justification for this, now the picture is changing considerably.

One of the well-known researchers of mediation, Kenneth Cloke, for example, explained the above bias in the scientific knowledge of mediation: “for a deeper transformative approach, it is necessary to have special techniques that include not only such mediation techniques that allow us to focus on the problem better, become more sympathetic to people, better understand ourselves and others, but also those that help us hear others better, be open in communication, establish a constructive dialogue, be creative in solving problems, learn to work and seek reconciliation”. This direction in the knowledge of mediation still prevails quantitatively.

However, in the last few years, mediation research has clearly shown a shift towards systematic knowledge of the worldview and value of mediation in general. Some important scientific conclusions have already been reached in this cognitive paradigm. In particular, the warning of danger both for the respective societies and for mediation in case of mechanical transfer of its ready-made models from one social soil to another is substantiated. This is especially true of Western models of mediation, as historical experience shows that Western individualistic mediation, aimed at solving specific problems, was developed taking into account the needs of Western culture and is not entirely suitable for collectivist values. We fully share this view.

J. Robbie even more convincingly reveals the ascendant attitudes of most aspects of mediation in Western societies: “Each of them is

convinced that the problem would not exist if the other side behaved more intelligently and accepted his point of view". However, the dialogical nature of mediation inevitably changes such positions and internal attitudes of its parties towards their self-awareness of the key role of "moral development of man, which is carried out simultaneously in two directions – gaining inner strength and improving relationships with others". This last aspect of mediation, namely its value as a way of constructing a new social reality in science has not yet been studied. Moreover, the first attempts of its analysis by Ukrainian mediation theorists turned out to be methodologically flawed.

The question arises – from which methodological approaches should mediation be studied as a way of constructing a new social reality? To answer it, it is necessary at least in the most general terms to "grasp" the quintessence of the subject of study, in other words, try to find an answer to the question, not what is mediation, but how is mediation?

According to Paul Connerton, mediation is a common platform for "memory-habits" of social behaviour, a certain institutional pattern of behaviour of civil society actors.

Roger Fisher, William Yuri and Bruce Patton consider mediation as balancing the interests of its parties.

Jonah Berger is convinced that mediation invisibly affects from the outside to its parties with practical preliminary results of non-traditional resolution of conflicts (disputes) of its parties. Mediation is a kind of institutional public memory.

What is common to all three of the above approaches to explaining the procedural nature of mediation is transcendental institutionalism. It should, and is also capable, in our opinion, of becoming an adequate paradigm for understanding mediation as a way of constructing a new social reality.

The aim of the research is to understand mediation as a way of constructing social reality. It was concretized through the analysis of the following specific tasks of the article: spontaneity of mediation; mediation as a form of freedom of its parties; justice of mediation.

Research methodology: as basic cognitive tools in the process of preparing the article the authors used the paradigm of transcendental institutionalism, the paradigm of dialogic, axiological and anthroposociocultural approaches, in particular, such components of the latter as the social ontology of P. Berger and T. Lukman and the ontology of social facts and social institutions of J.R. Searle, as well as the method of structural and functional analysis.

Discussions. The starting point of mediation has always been and continues to be the urgent need of its parties to overcome injustice. As Charles Dickens once wrote in "The Great Hope", "children, whoever raises them, feel nothing more painful than injustice. Acute feelings of injustice remain with most people for life. Parisians would not storm the Bastille, Gandhi would not challenge an empire over which the sun never set, Martin Luther King would not fight the dominance of whites in the "land of freedom and the cradle of courage", as if they were all somehow, they would feel a clear injustice that can be eradicated", Amartya Sam summed up in "The Idea of Justice".

But what is justice and how to achieve it? Adam Smith also pointed out that the term "justice" has "many different meanings". And Paolo Prodi, who specifically studied the evolution of justice, came to the conclusion that throughout history the phenomenon of justice has been considered one-sidedly, absolutizing some of its aspects. In his opinion, only those social practices and cognitive traditions that applied a dialogical approach to cognition and implementation in the practice of justice, found constructive for their time and the relevant performers to solve the problem of justice.

Mediation has become one of the most classic practices in which its parties not only work together to overcome mutual injustice, but also achieve it in reality and establish justice in our relations. The quintessence of mediation is the paradigm of dialogicity, and its real epicenter, according to the authors of the transformative model of mediation Robert Bush and Joseph Folder, is the search for mediation by the parties to common worldviews and values. The same point of view is shared by some domestic theorists of mediation.

The paradigm of dialogicity, according to the most famous philosophers-dialogists of modern times M. Bakhtin, M. Buber, E. Levinas, V. Makhlin, P. P. Ricœur, F. Rosenzweig makes it possible to successfully search for a “third way” to resolve the bulk of conflicts (disputes) that plague modern societies and its actors. In particular, according to M. Bakhtin, the dialogic attitude is such a universal phenomenon that permeates all manifestations of human existence, everything that has meaning and significance. He specifically notes that wherever consciousness manifests itself, a dialogue always takes place visibly or even invisibly. Moreover, “each dialogue” takes place against the background of ... a third person present “. According to M. Bakhtin, this third one testifies to the involvement of the relevant participants in a certain dialogue in the Dialogue as a universal relationship between people. Mediation intuitively “grasped” this dialogical matrix and thus, it implicitly includes the possibility for its parties, as participants in the dialogue, to achieve a more or less complete understanding each other, without yielding to their own worldview and needs. This is the implementation by the parties of mediation of the so-called “third way”, which was discussed above.

The well-known Ukrainian philosopher-dialogist L. Ozadovska pertinently notes that this path lies between the unfulfilled ideal of objectivity in research about a person and his needs and “the Cartesian reduction of one’s own individuality to a certain I that is completely unrelated to another “I”. In Ukraine, this path is still significantly deformed by the same ideas about the mediation procedure of a significant part of both researchers and mediation practitioners, who still inertia continue to see the key person of the mediator in the mediation procedure and refuse to be the parties and their interests in the role of *perpetum mobile* of the entire mediation procedure. In Ukraine, this path is still significantly deformed by the same ideas about the mediation procedure of a significant part of both researchers and mediation practitioners, who still inertly continue to see the key person of the mediator in the mediation procedure and refuse to be the parties and their interests in the role of *perpetum mobile* of

the entire mediation. However, this is how their role in this procedure was defined by the domestic legislator in the Law of Ukraine “On Mediation” and it is of fundamental importance. After all, only if the dialogic paradigm of mediation is consistently adhered to and the parties in this conflict resolution procedure play a key role, the latter will be able to successfully cope with its role and become an effective way of constructing a new social reality in the country. The development of mediation in Ukraine is taking place in this direction.

The Main Results of the Study. 1. Spontaneity of Mediation. The emergence of the term “spontaneity” of the science of society and its phenomenon is due to the German phenomenologist of the early XXth century Adolf Reinach. Exploring the a priori principles of civil law by means of the phenomenological method he drew attention to their attributive connection with the will and expression of will of the subjects who interact with each other. The latter, in his opinion, is manifested primarily in acts of experiencing. A. Reinach has studied that not all acts of experiencing belong to social ones, but only those of them “in which Ego is manifested to be active, when we have a desire or intention and we carry it in ourselves” These experiences, – he notes, – we will call spontaneous acts: spontaneity will mean in this case the internal act of the subject”. The above interpretation of the term “spontaneity” still remains to be the main one in the sciences of society and their phenomenon.

Mediation is also attributively connected with the will and the expression of the will of its parties, with the acts of their experience, in which each of the parties of mediation is effective in the terminology of A. Reinach. Hence, it is obvious that the above experiences of the mediation parties, according to the formal features derived by A. Reinach, also refer to spontaneous acts, since they are their internal actions.

Even more convincing of the spontaneous nature of mediation are the underlying reasons for its necessity. One of the authors of this article has studied these reasons specifically, as a result of which it has been concluded that there are at least two groups of such reasons.

These are the fundamental existential properties of man himself and the existential structure of the human world.

The priority of a profound scientific analysis of spontaneity as a general social phenomenon belongs to Adam Smith. In his main work, "An Inquiry into the Nature and Causes of the Wealth of Nations," he irrefutably proved that the fundamental cause of the wealth of nations is human needs and the satisfaction of these needs by people themselves. For the latter, people are forced to cooperate in their efforts. A. Smith convincingly revealed the nature and factors of such cooperation: "Man has almost constant occasion for the help of his brethren, and it is in vain for him to expect it from their benevolence only". He will achieve his goal more quickly when he appeals to their selfishness and knows how to show them that it is in their own interests to do for him what he requires of them. Anyone, offering any agreement to others, offers to do just that: give me what I need, and you will get what you need – this is the meaning of any such proposal".

These own needs and interests of each individual or their groups, as shown by A. Smith, internally determined for them, depends on many factors that can not be rationally taken into account, as far as they are spontaneous. . Contrary to the ideas of supporters of numerous concepts of understanding the nature of society as a certain ontological integrity, A. Smith proved that society arises as a result of elementary natural actions of selfish individuals.

One of the most common such cases is the constant need of many individuals or their groups to resolve conflicts (disputes) that inevitably arise in their joint existence with others. For a visual explanation of this phenomenon, you can use the formula of the invisible hand of the market by A. Smith. The quintessence of this formula, according to A. Smith, is that an individual entrepreneur, pursuing the goal of extracting his own benefit, usually does not think about what society will have from this: "... in this case, like in many others, he rushes with an invisible hand towards a goal that was not at all part of his intentions In pursuing his own interests, he often serves the interests of society more effectively than when he consciously seeks to do so".

Each party to mediation, when resolving a conflict (dispute) with the other party, is consistently guided only by its own needs, pursues only its own interests, seeks to obtain the maximum benefit. At the same time, their own will and expression of will, autonomy of will as a principle, are decisive for them. At each subsequent stage of mediation, its parties with the help of a mediator become able to perceive the conflict (dispute) more panoramically, hear the other side more adequately, and therefore to be more aware of the quintessence of their own needs and interests in the conflict (dispute), and to distinguish from them minor things and layers of emotions, which usually play the role of triggers in the emergence of conflicts (disputes) based on natural contradictions. The decision to refrain from further insisting on these secondary things and emotional layers in the conflict is also autonomously taken by each of the parties to the mediation. Therefore, in reality there are sufficient grounds for the conclusion that mediation meets all the above-mentioned criteria of social spontaneity. The need for mediation and its nature are determined by internal factors for the parties to mediation. Asserting a reconciled social space, it acts as an effective way of constructing a new social reality, is one of the manifestations of social necessity.

2. Mediation as a Form of Freedom of the Subject. Freedom is a fundamental category of philosophy, the humanities in general and the social sciences. Freedom refers to the basic European values and the values of Western civilization as a whole. In a number of universal values, it rightly occupies a place along with human dignity and it is one that by yielding to which man actually renounces his ancestral essence. Each of the cognitive traditions sees the nature and quintessence of freedom differently. From the point of view of the anthroposociocultural approach, freedom means cognized by the subject the need for his actions, reflects his attitude to his own acts of expression of will, in which the latter are considered as their determining cause. That is, according to the above approach, mediation is one of the forms of manifestation of the freedom of the subject. It is not determined by certain social, interpersonal-communicative or other

intersubjective or any other factors, moreover, it is not determined by natural causes.

For example, the Law of Ukraine “On Mediation” in the main article “Definition of Terms” states that “mediation is an extrajudicial voluntary, confidential, structured procedure during which the parties with the help of a mediator (mediators) try to prevent or resolve a conflict (dispute)”. The terms “voluntary” and “parties” are highlighted by us. The same article of the above-mentioned Law clarifies that “the parties to mediation are natural, legal persons or groups of persons who applied to a mediator (mediators) or an entity providing mediation in order to prevent the emergence or settlement of a conflict (dispute) between them through mediation and concluded an agreement on mediation”. The same article of the above-mentioned Law clarifies that “the parties to mediation are natural, legal persons or groups of persons who applied to a mediator (mediators) or an entity providing mediation in order to prevent the emergence or settlement of a conflict (dispute) between them through mediation and concluded an agreement on mediation”. At the same time, it would be ideologically short-sighted and methodologically flawed to reject any link between mediation and determinism. As practical experience shows, such a connection not only takes place, but is also diverse. He actively influences the phenomenon of mediation directly, its content, limits and possibilities. Consider some of the most common cases of interaction between mediation and determinism.

The very first in the functional series of such cases concerns the boundaries of the will and willingness of the subjects while initiating the mediation procedure. As stated in paragraph 4 of Article 5 “Voluntariness” of the Law of Ukraine “On Mediation”, “participation in mediation is a voluntary expression of will of the participants in mediation. No one can be forced to resolve a conflict (dispute) through mediation. Moreover, the next paragraph of the same article emphasizes that “the parties to the mediation and the mediator may at any time refuse to participate in mediation. That is, both the initiation and the mediation procedure require the consent of each of the

parties to the mediation. This is the principle of mediation enshrined in law: “Mediation is conducted by mutual consent of the parties to mediation, taking into account the principles of voluntariness, confidentiality, neutrality, independence and impartiality of the mediator, self-determination and equality of rights of mediation parties. The principles of mediation extend to the stage of preparation for mediation. Thus, no subject is endowed with unlimited will and the right to express the will to initiate and unhindered mediation. Mediation attributively implies the joint participation and mutual consent of its parties at all stages.

The next of the above cases concerns the limits of will and expression of the will of the parties to mediation in resolving the conflict (dispute) in this way. On the one hand, as noted above, the principle of autonomy of the will of the party to mediation operates here. This means that its will cannot be limited by any external factor. At the same time, based on the dialogical nature of mediation, the other side of mediation is endowed with a similar autonomy of will. As a result, self-limitation of the will of each of the parties to mediation is necessary: the will and willingness of one such party *de facto* ends where the will and willingness of the other party to mediation begins. However, the principle of autonomy of freedom of the parties to mediation is preserved.

The need for each side of mediation to take into account the will and the will of its other side, as follows from the second semantic condition of a person’s existence in the world in accordance with the postulates of practical philosophy, formulated at the end of the 20th century, is determined by the need for them to observe communicative solidarity, or, in other terminology, reliance of a man on neighbors and their help”, that is, on the Other. “I call it (reliance on the Other – P.P. and R.H.), – sums up one of the leaders of practical philosophy T. Rench, – a practical horizon of communicative solidarity”.

Somewhat more difficult to understand and explain is the relationship between the will and the expression of will of the party to mediation, on the one hand, and human autonomy, in principle, as

the first of the conditions of human existence. This condition, according to the concept of practical philosophy already mentioned above, is the constituent of the meaning of human existence. It is directly human existential facticity that makes it so, thereby affirming a person as a product of his own spontaneous self-development, and not someone else's project. In its turn, human existence is impossible without the satisfaction of transcendental and acquired human needs for goods. As a modern American phenomenologist of Ukrainian origin Damian Fedorika writes in the section "Human Needs and Human Freedom" of work "Philosophy of the Gift", a person is a slave to his own needs. On the one hand, these needs are inextricably linked with a person, but on the other hand, they are not an attribute of a person, but are the conditions of his existence.

Therefore, in reality there are sufficient grounds for the conclusion that, according to the terminology of practical philosophy, the basic structure of the human world (the existence of a person in society in traditional terminology) is marked by fundamental antinomianism, "which we must comprehend, on the one hand, as natural facticity, and on the other hand like a project in freedom". At the same time, one should not forget that it is the freedom of a person that plays the role of *perpetuum mobile* in all his life projects, including mediation. Mediation has already become in many civilized countries of the world and is also being actively established in Ukraine as one of the most obvious and effective forms of this freedom of social subjects, first of all, individuals.

3. Fairness of Mediation. Even more multifaceted in form of manifestation and richer in content compared to mediation as a form of freedom of the subject is the phenomenon of fairness of mediation. It could become an independent subject even for fundamental research. However, based on the goals and specific objectives of this article, we will limit ourselves to the analysis of only two aspects of the problem: the institutional fairness of mediation and the fairness of mediation as a social practice. At the same time, the general cognitive matrix of the analysis of the above issues will reveal the phenomenon

of fairness of mediation as a way of the attitude of one of its parties to the other party, mediated by their attitude to the benefits that they claim in the dispute (conflict).

From the cognitive standpoint of the anthroposociocultural approach we have chosen to the problem of research, as well as taking into account its subject and general purpose, it is most rational to analyze the institutional justice of mediation within the framework of the concept of justice by John Rawls, namely justice as honesty, which primarily deals with the institutional principles of justice. In particular, in chapter one “Justice as Honesty” of his fundamental research “The Theory of Justice”, he defines the subject of justice as follows: “the primary subject of justice is the basic structure of society, or, more precisely, the way in which the dominant social institutions distribute fundamental rights and obligations and determine the distribution of benefits from social cooperation”.

So does mediation in Ukraine belong to the leading social institutions and is the distribution of rights and obligations of the parties to mediation within this institution fair? The positive answer to the first of the above questions is obvious – yes, mediation in Ukraine is already one of the leading social institutions. This, in particular, is stated in the preamble to the Law of Ukraine “On Mediation”: “This Law defines the legal framework and procedure for conducting mediation as an out-of-court procedure for resolving a conflict (dispute), the principles of mediation, the status of a mediator, requirements for its preparation and other issues related to this procedure”. This is stated even more convincingly in Article 3 “Scope of the Law” of the same Law: This Law applies to public relations involving mediation in order to prevent conflicts (disputes) in the future or settlement of any conflicts (disputes), including civil, family, labor, economic, administrative, as well as in cases of administrative offenses and in criminal proceedings in order to reconcile the victim with the suspect (accused)”. In other words, we are talking about a truly gigantic layer of social conflicts (disputes) that can be resolved within the framework of the procedures of the institution of mediation.

The question of the fairness of the distribution of rights and obligations of the parties to mediation within this institution does not cause any special ideological and/or methodological problems. First of all, the fairness of the institution of mediation in the understanding of its honesty in relation to each of the parties to mediation is guaranteed by their personal participation in all mediation procedures. This is a fundamental principle of mediation, protected by the legislation of the state.

Secondly, according to the general principle and in accordance with the Law of Ukraine "On Mediation", mediation is possible only on the basis of self-determination and equality of rights of the parties to mediation. With this view domestic legislator provided the following: "1. The parties to mediation independently choose the mediator(s) and/or the entity providing mediation. Secondly, according to the general principle and in accordance with the Law of Ukraine "On Mediation", mediation is possible only on the basis of self-determination and equality of rights of the parties to mediation. With this view domestic legislator provided the following: 1. The parties to mediation independently choose the mediator(s) and/or the entity providing mediation. 2. The parties to the mediation independently determine the list of issues to be discussed, options for resolving the conflict (dispute), the content of the agreement based on the results of mediation, terms and methods of its implementation, other issues related to the conflict (dispute) and mediation. Other participants in the mediation may give advice and recommendations to the parties to the mediation, but the decision is made solely by the parties to the mediation. 3. If a party to mediation is a minor, he makes a decision in compliance with the requirements of the law, taking into account the scope of his legal capacity. 4. If the party to mediation is a person with limited civil capacity, he makes a decision in compliance with the law, taking into account the extent of his capacity. 5. Mediation is conducted on the basis of the equality of the parties. The parties to mediation should be given equal opportunities in mediation. The obliga-

tions of the mediator must be the same in relation to all parties to mediation”.

Section 3 “Conducting Mediation” of the Law of Ukraine “On Mediation” is specially devoted to the functional provision of the institutional fairness of mediation as its transparency and honesty. It describes in detail the procedures for preparing for mediation, the procedure for its conduct and termination, the content of the mediation agreement, the content of the agreement on the results of mediation, as well as the rights and obligations of the parties to mediation. In particular, in accordance with the above Law, the parties to mediation have the right to: “1) choose by mutual agreement a mediator(s) and/or an entity providing the mediation; 2) determine the terms of the mediation agreement; 3) to involve other participants in mediation by mutual consent; 4) refuse the services of a mediator (mediators) and choose another mediator (mediators); 5) refuse to participate in mediation at any time; 6) in case of non-fulfillment or improper fulfillment of the agreement based on the results of mediation, apply to the court, arbitration court, international commercial arbitration in the manner prescribed by law; 7) involve an expert, translator and other persons designated by agreement of the parties to the mediation. The law, the mediation agreement or the rules for mediation may determine other rights of the parties to mediation”.

The parties to mediation are obliged by the legislator: “1) to comply with the requirements of this Law, the mediation agreement and the rules for mediation; 2) execute the transaction based on the results of mediation in the manner and terms established by such an agreement; 3) perform other duties determined by law”.

Consequently, the institutional fairness of mediation, as its honesty, is guaranteed in Ukraine by the direct participation of the parties to mediation in all its procedures, the adoption of all decisions within this procedure exclusively by its parties, and the functional provision of the institutional fairness of mediation by the state. These are sufficient organizational and legal prerequisites for the introduction of mediation in Ukraine.

The issue of fairness of mediation as a social practice in Ukraine is much more complicated. In our opinion, before trying to justify a certain answer to it, it is necessary to at least get acquainted with this practice. Mediation began to take shape in Ukraine as a qualitatively distinguished phenomenon since the 90s of the XX century. It developed mainly spontaneously, by trial and error, under the patronage of individual foreign grant projects. On the domestic side, at different stages of its evolution, the interest in it turned out to be dominant either by individual state institutions, or by some institutions of civil society, and sometimes even by the private interest of certain groups of mediator communities. Each of the above-mentioned subjects saw mediation as a way to solve certain problems of their own with “small blood”.

After the signing and ratification by Ukraine of the Association Agreement with the EU in 2014, in which one of the tasks set for Ukraine was to actively develop conflict (dispute) resolution alternatives to judicial institutions, primarily mediation, the Ukrainian state made another clumsy attempt to nationalize mediation by joining it as a sub-institution to the institute of state justice». For this purpose, in particular, as well as for the implementation of Article 124 of the Constitution of Ukraine updated in 2016, the Verkhovna Rada of Ukraine adopted in October 2017 the Law of Ukraine “On Amendments to the Economic Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and other legislative acts. By this Law, each of the above-mentioned codes included separate chapters of “Settlement of Disputes with the Participation of a Judge”. The practice of applying these innovations turned out to be quite contradictory.

Finally, a completely different – opposite conceptual approach was embodied by the domestic legislator in the Law of Ukraine “On Mediation”, adopted in November 2021. It implemented the concept of mediation not only as an out-of-court procedure, but also as a procedure for resolving conflicts (disputes) that competes with legal proceedings. According to the above-mentioned Law, mediation has

a legitimate status of a commercial service in Ukraine and should therefore be provided, as a rule, on a paid basis. That is, mediation has been introduced in Ukraine as a civil society institution.

Is that fair? To answer this question, it is necessary first of all to find out what mediation actually is by its nature – a commercial service or a socially significant, common good? In other words, does an objective need for mediation arise for all members of society or only for a certain, insignificant part of them? Numerical theoretical studies and social practice unequivocally convince that the need for mediation is general, it concerns all members of society. Hence, mediation has the nature of the common good and should be provided free of charge to everyone, be available to all. However, it is beyond the power of the Ukrainian state to ensure the general gratuitousness of mediation. As well as beyond possible to allow paid mediation for the majority of the population of the country.

The analysis of international experience in the field of mediation shows that even in the developed countries of the world, where mediation is widely used, a combined approach to its provision is practiced in the form of public-private partnerships of an institutional type. It was recommended to the EU Member States in 2004 by the European Commission in the “Green Paper on Public-Private Partnerships and the Community Law on Public Contracts and Concessions”. With this approach, it remains for the state to ensure the high quality of mediation, and private partners are assigned the role of the driving force of public-private partnership, daily support for it with concrete deeds. In the aforementioned countries, civil society as a whole acts as the institutional customer of mediation, and the corresponding mediation procedures are its individual subjects who find themselves in conflict (controversial) life situations. It is they who usually pay for mediation procedures.

Thus, domestic social practice in the field of mediation should be assessed as a whole as fair. With the official introduction of mediation as an institution of civil society, Ukraine has taken a step of fundamental importance in entering the European civilization space. Its

quintessence is the steady transformation of individuals from objects of state procedure into full-fledged subjects and co-creators of social space. The parties to mediation, daily solving their own private problems with the help of its procedures, mainly on the same private basis, step by step change the entire social space, create a reconciled social environment, devoid of total antagonisms and permanent conflicts (disputes). In view of the foregoing, mediation should be recognized as an effective way of constructing a new social reality and, therefore, a manifestation of social necessity.

Conclusions. 1. Mediation as an extrajudicial way of resolving conflicts (disputes) in society has a spontaneous nature. Its necessity and nature are determined by internal factors for the parties to mediation. They are also actively influenced by external factors. 2. Mediation is an effective form of freedom for both its parties and all subjects of civil society, primarily individuals. It is to this freedom that the role of the perpetual motion machine of both the development of mediation and one of the factors of the humanization of social space belongs. 3. Mediation is fair both in its institutional nature and as a form of social practice. Its quintessence is the steady transformation of individuals from objects of state procedure into full-fledged subjects and creators of social space. Mediation has proved to be an effective way of constructing a new social reality. The parties to mediation, daily solving their own private problems by means of its procedures, usually on the same private basis, are steadily changing the entire social space, creating a reconciled social environment, devoid of total antagonisms and permanent conflicts (disputes).

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