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Articles

Studia Iuridica Lublinensia vol. 32, 3, 2023
DOI: 10.17951/sil.2023.32.3.89-109

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The Development of Mediation in Poland and Ukraine: A Comparison and Prospects for Experience Exchange*

Rozwój mediacji w Polsce i Ukrainie. Porównanie i perspektywy wymiany doświadczeń

ABSTRACT

Ukraine has become a candidate country for the European Union membership, which brings challenges, including those of a legal nature. One of such challenges is the regulation of the institution of mediation, which is a subject of interest to European institutions (both within the Council of Europe and the European Union) that actively promote methods of alternative dispute resolution (ADR methods). The aim of the article is to compare the current development of mediation in Poland and

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* The article is a result of the research project no. 2017/27/L/HS5/03245, titled "Constitutional Consciousness as a Remedy for the Crisis of Discourse and Democracy Deficit in the European Union", financed by the National Science Center (decision no. DEC-2017/27/L/HS5/03245).

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Ukraine, as well as to determine to what extent there are similarities in successes and challenges and to what extent the Polish experience could be helpful for the development of mediation in Ukraine. The essence of the problem is whether Ukraine shall follow Polish solutions in this area.

Keywords: mediation; alternative dispute resolution; ADR; development of mediation; Poland; Ukraine

INTRODUCTION

During the heroic struggle against the Russian aggressor, Ukraine quickly became a candidate country for the European Union (EU) membership.[1] Such fact not solely stimulates and hastens new political and economic opportunities or enables access to hitherto unavailable financial assistance, but also brings challenges, including those of legal nature. One of such challenges is the regulation of the institution of mediation, which is a subject of interest to the EU legislator[2] (and so to the Council of Europe as another pillar of European integration).[3] Such

[1] On 17 June 2022, the European Commission issued its opinion on the application for EU membership, and on 23 June, the European Council granted candidate status to Ukraine.

[2] Starting with the soft law of Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, COM(2002) 196, final and concluding with binding secondary law of the EU: 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 (OJ L 136/3, 24.5.2008), also known as the Mediation Directive; Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) (OJ L 165/63, 18.6.2013); Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR) (OJ L 165/1, 18.6.2013).

[3] Restricting only to normative regulations of a *lex generalis* nature, these are: Recommendation R (81) 7 of the Committee of Ministers to Member States on measures facilitating access to justice adopted by the Committee of Ministers on 14 May 1981 at its 68th Session; Recommendation R (86) 12 of the Committee of Ministers to Member States concerning measures to prevent and reduce the excessive workload in the courts adopted by the Committee of Ministers on 16 September 1986 at the 399th meeting of the Ministers' Deputies; resolution no. 1 (2000) on delivering justice in the 21st century. For *lex specialis* nature, see Recommendation R (87) 18 of the Committee of Ministers to Member States concerning the simplification of criminal justice adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers' Deputies; Recommendation R (98) 1 of the Committee of Ministers to Member States on family mediation adopted by the Committee of Ministers on 21 January 1998 at the 616th meeting of the Ministers' Deputies; Recommendation R (99) 19 of the Committee of Ministers 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; Recommendation Rec (2001) 9 of the Committee of Ministers to Member States on alternatives to litigation between administrative authorities and private parties adopted by the Committee of Ministers on 5 September 2001 at the 762nd meeting of the Ministers' Deputies; Recommendation Rec (2002) 10 of the Committee of Ministers to Member States on mediation in civil matters adopted

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a fact also creates a wide area of "novelty of the discussion" for scholars in many fields, bringing a new context to academic reflection.

The EU, together with the Council of Europe, actively promotes methods of alternative dispute resolution (ADR), including mediation. Although mediation is at varying stages of development in member states (there are some states with a solid mediation culture, comprehensive legislation or procedural rules on mediation, and some states where legislative bodies have shown little interest in regulating mediation), the Mediation Directive, concerning mediation in civil and commercial matters, applies in all the EU countries.

The aim of the article is to compare the current development of mediation in Poland and Ukraine, as well as to determine to what extent there are similarities in successes and challenges and to what extent the Polish experience could be helpful for the development of mediation in Ukraine. The essence of the problem is whether Ukraine shall follow the Polish solutions in such area. Although the state of the research and literature on the subject is advanced in Poland[4] and quite satisfactory in Ukraine, particularly recently,[5] a comparative overview of mediation regulations may be considered as novum.

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by the Committee of Ministers on 18 September 2002 at the 808th meeting of the Ministers' Deputies. See also European Code of Conduct for Mediators, http://www.euromed-justice-iii.eu/system/files/20090128130552_adr_ec_code_conduct_en.pdf (access: 17.7.2023).

[4] On mediation in general, see *Mediacja. Teoria i praktyka*, eds. E. Gmurzyńska, R. Morek, Warszawa 2014; *Rozwiązywanie sytuacji konfliktowych w wymiarze jednostkowym i społecznym*, M. Plucińska, Poznań 2014; A. Kalisz, A. Zienkiewicz, *Mediacja sądowa i pozasądowa. Zarys wykładu*, Warszawa 2014; A. Kalisz, *Mediacja jako forma dialogu w stosowaniu prawa*, Warszawa 2016; K. Płeszka, J. Czapska, M. Araszkiewicz, M. Pękala, *Mediacja. Teoria, normy, praktyka*, Warszawa 2017; M. Myślińska, *Mediator w polskim porządku prawnym*, Warszawa 2018; M. Plucińska-Nowak, *Status i oblicza mediacji w społeczeństwie polskim*, Poznań 2021. As for mediation in particular branches of law, see M. Białecki, *Mediacja w postępowaniu cywilnym*, Warszawa 2012; L. Cichobłaziński, *Mediacje w sporach zbiorowych*, Częstochowa 2010; W. Federczyk, *Mediacja w postępowaniu administracyjnym i sądowoadministracyjnym*, Warszawa 2013; *Mediacja karna jako instytucja ważna dla pokrzywdzonego*, ed. L. Mazowiecka, Warszawa 2013; A. Kalisz, A. Zienkiewicz, *Polubowne rozwiązywanie sporów w pomocy społecznej. Komunikacja, psychologia konfliktów, negocjacje i mediacje socjalne*, Sosnowiec 2015; A. Cybulko, *Mediacja cywilna i rola mediatora w ujęciu psychologii społecznej*, Warszawa 2018; K. Antolak-Szymańska, O. Piaskowska, *Mediacja w postępowaniu cywilnym. Komentarz*, Warszawa 2017; M. Tabernacka, *Negocjacje i mediacje w sferze publicznej*, Warszawa 2018; S. Pieckowski, *Mediacja gospodarcza*, Warszawa 2015; A. Torbus, *Mediacja w sprawach gospodarczych. Praktyka, teoria, perspektywy*, Warszawa 2015; A. Kalisz, A. Zienkiewicz, *Mediacja w sprawach gospodarczych jako narzędzie wspierające sukces w biznesie*, Warszawa 2020.

[5] See T. Kyselova, G. Eromenko, *The Need to Regulate Mediation in Ukraine*, "Interdisciplinary Humanities Studies: Studia Jurisprudentia" 2015, vol. 2, https://ssrn.com/abstract=2671775 (access: 17.7.2023; in Ukrainian); S. Fursa, *Mediation in Ukraine: Urgent Issues of Theory and Practice and Necessity of Legislative Regulation*, [in:] *New Developments in Civil and Commercial Mediation*, eds. C. Esplugues, L. Marquis, New York 2015, pp. 737–754; T. Kyselova, *Institutional Preconditions for Mediation Reform in Ukraine*, "Socìal'no-ekonomìčnì Problemì ì Deržava" 2016,

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The paper is based on the referenced literature, online sources, legal acts (i.e. selected provisions using the logical-linguistic and teleological interpretation of law), as well as – complementarily – mediation statistics. The paper is, therefore, dominated by the logical-linguistic method, although some conclusions were drawn on the basis of participant observation, i.e. the authors' own mediation practice. The leading method, however, is the comparative method in terms of taking the comparative perspective.

DEVELOPMENT OF MEDIATION IN POLAND AND UKRAINE

Mediation as a legal institution in Poland has just a slightly longer history than in Ukraine. Nevertheless, due to the existing literature and research on this matter, the part concerning Polish mediation reality is provided here much shorter.

1. Mediation in Poland: development, current legal regulations, and practice

For the first time such term as "mediation" *expressis verbis* was provided by the Act of 23 May 1991 – Law on resolution of collective disputes[6] as an extra-judicial form of mediation and part of multi-step ADR. Subsequently, the legislative process was concerning the court mediation and it developed in a somewhat unusual way compared to the Western experience. Since judicial mediation in Poland appeared first in public law, it was included in substantive and procedural criminal law, the procedure in juvenile matters, and in the court-administrative procedure.[7] The introduction to private law proceedings was actually the last stage.

In 1992, just a few years after the 1989 transition, a group of employees of the then Senate Intervention Office and representatives of the Penitentiary Association "Patronage" traveled to Cologne at the invitation of the German Heinrich Böll Foundation (Heinrich Böll Stiftung). There they were primarily confronted with the experience of German mediation centers, dealing – in particular – with juveniles. That experience led to the creation of a Team for the Introduction of

vol. 15(2), pp. 78–84; N. Mazaraki, *Mediation in Ukraine: Problems of Theory and Practice*, "Foreign Trade, Economics, Finance, Law" 2016, vol. 84(1), http://journals.knute.edu.ua/foreign-trade/article/view/533 (access: 17.7.2023; in Ukrainian), pp. 92–100; T. Tsuvina, *National Mechanisms of the Enforcement of Agreements Resulting from Mediation: EU Experience and Ukrainian Perspectives*, "Problems of Legality" 2022, no. 158, pp. 110–123; O. Mozhaikina, *Legal Regulation of Mediators' Professional Training in Ukraine and Slovakia*, "Foreign Trade, Economics, Finance, Law" 2022, vol. 124(5), pp. 30–39.

[6] Journal of Laws 1991, no. 55, item 236, as amended.

[7] Act of 30 August 2002 – Law on proceedings before administrative courts (Journal of Laws 2002, no. 153, item 1270, as amended).

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Mediation in Poland, which was officially established in December 1995 and financially supported by the Heinrich Böll Foundation. The aim of the Team was to introduce mediation as a legal institution into the Polish justice system and after 1995 mediation centers were established all over the country, in which an experimental program of mediation in juvenile cases was implemented. Drawing on this experience the institution of mediation was introduced into the new Penal Code and the Criminal Procedure Code in 1997,[8] and thereafter – in May 2001[9] – in juvenile cases. The issue of family mediation was, in turn, covered by the Family Mediation Pilot Team, which was set up in mid-2001. The task of the Team was to prepare materials providing the legal basis necessary for legislative changes to the Civil Procedure Code,[10] concerning also family matters.

In 2005, the law providing provisions regulating the use of mediation in civil cases (e.g. divorce cases, cases concerning custody of a child, the right to contact the child, division of property, division of inheritance; commercial cases, the right to a trademark; employment cases, compensation, etc.) came into force.[11] Subsequent amendments of 2008 – in force since 13 June 2009 – introduced to the provision of Article 58 of the Family Law Code[12] institution of the parental agreement on exercising parental authority and contact with the child after divorce. It, together with amended Article 107 of the Family Law Code providing such agreement when parental authority is vested in both parents living apart, opened a new era of mediation in family matters.

Therefore currently, mediation covers (1) legal disputes arising from criminal acts, (2) disputes between state authorities, or authorities and citizens, and (3) disputes falling within the formal and substantive scope of a civil case.

In recent years, there has been a growing interest in mediation among representatives of various governmental and non-governmental institutions and lawyers. By order of the Minister of Justice of 1 August 2005, the Social Council for Alternative Methods of Dispute and Conflict Resolution was set up as an advisory board to the Minister of Justice on ADR issues.

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[8] Act of 6 June 1997 – Penal Code (Journal of Laws 1997, no. 88, item 553, as amended); Act of 6 June 1997 – Criminal Procedure Code (Journal of Laws 1997, no. 89, item 555, as amended).

[9] Act of 26 October 1982 – Law on procedure in juvenile cases (Journal of Laws 1982, no. 35, item 228, as amended).

[10] Act of 17 November 1964 – Code of Civil Procedure (Journal of Laws 1964, no. 43, item 296, as amended).

[11] Act of 28 July 2005 amending the Civil Procedure Code (Journal of Laws 2005, no. 172, item 1438).

[12] Act of 25 February 1964 – Family Law Code (Journal of Laws 1964, no. 9, item 59, as amended).

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However, the development of mediation in Poland is rather a slowly progress and is not as vivid as its enthusiasts would expect, as shown by the mediation statistics available on the website of the Ministry of Justice.[13]

2. Development and regulation of mediation in Ukraine

The history of mediation development in Ukraine is a story of co-existence and interaction of the donor-lead and the grass-root movements. There can be several stages distinguished: the first stage (the collapse of the Soviet Union and Ukraine's independence), the second stage (until the early 2000s), and the third stage (2000s until 16 November 2022 when the Law on Mediation was finally adopted).

2.1. Evolution of Ukrainian mediation

The first stage, which began with gaining independence, was the process of restructuring all areas of social relations that led to both the development of public initiatives and the activity of international donor organizations. Thus, at the end of the Soviet times, the coal industry crisis and strikes of miners began in the Donetsk region.

> In an attempt to help solve the problems, a group of psychologists from Donetsk turned to the American Arbitration Association and the U.S. Federal Mediation and Conciliation Service and (…) together with them held a series of joint Soviet-American seminars on conflict resolution in Donetsk and Luhansk regions.[14]

In the second stage, international donors from the USA and Canada played the main role for the mediation's further progress. At that time, the United States Agency for International Development (USAID – the US government agency responsible for humanitarian assistance to other countries), the Eurasia Foundation, and the George Soros' Foundation (the Renaissance Foundation) supported financially a number of projects in Ukraine. In particular, in 1994, the Donetsk Psychological Center together with the American NGO Search for Common Ground established the very first mediation center in Ukraine. As a result, eight subsequent mediation

[13] Ministerstwo Sprawiedliwości, *Dane statystyczne dotyczące mediacji*, https://www.gov.pl/web/sprawiedliwosc/dane-statystyczne-dotyczace-mediacji (access: 17.7.2023). For further information and commentary, see also *Postępowanie mediacyjne w świetle danych statystycznych. Sądy rejonowe i okręgowe w latach 2006–2021*, eds. M. Bettin, J. Kowalczyk, Warszawa 2022; J. Włodarczyk-Madejska, *Mediacja w postępowaniu sądowym. Wyniki badań aktowych i danych statystycznych*, Warszawa 2022.

[14] N. Krestovska, Yu. Mykytin, *Historical Origins of Alternative Conflict Resolution (Dispute Resolution)*, [in:] *Mediation in the Professional Activity of a Lawyer: Textbook*, eds. N. Krestovska, L. Romanadze, Odessa 2019, pp. 75–76 [in Ukrainian].

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centers were opened throughout the country.[15] Also in 1994, the Odesa Regional Mediation Group was established and mediated the first case that came out from court in 1993.[16] In 1998, the government of Ukraine established the National Mediation and Reconciliation Service,[17] a new body accountable directly to the President of Ukraine in order to facilitate the resolution of collective labor disputes. In the early 2000s, Kyiv became a leader in the development of mediation, so in 2002, the Ukrainian Center for Common Ground (UCCG)[18] was registered and began its activity in the field of mediation serving criminal cases, restorative justice, community development as well as school mediation. A network of 15 Ukrainian NGOs was created, and in 2012 the Institute for Peace and Common Ground was established.[19] In 2006, the International Finance Corporation of the World Bank Group (IFC) surveyed Ukrainian companies, the results of which became the basis for the creation of IFC mediation projects for Ukraine.[20] One of the results is the opening of the Ukrainian Mediation Center at the Kyiv-Mohyla Business School.[21]

As for the third stage, it should be re-noted – as mentioned – that since 2008, the European Union has become a leading promoter of mediation and other ADR mechanisms among its member states, influencing neighboring countries such as Ukraine.[22] During this period, funding for mediation projects was mainly provided by European donors, including the Council of Europe, the European Commission, the British Embassy, the Swiss Agency for Development and Cooperation, the Swedish International Development Cooperation Agency, Polish Aid, and others. Ukrainian Revolution of Dignity in 2013[23] and the war in eastern Ukraine launched

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[15] *Ibidem*, p. 76.

[16] Odesa Regional Mediation Group, https://civilmplus.org/en/actors/odesa-regional-mediation-group (access: 17.7.2023).

[17] On the procedure for resolving collective labor disputes, see Law of Ukraine of 3 March 1998, no. 137/98-BP, http://zakon3.rada.gov.ua/laws/show/137/98-%D0%B2%D1%80 (access: 17.7.2023). See also S. Zapara, *The Role of the National Service Mediation and Reconciliation in the New Labour Dispute Resolution System in Ukraine*, "Scientific Herald of International Humanitarian University, Series: Jurisprudence" 2013, vol. 2(6–1), p. 27.

[18] Ukrainian Centre for Common Ground (UCCG) – Ukraine, https://www.comminit.com/content/ukrainian-centre-common-ground-uccg-ukraine (access: 17.7.2023); Ukrainian Center for Understanding, https://uccg.org.ua (access: 17.7.2023; in Ukrainian).

[19] Institute for Peace & Common Ground – IPCG, https://issuu.com/ipcg (access: 17.7.2023).

[20] World Bank, *Ukraine Commercial Dispute Resolution Study: Researching Commercial Disputes among Ukrainian Companies*, https://documents.worldbank.org/en/publication/documents-reports/documentdetail/563421468112462772/ukraine-commercial-despute-resolution-study-researching-commercial-disputes-among-ukrainian-companies (access: 17.7.2023).

[21] Ukrainian Mediation Center, *What Is a Mediation? Video and Training Course*, https://ukrmediation.com.ua/en (access: 17.7.2023).

[22] [24] T. Kyselova, *Mediation Development in Ukraine: 1991–2016*, https://ssrn.com/abstract=2704781 (access: 17.7.2023).

[23] For more, see Brittanica, *The Maidan Protest Movement*, https://www.britannica.com/place/Ukraine/The-Maidan-protest-movement (access: 17.7.2023).

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by the Russian Federation in April 2014 prompted international agencies such as the Organization for Security and Co-operation in Europe (OSCE),[24] MATRA (Maatschappelijke Transformatie – Social Transformation Program) Kingdom of the Netherlands,[25] the British Embassy,[26] and others to start active work in the field of mediation and dialogue facilitation. Ukrainian civic activists and the community of mediators and conflictologists also reacted and intensified their efforts, so in 2014 two public associations were registered: the Ukrainian Academy of Mediation (UAM)[27] and the National Association of Mediators of Ukraine (NAMU).[28]

Over the past decade, a number of other organizations have been registered in Ukraine that play an important role in promoting mediation. The most active organizations established between 2015 and today are the Lviv Mediation Center, the League of Mediators of Ukraine, the Association of Family Mediators of Ukraine, and the Center for Law and Mediation. Leading schools for teaching basic mediation skills have – apart from the aforementioned Kyiv-Mohyla Business School – also been formed by the Odesa Regional Mediation Group, the Ukrainian Academy of Mediation, the Center for Law and Mediation, and certificate programs based on academic institutions, namely at the Yaroslav Mudryi National Law University[29] and the Yuriy Fedkovych Chernivtsi National University.[30]

However, it should be noted that there is still much to be done. In spite of these efforts, mediation does not enjoy sufficient use among citizens. Quite low popularity is also coupled with a lack of legislative regulation facilitating the referral of parties to mediation as well as a lack of information policy. All these factors create an unfavorable climate for spreading the culture of a civilized, consensual way of resolving (legal) disputes.

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[24] Organization for Security and Co-operation in Europe, *OSCE National Dialogue Project Completes Field Work in Ukraine*, http://www.osce.org/ukraine/117808 (access: 17.7.2023).

[25] Embassy of Ukraine in the Kingdom of the Netherlands, *Ambassador Meets Ukrainian Delegation Visiting the Netherlands within the Framework of MATRA Program*, 2016, https://netherlands.mfa.gov.ua/en/news/48277-posol-zustrivsya-z-delegacijeju-ukrajini-shho-perebuvaje-v-niderlandah-u-ramkah-programi-matra (access: 17.7.2023). See also Rijksoverheid, *NFRP-Matra: subsidie voor versterken rechtsstaat en democratie in de Europese regio*, https://www.rijksoverheid.nl/onderwerpen/europese-subsidies/nederlands-fonds-voor-regionale-partnerschappen-nfrp/nfrp-matra-subsidie (access: 17.7.2023).

[26] *Corporate Report: UK Conflict Pool Work in Ukraine*, https://www.gov.uk/government/publications/conflict-prevention-pool-work-in-ukraine (access: 17.7.2023).

[27] Ukrainian Academy of Mediation, https://mediation.ua/en (access: 17.7.2023).

[28] National Association of Mediators of Ukraine, http://namu.com.ua/en (access: 17.7.2023).

[29] Yaroslav Mudryi National Law University in Kharkiv, *Recruitment for the Certificate Educational Program "Mediation: Basic Skills" Has Begun!*, 2022, https://nlu.edu.ua/sertyfikatni-programy/rozpochato-nabir-na-sertyfikatnu-osvitnyu-programu-mediacziya-bazovi-navychky (access: 17.7.2023; in Ukrainian).

[30] Chernivtsi Law School, https://law.chnu.edu.ua/mediation (access: 17.7.2023).

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2.2. Current Ukrainian regulations on various types of disputes that mediation may be a solving tool

Since the 2000s, there have been many attempts to develop legislative regulation of mediation. One of the conclusions arising from the pilot projects within the courts was that legislation for mediation was needed, as implementing ADR methods without proper regulations is not possible outside of pilot projects.

There are certain stages of the legislative initiative that have been analyzed here. In particular, the first attempt was in 2010 (draft no. 7481), and several further attempts to pass such law through the Parliament in 2011 (no. 8137), 2012 (nos. 10301, 10301-1, 10302), and 2013 (nos. 2425a, 2425a-1) failed due to political reasons. In 2015, draft law no. 2480 was submitted to the Parliament in cooperation with the community of mediators.[31] Shortly after, an alternative draft law no. 2480-1 was registered by the Party of Regions.[32] In 2015, two draft laws nos. 3665 and 3665-1 were registered. Finally, in 2019, Ukraine became one of the 46 countries that signed the United Nations Conventions on International Settlement Agreements on the Results of Mediation in Singapore (the Singapore Convention).[33] This event intensified legislative activity, so draft law no. 3665, actively supported by the community of mediators, was eventually adopted by the Parliament – after some revision – on 16 November 2021 as the Law on Mediation.[34]

The Ukrainian Law on Mediation took into account both best foreign legislative practice in mediation law-making[35] and international standards of mediation, such as the aforementioned Directive 2008/52/EC, recommendations of the Council of Europe on mediation for different categories of cases (listed above) together with the commentary by the European Commission for the Efficiency of Justice,[36] and

[31] Draft of the Law of Ukraine on Mediation, no. 2480, http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=54558 (access: 17.7.2023; in Ukrainian).

[32] Draft of the Law of Ukraine on Mediation, no. 2480-1, http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=54758 (access: 17.7.2023; in Ukrainian).

[33] United Nations Convention on International Settlement Agreements Resulting from Mediation, March 2019, https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf (access: 17.7.2023). For more, see G. Matteucci, *Mediation Will Now Have Teeth*, Altalex 2018, https://www.altalex.com/documents/news/2018/10/26/mediation-will-now-have-teeth (access: 17.7.2023).

[34] Law of Ukraine of 16 November 2021 on Mediation, https://zakon.rada.gov.ua/laws/show/1875-20#Text (access: 17.7.2023).

[35] European Commission for the Efficiency of Justice (CEPEJ), *European Handbook for Mediation Lawmaking*, as adopted at the 32nd plenary meeting of the CEPEJ, Strasbourg, 13–14 June 2019, https://rm.coe.int/cepej-2019-9-en-handbook/1680951928 (access: 17.7.2023).

[36] CEPEJ Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters, Strasbourg, 7.12.2007, https://rm.coe.int/16807475b6 (access: 17.7.2023); CEPEJ Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters, Strasbourg, 7.12.2007, https://rm.coe.int/1680747759 (access: 17.7.2023).

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the UNCITRAL Model Law on International Commercial Mediation and International Mediated Dispute Settlement Agreements Resulting from Mediation.[37] The communities of mediators, lawyers, state authorities, academics, and international donor organizations provided the expert support, including an expert comprehensive analysis.[38]

The Law in question is of a framework nature and determines general provisions. It is based on the very classical model of facilitative mediation, defined as "an extrajudicial voluntary, confidential, structured procedure during which the parties, with the participation of a mediator (mediators), try to prevent or resolve a conflict (dispute) through negotiations".[39] Also, enshrines the following provisions on the basic "dos and don'ts" of the mediator: to moderate the mediation procedure;[40] not to provide advice and recommendations on merits nor make decisions.[41] Advice and recommendations may concern solely the mediation procedure and enforcement of its legal results.[42]

A mediator is a "specially trained neutral, independent, impartial person who conducts mediation".[43] The only requirement for such a position is to complete a basic mediation course (at minimum 90 hours, including at least 45 hours of practical workshops)[44] in Ukraine or abroad. There is no age limit for mediators. In addition, notaries have the right to conduct mediation provided that they have completed such a course, and the Notary Chamber of Ukraine is allowed to conduct mediation trainings and maintain a register of notaries who can practice as mediators.

According to the Law on Mediation, mediation in Ukraine is conducted in accordance with the (universal) principles of voluntariness, confidentiality, neutrality, independence and impartiality of the mediator, self-determination, and equal rights of the parties to the mediation.[45] Voluntariness, in particular, is defined as one of the main and basic principles, according to which no one must be forced to participate in mediation that is possible only if the parties voluntarily, by mutual consent, apply to the mediator of their choice, and the procedure can be stopped at any time by any

[37] UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002, https://www.uncitral.org/pdf/english/commissionsessions/51stsession/Annex_II.pdf (access: 17.7.2023).

[38] B. Bert Maan, R. van Rhee, L. Romanadze, A. Serhieieva, S. Sergeyeva, V. Rodchenko, *Mediation Gap Analysis Report*, July 2020, https://www.pravojustice.eu/storage/app/uploads/public/5f7/435/116/5f743511604ec221015187.pdf (access: 17.7.2023).

[39] Article 1.1 § 4 of the Law on Mediation.

[40] Article 12.1 § 7 of the Law on Mediation.

[41] Article 7.2 § 2–3 of the Law on Mediation.

[42] Article 7.5 of the Law on Mediation.

[43] Article 8.2 of the Law on Mediation.

[44] Article 10.1 of the Law on Mediation.

[45] Article 4 of the Law on Mediation.

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of the parties.[46] However, the tendency to introduce various types of compulsory mediation for certain categories of disputes may be observed (as it is a global trend), that alters the interpretation of the principle of voluntariness from voluntary entry to voluntary completion.[47] Since 2016, when amendments were made to the Constitution of Ukraine,[48] also the provision of Article 124 – that states "the jurisdiction of the courts covers any legal dispute and any criminal charge. Courts consider also other matters in cases prescribed by the law. Mandatory pre-trial dispute resolution procedures may be provided for in the law" – opens the possibility to introduce a mandatory mediation model in certain categories of cases in the future.

The scope of application of the Law on Mediation is quite broad. It applies to both preventive mediation, i.e. mediation in order to prevent conflicts (disputes) in the future and to mediation meant to settle any conflicts (disputes), including civil, family, labor, economic, administrative, as well as in cases of administrative offences and criminal proceedings in order to reconcile the victim with the suspect/accused.[49]

Currently, Ukrainian legislation provides for certain ADR methods (mainly mediation) also in the Civil Procedure Code of Ukraine,[50] Commercial Procedure Code of Ukraine,[51] Administrative Procedure Code of Ukraine,[52] and the Laws of Ukraine "On Arbitration Courts"[53] and "On Enforcement Proceedings".[54]

The Law of Ukraine "On Social Services" of 17 January 2019,[55] the Order of the Ministry of Social Policy of Ukraine on Approval of the State Standard of

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[46] Article 5 of the Law on Mediation.

[47] T. Tsuvina, T. Vakhonieva, *Law of Ukraine "On Mediation": Main Achievements and Further Steps of Developing Mediation in Ukraine*, "Access to Justice in Eastern Europe" 2022, vol. 13(1), pp. 142–153.

[48] Constitution of Ukraine of 28 June 1996, https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text (access: 17.7.2023). English translation: Constitution of Ukraine adopted at the Fifth Session of the Verkhovna Rada of Ukraine on 28 June 1996, amended by the Laws of Ukraine no. 222-IV dated 8 December 2004, no. 2952-VI dated 1 February 2011, no. 586-VII dated 19 September 2013, no. 742-VII dated 21 February 2014, no. 1401-VIII dated 2 June 2016, http://biblioteka.sejm.gov.pl/wp-content/uploads/2017/06/Ukraina_ang_010117 (access: 17.7.2023).

[49] Article 3.1 of the Law on Mediation.

[50] Civil Procedure Code of Ukraine of 18 March 2004, nos. 40–41, 42, item 492, https://zakon.rada.gov.ua/laws/show/1618-15#Text (access: 17.7.2023).

[51] Commercial Procedure Code of Ukraine of 6 November 1991, no. 6, item 56, https://zakon.rada.gov.ua/laws/show/1798-12#Text (access: 17.7.2023).

[52] Administrative Procedure Code of Ukraine of 6 July 2005, nos. 35–36, 37, item 446, https://zakon.rada.gov.ua/laws/show/2747-15#Text (access: 17.7.2023).

[53] Law of Ukraine of 18 March 2004 on Arbitration Courts, no. 35, item 412, https://zakon.rada.gov.ua/laws/show/1701-15#Text (access: 17.7.2023).

[54] Law of Ukraine of 3 November 2016 on Enforcement Proceeding, no. 30, item 542, https://zakon.rada.gov.ua/laws/show/1404-19#Text (access: 17.7.2023).

[55] Law of Ukraine of 17 January 2019 on Social Services, no. 18, item 73, https://zakon.rada.gov.ua/laws/show/2671-19#Text (access: 17.7.2023).

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Social Mediation Services of 17 August 2016,[56] and the Order of the Ministry of Social Policy of Ukraine on Approval of the Classifier of Social Services of 23 June 2020[57] granted mediation the status of a basic social service.

The National Strategy for the Development of the Judiciary, Judicial Proceedings and Constitutional Justice for 2021–2023,[58] as well as the Draft Document "Recovery Plan for Ukraine"[59] recognize the introduction and development of mediation as an important element of expanding access to justice.

Although the dominant approach to the concept of justice in Ukraine remains the principle of legal centralism and the inseparable liaison between justice, adjudication and courts, there is also a slight hope that Ukraine picks up the European trends of consensual approach in the judiciary and moves towards the understanding that the lack of ADR procedures is a disadvantage for justice.

2.3. Ukrainian mediation "in action"

As mentioned, mediation in Ukraine had no legislative regulation for many years, which was one of the main obstacles that restrained ADR development in Ukraine, even though the mediation community had been growing. Eventually, as specified, the Law on Mediation was adopted in the end of 2021. One of the objectives of regulating the mediation and introducing it into legal order is to unburden the judicial system. In particular, the development of mediation was influenced by the trends of strengthening the interaction of judicial proceedings, which resulted nn efforts to develop court-assisted mediation. For most international donors, mediation itself has not been a core topic, and it has been a component for justice and rule-of-law reform programs. As a result, most of the projects have focused on courts.

Thus, the analysis of pilot projects related to mediation is relevant to this work as an illustration of mediation practice. It is also worth noting that the mediation experiments in Ukraine were based on two different paradigms. First, a paradigm of referring cases to external mediators, with the consent of the parties to the dis-

[56] Order of the Ministry of Social Policy of Ukraine on Approval of the State Standard of Social Mediation Services of 17 August 2016, no. 892, https://zakon.rada.gov.ua/laws/show/z1243-16#Text (access: 17.7.2023).

[57] Order of the Ministry of Social Policy of Ukraine on Approval of the Classifier of Social Services of 23 June 2020, no. 429, https://zakon.rada.gov.ua/laws/show/z0643-20#Text (access: 17.7.2023).

[58] Decree of the President of Ukraine no. 231/2021 on Strategy for the Development of the Justice System and Constitutional Judiciary for 2021–2023, https://www.president.gov.ua/documents/2312021-39137 (access: 17.7.2023).

[59] National Council for the Recovery of Ukraine from the Consequences of the War, *Draft Ukraine: Ukraine Recovery Plan. Materials of the "Justice" Working Group*, July 2022, https://www.kmu.gov.ua/storage/app/sites/1/recoveryrada/eng/justice-eng.pdf (access: 17.7.2023).

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pute (an Anglo-Saxon/common law model), and the latter – a mediation conducted by specially trained judges acted as mediators (a German model of *Güterichter* – conciliation judges).

Since the early 1990s until now, several pilot projects have been implemented to test various models of mediation, including judicial mediation. In 1997–1999, the Donetsk Mediation Group, with the support of USAID, implemented a project aimed at creating an association of mediators and mediation centers throughout Ukraine for training mediators and providing mediation services to the public. The creation of the national association took place only in 2014.[60] Within such project 90 mediations were conducted, of which less than one-third were paid by the parties, the rest were *pro bono*.

In 1999, Eurasia Foundation financed the introductory mediation programs in pilot courts in Donetsk and Odesa. This project used a paradigm of referring cases to external mediators. According to the project report, only nine mediations were conducted.[61] This model was also piloted in the project titled "Supporting the development of mediation in eight courts of Volyn region as an alternative way of conflict resolution" with the support of USAID and the International Renaissance Foundation[62] in 2014–2015. Within the project 108 information and evaluation meetings and 38 mediations were held, of which about one-third ended with agreements (concerning succession law, land, family disputes, and other civil disputes).[63]

Within the projects granted by the European Commission and the Council of Europe titled respectively "Procedure for the Selection and Appointment of Judges, Their Training, Disciplinary Liability, Distribution of Cases and Alternative Dispute Resolution" (2006–2007) and "Transparency and Efficiency of the Justice System in Ukraine" (2008–2011) a paradigm of judicial mediation, where specially trained judges acted as mediators, was introduced by Dutch and German experts. The judges of four courts (Bila Tserkva, Kyiv, Ivano-Frankivsk, Vinnytsia and Donetsk) of civil, criminal and administrative jurisdiction were trained and 50 mediations were conducted (2010–2011), 72% completed with settlement.[64] Mediation was continued in none of the pilot courts as the project ended in 2011.

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[60] Search for Common Ground, The Ukrainian Mediation Group, *Improving Dispute Resolution Capabilities in Ukraine. Final Narrative Report: August 1997 – August 1999*, February 2000, http://pdf.usaid.gov/pdf_docs/pdabs114.pdf (access: 17.7.2023).

[61] Unpublished narrative report of the project, in the file of the co-author.

[62] International Renaissance Foundation, http://www.irf.ua/en (access: 17.7.2023).

[63] O.M. Matviychuk, O.G. Zavydovska, *Mediation in Courts: Myth or Reality?*, Lutsk 2016, passim.

[64] T. Kyselova, *Mediation Movements in Ukraine: Donor-Sponsored and Grass-Root Level*, [in:] *Alternatywne sposoby rozstrzygania sporów w Polsce, w Niemczech i na Ukrainie*, ed. J. Koredczuk, Wrocław 2018, pp. 105–117.

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In 2018, the Ukrainian Academy of Mediation in cooperation with the Free Legal Aid System and with the support of USAID under the New Justice Program, implemented a project on mediation rooms in commercial court, administrative court, and certain district courts in Odesa.

Although the aforementioned projects with various types of mediation integrated into the judicial system had better results than the transfer of cases to external mediators for extra-court procedure, the Law on Mediation does not provide for the possibility of mediation conducted by judges or other court staff, sticking to a classic, Anglo-Saxon/common law paradigm. Therefore, currently in Ukraine there is solely a voluntary and external mediation in line with legal regulations. It seems that work on the introduction of German-alike "inside-court" mediation should be the next step in spreading the ADR culture.

In the field of restorative justice, a significant part of the projects funded by international donors was implemented by the Ukrainian Center for Common Ground. The main strategy and goal were to unite the efforts of courts, authorities, local communities, mediators, and parties to a dispute. In 2004–2011, the network's centers conducted 364 mediations.[65] Seventy percent of these cases were referred by police officers, 20% by courts, and the remaining 10% by prosecutors, lawyers, social welfare agencies, NGOs, schools, or the parties themselves. In 2019, the Ministry of Justice of Ukraine and the Prosecutor General's Office of Ukraine adopted the Order on the Implementation of the Pilot Project Recovery Program for Minors Suspected of Committing Crimes[66] which launched the pilot project with the support of the Interagency Coordination Council on Juvenile Justice and the United Nations Children's Fund (UNICEF) on the basis of the free legal aid system (in Donetsk, Odesa, Lviv, Luhansk, Mykolaiv, and Kharkiv regions). In total, since 2019, 885 young people have been informed about the opportunity to participate in it and 186 juveniles have already been able to obtain remedy – the court released them from criminal liability, and 64 minors are awaiting a court decision. Also in 2019, another project "Implementation of Restorative Justice in Ukraine", granted with the United Nations Democracy Fund, was launched to be implemented by the Institute for Peace and Common Ground, with the support of the Supreme Court.[67] Within its framework mechanisms for the implementation of restorative justice in the criminal justice system in Ukraine were developed and

[65] N. Pylypiv, *Restorative Justice in Ukraine: Results and Prospects*, "Restorative Justice in Ukraine" 2011, vol. 17(3–4), pp. 87–99.

[66] Order of the Ministry Justice of Ukraine "On the Implementation of the Pilot Project Recovery Program for Minors Suspected of Committing Crimes" of 21 January 2019, no. 172/5/10, https://zakon.rada.gov.ua/laws/show/z0087-19#Text (access: 17.7.2023).

[67] United Nations Democracy Fund, *Implementation of Restorative Justice in Ukraine: Brief Description of the Project*, http://ipcg.org.ua/upload/korotkiy-opis-proektu-vprovadgennya-vp.pdf (access: 17.7.2023; in Ukrainian).

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tested in pilot projects in six regions of Ukraine. The results of the project became the basis for extending it to the entire territory of Ukraine. The project provided the involvement of the Juvenile Probation Service to spread the practice of applying restorative justice to juveniles.

As for mediation for the settlement of family disputes, since February 2020, the Association of Family Mediators of Ukraine, with the support of USAID, has implemented the project "Sustainable Regional Development of Family Mediation in Ukraine in Cooperation with Social Services for Children to Ensure Access to Justice and Respect for Children's Rights" in Kyiv, Odesa, Lviv, Rivne, Zaporizhzhia, Dnipro, and Ivano-Frankivsk. The legal ground is the State Standard of Social Mediation Services.[68]

In 2017, the institution of dispute settlement with the participation of a judge in civil, commercial, and administrative proceedings was introduced, but it did not gain wider popularity due to the imperfection of the procedural framework and the cautious attitude of judges. In 2021, there were 66 attempts to use the mechanism in civil proceedings (0.01% of open proceedings and only 12 out of 66 were successful) and 30 attempts in commercial proceedings (0.04% of open proceedings, but 15 out of 30 were successful).[69]

To sum up, Ukrainian legislation is favorable to the possibility of settling disputes at any stage of the judicial process, including enforcement proceedings, but mediations practice reveals some certain reluctance.

CONCLUSIONS: POLAND AND UKRAINE – COMMON GROUNDS, DISCREPANCIES, AND PROSPECTS FOR EXPERIENCE EXCHANGE

Development of mediation in Poland and Ukraine to some extent points to similarities and correlates in successes and challenges. At first, we share the experience of both donor-sponsored from the West (firstly the USA, then the EU) and the grass-root evolution of mediation emerging from a growing civic society. In Poland, however, the legislator followed social innovations up to the point when mediation is overregulated, while in Ukraine mediation has been underregulated for a long time – proper regulation was procrastinated until a year before the war, which is naturally a suppressing factor in many areas of civic life.

Secondly, in both legal systems, mediation covers a broad scope of cases – disputes arising from criminal acts, disputes between state authorities, or authorities and citizens, and disputes concerning civil and family.

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[68] See Order of the Ministry of Social Policy of 17 August 2016, no. 892.

[69] Ukrainian Courts Rules, https://court.gov.ua/inshe/sudova_statystyka/zvitnist_21 (access: 17.7.2023; in Ukrainian).

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Thirdly, we share common social and mental barriers to mediation development[70] as well as a need of raising public awareness about mediation.

The Russian invasion of Ukraine has made no contribution to the implementation of the Law on Mediation and planned pilot projects have been suspended. The development of cooperation between courts and mediation has been retarded, so they remain to follow parallel paths, while in Poland they are much more closely linked. Since Ukrainian mediation is still not integrated into the judicial system, there is no unified register of mediators and no obligation to report on mediations, unfortunately, there is almost no statistical data in Ukraine, a gap that definitely needs to be examined in future.

At the same time, the idea of mediation is still vivid and the Ukrainian community of mediators remains active, even during the war, so unfavorable to pro-mediation attitudes. Mediators who remained in the country conduct online and offline counseling, mediation, negotiations, trainings on effective communication for internally displaced persons and workshops, trainings, and discussions for the mediation community, while those who immigrated are actively studying, obtaining international certification, establishing international communications, and representing Ukraine at international conferences and in international organizations.

Apart from war, Ukraine faces undoubtedly greater challenges than Poland – such as short experience in legally regulated mediation and a lack of unified register of mediators. As with many of the other standards that derive from the Copenhagen criteria as well as rules and principles under the EU law, Ukraine will face the harmonization process concerning – apart from many other branches of life and of law – also the mediation area. Poland has already gone down this road (also in terms of regulating mediation). In this sense, part of the Polish experience can be useful for Ukraine. But the answer to the question whether Ukraine shall follow the Polish solutions in such area shall be at least partly negative, since Polish mediation suffers from the same barriers and imperfections in legislation.

War, unfortunately, will only increase the number of categories of inheritance and family disputes. For disputes over compensation for destroyed property, lost documents confirming property, and other rights, mediation could be the best way to settle them, taking into account not solely the legal aspects but also their emotions. This only emphasizes the need for cooperation between courts and mediators.

[70] Such as lack of knowledge, awareness, and habit; social mentality which is not favorable for amicable dispute resolution and lack of conviction towards ADR institutions; a society-wide lack of trust, including trust in each other and in the potential mediator; the conviction of the litigants that their case will ultimately go to court anyway; lawyers' reluctance to mediation due to misunderstanding of the nature of mediation or fear of losing a financial remuneration; low rates of remuneration for mediators, which make it a side occupation rather than a professional career. For more, see A. Kalisz, A. Zienkiewicz, *Mediacja w sprawach gospodarczych…*, pp. 191–193 (the topic has not been developed here due to limited volume).

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ABSTRAKT

Ukraina ma obecnie status państwa kandydującego do uzyskania członkostwa w Unii Europejskiej, co niesie za sobą wyzwania, w tym natury prawnej. Jednym z takich wyzwań jest uregulowanie instytucji mediacji, będącej przedmiotem zainteresowania instytucji europejskich (zarówno w ramach Rady Europy, jak i Unii Europejskiej) aktywnie promujących alternatywne metody rozwiązywania sporów (ADR). Celem artykułu jest porównanie obecnego rozwoju mediacji w Polsce i Ukrainie, a także określenie skali podobieństw w zakresie sukcesów i wyzwań oraz udzielenie odpowiedzi na pytanie, na ile doświadczenia polskie mogą być pomocne dla rozwoju mediacji w Ukrainie. Istotą problemu jest to, czy Ukraina będzie podążać za polskimi rozwiązaniami w tym zakresie.

Słowa kluczowe: mediacja; alternatywne metody rozwiązywania sporów; ADR; rozwój mediacji; Polska; Ukraina