Mediation Principles in the Civil Society and Features of Their Application in the Educational Environment of Ukraine

Anzhelika Sheremet

I. Malynovskyi Institute of Law, National University of Ostroh Academy
35800, Rivne region, Ostroh, vul. Seminarska 2, Ukraine
E-mail address: angelikarv@ukr.net
ORCID: https://doi.org/0000-0001-9691-0284

Tetiana Blashchuk

I. Malynovskyi Institute of Law, National University of Ostroh Academy
35800, Rivne region, Ostroh, vul. Seminarska 2, Ukraine
E-mail address: tetiana.blashchuk@oa.edu.ua
ORCID: https://doi.org/0000-0002-0605-1920

Serhii Ishchuk

I. Malinowski Institute of Law, National University of Ostroh Academy
35800, Rivne region, Ostroh, vul. Seminarska 2, Ukraine
E-mail address: serhii.ishchuk@oa.edu.ua
ORCID: https://doi.org/0000-0002-3080-3870

Abstract

Aim. The main purpose of research presented in this article is to analyse mediation principles and features of their application in the educational environment of Ukraine.

Methods. The study is based on the analysis of enacted regulations and their comparison in different countries, as well as information obtained from the study of literature, including works by authors of both legal and other social sciences where mediation is used as a means of compromise, including psychology, medicine, ecology, along with the use of tools and comments specific to the study of law. To study the prospects and effective application of mediation principles in the educational environment, sociological surveys of various participants of the educational process were conducted.

Results. The results of study showed that certain types of mediation principles are applied in different countries taking into account the peculiarities of national legal systems. Notwithstanding, such principles as the rule of law, the principle

of equality (equal rights) of the parties, the principle of voluntariness, confidentiality and mediator behaviour (independence and impartiality, trust and justice) are applied in most of the studied national models of mediation, consequently they can be called fundamental. The survey results have revealed the readiness of the educational environment to introduce mediation as a tool for resolving conflicts in the educational environment.

Conclusions. The specifics of the implementation of mediation principles in Ukraine and their correlation with the principles of the judicial process require further research.

Keywords: mediation, alternative dispute resolution, principle, rule of law, confidentiality and voluntariness, educational environment, civil society institutions

Introduction

The development of relations in many spheres of human life often leads to conflicts, including private law conflicts. In post-Soviet countries, it is common to go to court or other authority with jurisdiction to resolve any conflict.

At the same time, one of the indicators of a developed civil society is the attempt of society members to resolve conflict situations through negotiations, without recourse to the state and its institutions. Thus, in many countries, separate institutions of self-regulation of civil society have been developed, which are aimed at resolving conflicts (disputes) on the basis of mutual trust and voluntariness.

Such methods of dispute settlement are carried out without recourse to jurisdictional bodies, and they are implemented by non-judicial means and, as a rule, without following a formal procedure and are not supported by coercion. Therefore, they are considered as an alternative to formal justice and are called Alternative Dispute Resolution (ADR), one of which is mediation.

In Ukraine, civil society institutions have been trying on their own to introduce and promote mediation as a way of alternative dispute resolution. However, systemic problems of access to justice require finding other ways to resolve conflict situations. Mediation becomes especially relevant in the context of Covid-19 coronavirus pandemic, when access to the court system has been limited.

ADR is a set of practices and techniques aimed at permission for resolving out-of-court litigation. It is generally considered to cover mediation, arbitration and various "hybrid" processes through which the mediator facilitates the resolution of litigation without a formal decision (Mnookin, 2002).

At the same time, mediation, as well as other ways of alternative dispute resolution, does not replace justice, but their emergence indicates that civil society can no longer be satisfied with just a judicial way of resolving disputes and needs other ways.

Researchers point out that mediation helps to build civil society by strengthening the sense of responsibility for one's own actions, as it also facilitates a dialogue and activeness (Barcz, 2013; Belskaya & Hellman, 2015), and reduces expenses for justice (Mernitz, 1980).

Frans van Arem– a mediator, coach, judge of the district court of Zwolle Lelystad in the Netherlands in his articles notes that European law, in particular the European Convention on Human Rights guarantees everyone the right of access to a court. And this right cannot be changed by transferring the case to mediation. It is also important to remember that mediation is not a panacea. It can be an aid only when the parties are ready and able to participate in mediation. In most cases, the courts will continue to resolve conflicts and make decisions. However, the judge usually looks back into the past and decides what went wrong in it; the mediator, on the other hand, encourages participants to focus on the real future (Belinska, 2011).

In Ukraine, despite many years of attempts by both the state and civil society to overcome it, the problem of respecting a person's right to access to justice as a component of the right to a court remains.

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 states that access to justice should include access to both judicial and extrajudicial methods of dispute settlement (preambular paragraph 5) and calls on the Member States to establish alternative non-judicial processes.

Researchers also point out that there are incentives that should lead to a more frequent search for out-of-court dispute settlement (Aguiar de Carvalho, 2018). It is believed that most medical disputes are best resolved through alternative dispute resolution mechanisms and that these mechanisms can help improve patient safety by encouraging more open and comprehensive risk reporting (Amirthalingam, 2017). In addition, mediation is effective in solving family conflicts as well as conflicts arising in an educational environment. Conflicts arising in medicine, education, family and labour relations need not only legal regulation but also psychological assistance. Therefore, mediation is a more effective tool for solving them than going to court.

In Ukraine, civil society institutions have been trying on their own to introduce and promote mediation as a way of alternative dispute resolution, despite the lack of support from the state and the absence of specific legislation. The first attempts at mediation were related to the need to resolve a conflict between miners and the state over non-payment of wages. This is how the Psychological Centre was established in Donetsk. Later, similar mediation centres appeared in Kyiv (Ukrainian Mediation Centre), Odessa (Odessa Regional Mediation Group) and other cities of Ukraine. Today, most of these mediation centres operate as public organisations financed through grants. In 2014, the National Association of Ukrainian Mediators (NAMU) was established to represent the interests of Ukrainian mediators at the national level. In addition, as will be shown below, media-

tion is becoming part of the activities of lawyers and notaries. The evolution of mediation actors in Ukraine and their achievements are the subject of a separate study.

At the same time, mediation in Ukraine can be one of the ways to overcome the systemic problem of access to justice. In this context, it is necessary to clarify the mediation principles as an alternative way of dispute resolution.

Research Methodology

The methodology used in this article provides an analysis of the literature, which includes works by authors of both legal and other social sciences where mediation is used as a means of compromise, including psychology, medicine, and ecology, along with the use of tools and comments specific to the study of law. Thus, with the help of the inductive method, individual cases of mediation in medicine and ecology were analysed and conclusions were made about the principles of their implementation. Using the deductive method, the preconditions for mediation introduction in different countries and their principles were analysed and the most applicable ones were identified. Finally, the analogy method was used to explore whether the principles of other legal institutions could be applied to mediation. The method of analysis was used in the study of the essence of mediation principles, as well as comparing foreign experience and summarising the data obtained.

In order to investigate the prospects and effective application of mediation principles in the educational environment, sociological surveys of various participants of the educational process were conducted. In particular, schoolchildren, teachers, students and educators, totally 150 people aged from 13 to 65 years, took part in the survey. The task of the study was to determine the frequency of conflicts arising between different categories of participants of the educational process, causes and method of settlement. In order to fulfil the task, six questionnaires were generated that aimed to identify the characteristics of conflict resolution in different educational settings. The survey was conducted anonymously online. The first questionnaire was addressed to pupils and dealt with conflicts between pupils in a purely pupil-centred environment (a total of 37 pupils aged between 13 and 17 were interviewed). The second questionnaire was aimed at students and dealt with conflicts between students (a total of 39 students between the ages of 17 and 21). The third questionnaire was aimed at school teachers and dealt with conflicts among teachers (a total of 38 teachers aged 30 to 65 were questioned). The fourth questionnaire was addressed to university lecturers and dealt with conflicts among lecturers and teachers (a total of 36 lecturers aged between 35 and 60 years old). The fifth questionnaire was addressed to pupils and teachers and dealt with conflicts between

pupils and teachers (a total of 65 respondents were interviewed). The sixth questionnaire was addressed to university students and teachers and dealt with conflicts between students and teachers (a total of 69 respondents were interviewed).

Concept and Role of Mediation Principles as an Alternative Way of Dispute Resolution

The general mediation principles are defined at the level of principles, which should act as at least a minimum guarantee of the rights and interests of the mediation participants. Compliance by the parties to the mediation and the mediator with the principles of mediation contributes to resolving the conflict in the most effective way.

Yuri Prytyka (2011) notes that the "cornerstone of building any legal mechanism for resolving legal conflicts, of either state (in the form of justice), or alternative methods, which, in particular, include mediation, is a system of principles" (p. 87). Olena Mozhaikina (2017) also emphasises that "...mediation cannot be effective without the presence and implementation of certain principles that determine the basic standards of organisation and conduct of dispute resolution procedure with the participation of a mediator" (p.55). The principle is not only an initial onset, idea, but also a norm, because it acquires normative and law enforcement content and has a certain ideological and educational significance (Onishchenko, 2002).

The principles as norms are contained in both national and international acts on mediation.

The European Union has adopted a number of rules that define mediation principles and recommends that individual Member States implement them in national legislation. Among such acts there is the above-mentioned 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.

The Directive regulates only the basic mediation principles, in particular, such as voluntary mediation, independence, competence, impartiality and equality of the mediator, fairness and confidentiality of justice, protection of rights during t mediation process (without limitation and time limitation), access to legal advice, suitability of agreements and access to court if the mediation is not completed. In addition, the Directive proposes the following mediation mechanisms by providing information on mediation systems and services, as well as mechanisms to encourage mediation as an alternative to litigation. Carolina Riveros and Dagmar Coester-Waltjen (2019), studying the EU experience, note that "the Directive leaves the implementation of these principles and proposals to national legislators" (Chapter 1, para. 6). At the level of national legislation, most Member States have developed specific legislation and have experience in implementing mediation.

There are different approaches to the classification of mediation principles, depending on how the national legal order incorporates mediation into the legal system. Where mediation is closely linked to the judicial system (so-called judicial or adjudication mediation), the principles of mediation are closely linked to the principles of the process (independence and impartiality). In that case, when mediation is an independent separate institution (out-of-court mediation), it has its own principles that may overlap the principles of litigation (voluntariness). Moreover, because mediation is part of the legal system, it uses the principles inherent in law in general (the principle of the rule of law).

Some scholars distinguish general-legal principles of mediation and specific-legal (special) mediation principles (Yosypenko, 2015).

Anna Ohrenchuk's (2016) view, "according to the functional purpose mediation principles can be divided into organisational and procedural" (p.98). Organisational principles characterise the features of mediation and the status of its participants. Procedural principles characterise the procedure for mediation.

The principles of mediation, as Natalia Mazaraki (2019) points out, "are implemented interconnectedly, and their observance makes it possible to achieve the ultimate mediation goal – a just settlement of the dispute amicably and formation of preconditions for further relations between the parties" (p. 8).

Below we look at the individual types of mediation principles and their role in conflict resolution in educational settings.

Types of Mediation Principles as an Alternative Way of Dispute Resolution, their Essence and Meaning, Applicability in Ukraine

Among the fundamental principles of law in general and mediation in particular, it is necessary to highlight the principle of the rule of law, which permeates all social relations and is the cornerstone of the rule of law. The rule of law in this case is the subordination of all decisions and actions of those involved in mediation to the most effective resolution of the conflict, while respecting human rights and freedoms. Mediation as a way of alternative dispute resolution through self-regulatory mechanisms contributes to the restoration of justice and realisation of the right to a court, which are part of the rule of law. The task of ensuring the principle of the rule of law, says Gleb Sevastianov (2009), "should include access to both judicial and extrajudicial methods of dispute resolution, in particular, access to mediation procedures" (p. 528).

However, it is incorrect to define mediation as a fundamental principle of legality, as do Irina Belskaya (2015) and Solomiya Yosypenko (2015), given that the law is not the main source of regulation of relations in mediation.

In connection with the principle of the rule of law, scholars, in particular Sevastianov (2009), highlight the principle of accessibility, as indicating the obligation of the state to provide access to alternative dispute resolution, including to mediation, and to promote its implementation in practice.

It is the accessibility of mediation that argues in favour of its use for conflict resolution in an educational setting. Young people are generally sceptical about the possibility of resolving conflicts in an educational setting by going to court or to the administration of an educational institution. On the other hand, they respond positively to the suggestion of using mediation.

Another fundamental principle of mediation is the principle of equality (equal rights) of the parties, which is manifested in the equality of rights of participants in mediation both in the procedure of access and in the procedure of mediation. However, Article 3 of the Law of the Republic of Moldova On Mediation of June 14, 2007, defines it as equality of access (combined with freedom of access) to mediation, while Article 3 of the Law of the Republic of Belarus On Mediation of June 12, 2013, It is defined as equality of the parties in combination with good faith and cooperation of the parties. Similarly, Article 4 of the Law of the Republic of Kazakhstan On Mediation of January 28, 2011, as well as Article 3 of the Federal Law of the Russian Federation On Alternative Dispute Resolution Procedure with Mediator (Mediation Procedure) of July 27, 2010, also defines equality of mediation parties.

Olga Karpeniuk (2008), also points to the principle of equality of the parties to mediation, combining it with freedom of will and cooperation.

Unlike the principle of procedural equality of the parties, which exists in civil proceedings, when the parties have equal but not the same rights during the court trial, there are no plaintiffs, defendants, third parties, etc. in mediation, and therefore fully to a greater extent, all participants have not just equal, but the same rights during the mediation procedure (Krasilovska, 2017).

Indeed, establishing the true circumstances of the case, the relationship of the parties' conduct with the law and other similar procedures that are necessary components of the trial are not the purpose of mediation. Therefore, it is more correct to interpret the equality of the parties as an opportunity to gain equal access to all mediation procedures while having the same rights and freedoms.

Mozhaikina (2017) notes that the principle of equality of the parties, correlates with the principle of autonomy (freedom) of the parties, or as Olga Avimska (2009) calls it a principle of personal responsibility. This principle is revealed through the possibility (right) of the parties to act at their own discretion at all stages of mediation, as well as in the choice of the mediator. According to Jaroslav Liubchenko (2018), this freedom includes the right to choose any way to resolve the dispute, the competent third party, the applicable law, the rules under which the process will take place, as well as the language and place of dispute resolution. This principle also includes a

declaration that no additional sanctions may be applied to the parties other than those provided by the parties.

Different approaches of the national models of mediation (judicial, extrajudicial) are reflected in the mediation principles.

In most countries, mediation is voluntary. Thus, in the Standards for Mediation of the Republic of Poland of June 26, 2006, 1 standard indicates that the mediator provides voluntary participation in mediation, 2 and 3 standard – for neutrality and impartiality of the mediator, 4 – indicates confidentiality, and 5 – indicates that the mediator reliably informs the parties about nature and course of mediation.

Similarly, voluntariness among the mediation principles is distinguished by the relevant legislative acts of the Republic of Moldova, the Republic of Belarus, the Russian Federation, as well as the Law of the Republic of Bulgaria on Mediation of December 17, 2004.

Malta's Law on Mediation of 21 December 2004, states that voluntary mediation is only one option. However, the national models of mediation may provide for mandatory mediation, with the parties having the right to apply to a judge only if the attempt to mediate was unsuccessful.

This kind of mediation is regulated by the legislation of many foreign countries. For example, in Italy, a legislative decree No. 28 of March 4, 2010, enacted Art. 60 of Law No. 69 of June 18, 2009, in the field of mediation, aimed at conciliation in civil and commercial disputes. The purpose of mediation was primarily to reduce the influx of new cases into the country's judiciary system, giving citizens a simpler, faster and cheaper tool for resolving disputes (Haidenko, 2011).

EU member states use mediation models such as voluntary mediation, in which the parties to the dispute involve a mediator to facilitate the settlement of a dispute, which they are unable to resolve on their own; voluntary mediation with incentives and sanctions for the avoidance of mediation; mandatory mediation sessions before the trial, which involve a meeting between the parties and a professional mediator (free of charge or for a modest fee) to determine the possibility of resolving the dispute through mediation, as well as mandatory mediation in which the parties must participate and pay for the full mediation procedure as a precondition for going to court (Mazaraki, 2019).

The principle of voluntariness in mediation is revealed through its individual elements. Voluntariness, first of all, presupposes the voluntary recourse to mediation, as a person has the right to mediation. Further, the principle of voluntariness involves the voluntary choice of method (mediation method) – mediation, arbitration, consultation, appointment of an expert etc. Voluntariness also includes the possibility to refuse mediation and move to court proceedings (Dmitriiev et al., 1993). Further development of mediation relations involves volunteering at the stage of drafting a mediation agreement, dispute settlement agreement, and voluntary execution of decisions based on mediation (contrary to the principle of binding court decisions). Volun-

tary execution of the decision based on mediation results does not preclude its further appeal to the court. However, the parties take a more responsible approach to the implementation of those decisions to the adoption of which (and the development of their content) they are directly related.

According to Prytyka (2011), the content of this principle also includes the right of the parties to make any decisions on resolving the conflict only by mutual consent. Such an opinion is contained in the works of Yosypenko (2015) and Mozhaikina (2017).

According to 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, voluntary mediation presupposes that the parties themselves are responsible for the process and may organise it at their own discretion and may terminate it at any time. However, the court must be able, by virtue of the national law, to limit the mediation process in time. In addition, courts should be able to draw the parties' attention to the possibility of mediation where this is appropriate decision.

Thus, the principle of voluntary mediation provides for the possibility for the parties to resort to mediation at their own discretion (and act in their own discretion in its process), without excluding the possibility for the state to encourage the parties to reconcile, but with appropriate restrictions.

The German Law on Mediation of 21 July, 2012, defining mediation indicates that it is a confidential process. The principle of confidentiality is mentioned in all the national and international acts on mediation, which gives grounds to assert the unity of opinion of scholars on the principle of confidentiality (Belskaya & Hellman, 2015; Kirtlty, 1998; Kovach, 1994; McEwen & Mainman, 1984).

The principle of confidentiality is extremely important in the process of mediation in medicine, education and family mediation. In educational settings, failure to respect confidentiality will lead to psychological, social and other problems for students and learners, sometimes resulting in irreparable losses, and for educators and teachers may result in an inability to continue their career.

As Kumaralingam Amirthalingam (2017) points out

> it is extremely important that everything that is said during mediation remains confidential; otherwise it will be difficult to have a full and frank discussion, as the parties will worry that what they say can be used in court if mediation fails. (p. 683)

Ellen E. Deason (2001), a well-known mediation researcher, emphasises that "confidentiality fosters communication between the parties and the mediator. It can make an agreement possible even when one cannot be reached in ordinary negotiation" (p. 80).

The essence of the principle of confidentiality is revealed through its individual aspects. As a rule, confidentiality includes the inability to disclose information to the third parties. Mediation (mediation) is carried

out without the permission of any third parties (third parties), and certain methods of dispute resolution do not allow the participation of any third party except the parties to the conflict, including the mediator. If the dispute is settled without the participation of a mediator, the parties act independently to resolve the dispute, in particular through negotiations, and therefore the information in this process does not become known to persons other than the parties to the conflict. The parties do not record the negotiation process, and therefore the information obtained in this way remains confidential.

Notwithstanding, in the presence of a mediator, he is admitted to the information, but undertakes to ensure its confidentiality. And in some cases, confidentiality implies the impossibility of disclosing information to the other party to the mediation procedure. Researchers point to the possibility of the mediator holding separate meetings, during which each of the parties to the conflict may disclose to the mediator information that he does not want to disclose to the other party. The question of whether the mediator should disclose information received from the other party in the mediation process should be regulated in the mediation agreement.

Article 8 of the UNCITRAL Model Law on the International Conciliation Procedures states that when a mediator receives information on a conflict from one party, he may disclose the essence of such information to the other party to the conciliation procedure. However, if a party discloses any information to the mediator, provided that its confidentiality is maintained, such information shall not be disclosed to the other party to the conciliation procedure.

It is important that the disclosure of information is an opportunity, not an obligation of the mediator, who (in the absence of a direct prohibition on disclosure) independently decides on the scope and content of the information he discloses to the other party. Here the principle of independence of the mediator manifests itself, who independently, with the aim of resolving the dispute, discloses or does not disclose the information received from the parties.

In this case, we should talk about the existence of a confidentiality presumption. Mediation information is confidential unless the participants in the mediation agree otherwise. The existence of such a presumption is ensured through appropriate mechanisms. One such mechanism is the definition in the national law of the impossibility of the parties and the mediator to be questioned about the circumstances that became known to them during the mediation (confidentiality from the court). As well as the inability to communicate information obtained during mediation to any other person or authority.

Article 7 of Directive 2008/52/EC of the European Parliament and of the Council of 21 May, 2008, On Certain Aspects of Mediation in Civil and Commercial Matters (2008) discloses the confidentiality of mediation in this respect:

> Whereas mediation must be carried out in such a way as to preserve confidentiality, Member States must ensure that, unless the parties agree otherwise, neither the mediators nor the persons involved in the management of the mediation process will be required to testify in civil or commercial litigation or arbitration of information, arising from or in connection with the mediation process. (European Parliament and of the Council, 2008, article 7, para. 1)

with exceptions

> (a) if it is necessary for public order in the Member State concerned, especially to ensure the protection of the primary interests of children or to prevent any encroachment on the physical or psychological safety of a person; or (b) when the disclosure of the content of an agreement reached through mediation is necessary in order to implement or enforce the agreement. (European Parliament and of the Council, 2008, article 7, para. 2)

Regarding the content of information that is confidential, Mozhaikina (2017) divides it into procedural (information on the participation in the process) and substantive (information that became known during the negotiations) (p. 55). Other scholars also highlight the principle of informality, because in mediation the parties are looking for ways to resolve the dispute (Mazaraki, 2019; Sushko & Krasnogir, 2009).

According to some researchers, the preservation of subsequent partnerships is important for mediation, so as the principle of mediation they identify the satisfaction of mutual interests and the preservation of subsequent partnerships (Koliasnikova, 2007; Reshetnikova & Koliasnikova, 2007; Semenova, 2002).

Mediation in environmental damage disputes faces the problem that mediation is a favourable solution to a situation where, as in many environmental pollution disputes (Hall, 2017), "the polluter and his victims are located next to each other and will remain in place and support permanent relations after their dispute is resolved" (Matsumoto, 2011, p.660).

Equally important are the principles that determine activities of the mediator (arbitrator). Most national and international acts in the field of mediation highlight the independence and impartiality of the mediator as fundamental principles of mediation. Such norms are contained in Article 3 of the Law of the Republic of Belarus On Mediation of June 12, 2013 (2013), Article 4 of the Law of the Republic of Kazakhstan On Mediation of January 28, 2011 (2011), Article 3 of the Federal Law of the Russian Federation On Alternative Dispute Resolution Procedure with Mediator (Mediation Procedure) of July 27, 2010 (2010), Article 3 of the Law of the Republic of Moldova On Mediation of June 14, 2007 (2007), as well as in the European Code of Conduct for Mediators (2004).

The principle of independence and impartiality of the mediator means that the mediator's neutrality must be maintained during the mediation procedure. This allows mediation to perform its functions and ensures its effectiveness. A mediator acts as an intermediate party who is independ-

ent of any of the parties and any public authorities. The impartiality of the mediator is manifested in the fact that he is obliged to act in the interests of all participants in the procedure, to treat the parties equally impartially, not to allow manifestations of favouritism towards the individuals. If participants have doubts about the impartiality of the mediator, they have the right to stop the mediation process (Brian, 1998).

In addition, the European Code of Conduct for Mediators states the importance of the principle of mediator's competence, and the Law of the Republic of Moldova "On Mediation" of 14 June 2007, indicates its neutrality and the possibility of free choice of the mediator.

Article 7 of UNCITRAL Conciliation Regulations of 1 January 1976, states that the mediator is guided, inter alia, by the principle of fairness. The European Code of Conduct for Mediators also points to the need to respect the principle of fairness.

Commission Recommendation 2001/310/ EC of 4 April 2001 "On the operation principles of the out-of-court bodies involved in the compromise of consumer dispute resolution" states that such bodies should, as Alexandre Biard (2019) notes, "confirm compliance with several mandatory quality criteria that, inter alia, show their independence, impartiality, fairness and experience" (p. 110).

Mediation relations are fiduciary in nature, which is also reflected in special legislation. Thus, Article 3 of the Law of the Republic of Belarus On Mediation of June 12, 2013, states that mediation is based on the trust that the parties show to the mediator as a person capable of ensuring the effective conduct of mediation negotiations.

Depending on the specialisation, mediation also has principles that apply within such specialisation. Accordingly, among the principles of family mediation in Chile, the principle of "best interests of children" is distinguished, the essence of which is revealed as: "everything that the parties solve and agree in the mediation process is reflected directly on each member of the family" (Riveros & Coester-Waltjen, 2019, The legal framework: Europe and Chile). Therefore, as Caterine Valdebenito (2013) points out, "in making decisions it is necessary to take into account not only the interests of adults, but also the interests of children, including issues that affect their own lives and the environment" (p. 59).

The separate types of mediation principles discussed in this article are applied in different countries, taking into account the peculiarities of the national legal systems, but such principles as the rule of law, the principle of equality (equal rights) of the parties, the principle of voluntariness, the principle of confidentiality, and the principles of mediator behaviour (independence and impartiality, trust and justice) are used in most of the studied national models of mediation, so they can be called fundamental.

Unlike other countries for which the principles of mediation have been studied in this article, Ukraine has not yet adopted a special law on mediation, although attempts to do so have been made more than once. There-

fore, in this section, mediation principles are disclosed on the basis of an analysis of other regulations that do not prohibit mediation, as well as draft law No. 3504 of May 19, 2020 (2020), which was approved by the Government of Ukraine.

The adoption of a special law on mediation is also necessary for the implementation of United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation), signed by the Minister of Justice of Ukraine on August 7, 2019 (2019).

In the explanatory note to the draft law No. 3504 of 19 May 2020 (2020), paragraph 1 states that its purpose is: "to consolidate at the legislative level the possibility of conducting a mediation procedure, which will consist in voluntary out-of-court settlement of a conflict (dispute) through negotiations between its parties, with the help of mediator" (p. 1). The draft law proposes, in particular, to define: the terminology used in it; mediator status; rights and responsibilities of the mediator and the parties to the mediation; requirements to the mediation agreement and to the agreement on conflict (dispute) settlement based on the results of mediation, etc.

It is suggested to carry out mediation on a voluntary basis, which is the most common practice. Ohrenchuk (2014) considers any restrictions on voluntary mediation unacceptable in Ukrainian conditions: "in the legislation of some countries the restriction of the principle of voluntary mediation may be restricted, which restricts access to justice" (p. 179).

Despite the widespread practice of introducing mandatory mediation in various forms and volumes in different countries, such a decision will be premature for Ukraine, not least because the mediation infrastructure is certainly not ready for this. At the same time, the obligation to mediate in clearly defined disputes with the appropriate provision of qualified mediators is possible, for example, in labour disputes in public authorities and local governments, in family disputes in child protection services. At the same time, the issue of voluntariness and other principles of mediation should remain the subject of discussion in Ukrainian science (Mazaraki, 2019).

The problem, however, is the lack of clear criteria for disputes that cannot be referred to mediation, which can lead to problems in the implementation of the provision of law. Scientists also cite the lack of a mechanism for fulfilling the terms of the contract based on the results of mediation as a problem, and suggest that it be provided for in the law (Melenko, 2020).

Another fundamental principle of mediation in the draft law is the principle of confidentiality. It is suggested that all information related to mediation, including the fact of mediation, and information obtained during mediation, the content of the agreement based on the results of mediation is confidential.

In Ukraine, the legislative definition of confidential information is contained in the Law of Ukraine On Information of October 2, 1992, which stipulates that

> information about an individual is confidential, as well as information to which access is restricted by a natural or legal person, except for power entities. Confidential information may be disseminated at the request (consent) of the person concerned in the manner prescribed by him in accordance with the conditions provided by him, as well as in other cases specified by law. (Verkhovna Rada of Ukraine, 1992, Article 1)

Based on the essence of mediation principle, the draft law does not take into account all aspects of the principle of confidentiality; in particular, confidential information does not include information about the parties. However, it is positive that the mediator has a mechanism for disclosing information received from the parties on the merits of the dispute to the other party.

The government also proposes the principle of equality of rights of the parties to mediation, as well as a number of principles that determine the activities of the mediator (independence and neutrality of the mediator, impartiality of the mediator, self-determination). The most important gap in the draft law is the lack of the principle of the rule of law as one of the fundamental principles of mediation.

Application Features of Mediation Principles in the Educational Environment of Ukraine

The principles of mediation are effective in many areas of social life. In particular, in the family and domestic sphere, educational environment, corporate and inter-corporate disputes, financial and banking environment, small and medium business, in the international law and intercultural communication.

However, John Burton (1990), based on Abraham Maslow's model, suggested that the key to understanding the causes of conflict can be an analysis of the actual basic needs of the individual. According to the author, unmet needs of an individual negate social stability in his or her behaviour, which makes it impossible to resolve a dispute.

In the mediation process, based on Burton's concept, it is necessary to organise the interaction in such a way that there is consistency in the demands and reactions of all participants in the process, that there is fairness towards each party, that there is a sense of rationality in what is happening. It is important that the demands of the parties are meaningful and not contradictory, otherwise they are perceived as irrational, which ultimately leads to a sense of loss of control over the situation, distrust of the opponent and the mediator himself.

The educational environment is a place where conflicts arise between representatives of different age and social groups, with many factors increasing irritation and the emergence of aggression, including the saturation of the curriculum, competition etc. The above-mentioned factors have

a negative impact on the behaviour of applicants for education, as well as teachers-educators. The modern system of Ukrainian education receives more and more new challenges to overcome the socio-pedagogical problem.

To solve conflict situations between different subjects of the educational process, it is necessary to apply the mediation principles. However, the low level of knowledge of methods and techniques of conflict resolution in schools and institutions of higher education aggravates the situation. Usually, "the main ways of educational influence on conflicting pupils and students on the part of educators-teachers are: admonitions, threat of punishment or punishment, searching for the culprit, formal conflict resolution" (Yenin et al., 2019, p. 61).

It is ineffective to resolve conflict situations with authoritarian methods that degrade the dignity of pupils and students and are directed against them. Within the scope of study of the prospects and effective application of mediation principles in the educational environment, a sociological survey was conducted of various participants in the educational process.

Having analysed the results of a survey of schoolchildren, most of whom are high school students, it was found that 25% have daily conflicts, other 25% have monthly conflicts and the rest have conflicts at least once a year. Moreover, the reasons for the disputes are quite different, but the ways of resolution are the same. According to the respondents, teachers and school administration do not play a significant role in conflict resolution. In this regard, most respondents believe it is necessary to identify a separate body (person), which could effectively resolve conflicts between the participants of educational process.

In a pedagogical environment the disputes arise less often, but the ways of their settlement are ineffective. In particular, conflicts between teachers are regulated by the parties themselves. According to the respondents, school administration mostly does not intervene in dispute resolution, and the work of trade unions is ineffective. Most respondents believe that a separate body (person) should be identified, which would be uninterested and fair in resolving the conflicts.

Very interesting are the results of the survey regarding conflicts that arise between pupils and teachers. Despite the fact that conflicts between the named respondents occur weekly, less frequently monthly, the desire for a new dispute resolution tool is the same. Both teachers and pupils note that conflicts are solved unfairly, without the involvement of independent parties. More than 50% of respondents are convinced of the need to involve an independent body or person who could directly regulate the misunderstanding.

Thus, conflicts in general secondary education institutions are quite frequent. Moreover, the reasons for misunderstandings are unique and individual in each case. It is not possible to develop a general approach to solving problematic situations. As the results of the study show, only an individual and independent approach can resolve conflicts properly.

In addition to general secondary education institutions, a survey was also conducted in the higher education institutions. The results of student survey indicate that conflicts arise mostly on a monthly basis. Most of the respondents claim to resolve conflicts independently, and sometimes, with the help of student self-government body. However, the respondents note the need to empower student government bodies to resolve disputes between students.

Conflicts in the teaching environment, on the other hand, are regulated with the help of the participants themselves. Despite the fact that disputes do not arise often, teachers also consider it necessary to create a body or to give competence to the existing one to resolve misunderstandings in a full and impartial way.

According to the results of the survey regarding misunderstandings between students and teachers, these arise quite often, but, as in general secondary education institutions, such conflicts are settled by their participants. Most of the respondents are also convinced that it is worth establishing a body that can properly solve the problematic situation.

Mediation could be an independent tool to help resolve conflicts in the educational environment. Andrew Shipilov (2002) notes that mediation activities in the educational environment require: independent awareness of the nature of contradictions between subjects; development of personal constructive attitude towards student conflicts; mastering the skills of non-conflict communication in difficult life situations; having conflict management skills; ability to constructively manage contradictions and conflicts; ability to analyse emerging problem situations.

In the educational setting, the principles of mediation, such as voluntariness, as coercion is not effective in working with young people, and confidentiality, for the reasons previously analysed, come to the fore. As the survey shows, the independence and impartiality of the mediator is also an important factor in the choice of mediation as a means of conflict resolution in an educational setting.

In most cases, mediators, who are representatives of civil society institutions and do not trust the state, are used to resolve conflicts between participants in the educational process.

Thus, given the findings of this study, mediation principles, such as confidentiality, impartiality and voluntariness, should also be applied in the educational environment. The implementation of basic mediation skills and tools in educational institutions would create a favourable legal framework for mediators in the future.

Conclusion

As we go forward, more frequently alternative ways of dispute resolution are gaining legislative support in different parts of the world. The principles are the basis for mediation, compliance with which contributes to resolving the

conflict in the most effective way and therefore require regulation at the level of law, including in Ukraine. In most countries where special legislation in the field of mediation is adopted, it defines mediation principles as a minimum guarantee of the rights and interests of mediation participants. The principles define general ideas on which mediation is carried out and can be used independently by the participants of mediation to determine their rules of conduct.

As the medical profession is a relatively new institution, it uses by analogy the principles of other legal institutions, adapting them to its own needs. The principle of the rule of law as the underlying principle of the medical profession should be identified as the ordering of all decisions and actions of those involved in the medical profession to the most effective prevention of conflict with respect for human rights and freedoms. Both at the stage of access and in the process of mediation, the principle of equality (equal rights) of the parties is prevailing.

Such a fundamental principle as the confidentiality of mediation is revealed through such aspects as the inability to disclose information to third parties and the inability to disclose information to the other party to the mediation procedure, which suggests the existence of a presumption of confidentiality. Finally, the principles of mediator's behaviour (independence and impartiality, trust and justice, competence) determine the principles of his activity.

Mediation can be an effective tool for resolving conflicts in the educational environment, as it is perceived by pupils, students and teachers as an impartial and independent body or a person who will help to reach a compromise. All of the above principles of mediation are used to prevent conflicts in the educational environment, but the most important are the principles of goodwill, confidentiality and autonomy. The involvement of representatives of civil society institutions is effective for the implementation of education mediation.

References

[1] Aguiar de Carvalho, V. (2018). Health assessment from the point of view of economic analysis of law: the study of incentives for filing and out-of-court dispute resolution. *Revista Brasileira de Politicas Publicas*, *8*(3), 308-326. http://dx.doi.org/10.5102/rbpp.v8i3.5676

[2] Amirthalingam, K. (2017) Medical Dispute Resolution, Patient Safety, and Physician-Patient Relationships, *Singapore Medical Journal, 58*(12), 681-684.

[3] Avimska, O. V. (2009) *Pryntsypy medyatsyy (posrednychestva)* [Mediation Principles]. *Arbitration court*, 5, 147-155.

[4] Barcz, J. (2013). Środki międzyrządowe konsolidujące strefę euro (w świetle wyroku Trybunału Sprawiedliwości UE w sprawie Pringle) [Intergovernmental measures to consolidate the euro area (in light of the Court of Justice of the EU's Pringle judgment)], *Panstwo i Prawo*, *8,* 3-19.

[5] Belinska, O. (2011). *Mediatsiia – alternatyvne vyrishennia sporiv.* [Mediation is an alternative dispute resolution]. *Bulletin of the High Council of Justice, 1(5),* 158-173.

[6] Belskaya, I. A. & Hellmann, W. (Eds.). (2015). *Teoryia y praktyka medyatsyy (posrednychestva) v эkonomycheskoi sfere : ucheb.-metod. posobye* [The theory and practice of mediation in the economic sphere: study guide]. Publ. Center BSU.

[7] Biard, A. (2019). Impact of Directive 2013/11/EU on Consumer ADR Quality: Evidence from France and the UK. *J Consum Policy* 42, 109–147, https://doi.org/10.1007/s10603-018-9394-z
[8] Brian, A. L. (1998). Understanding and Application of Alternative Dispute Resolution Methods in Contemporary Medical Conflicts. *Journal of Legal Medicine*, *19*(3), 397-430. https://doi.org/10.1080/ 01947649809511069
[9] Burton, J. (1990). *Conflict: Resolution and Prevention*. St. Martin's Press.
[10] Deason, E. E. (2001). The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability? *SSRN Electronic Journal*. http://dx.doi.org/10.2139/ssrn.289402
[11] Dmitriiev, A. V., Kudriavtsev, V. N., & Kudriavtsev, S. V. (1993). *Vvedenye v obshchuiu teoryiu konflyktov* [Introduction to the general theory of conflicts]. Yzd-vo YHyP RAN..
[12] European Code of Conduct for Mediators 2004. https://rm.coe.int/cepej-2018-24-en-mediation-development-toolkit-european-code-of-conduc/1680901dc6
[13] Gesetz zur Förderung der Mediation und anderer Verfahren der außergerichtlichen Konfliktbeilegung) Vom 21. Juli 2012*, Bundestag. http://surl.li/cryii
[14] Haidenko, S. N. (2011). Obiazatelnaia medyatsyia: opyt Ytalyy [Mandatory mediation: the experience of Italy]. *Arbitration court*, *1*, 156-165.
[15] Hall, M. (2017). Exploring the cultural dimensions of environmental victimisation. *Palgrave Commun* 3, 17076. https://doi.org/10.1057/palcomms.2017.76
[16] Karpeniuk, O. S. (2008). *Pravovoe rehulyrovanye posrednychestva pry razreshenyy vneshnieekonomycheskykh sporov* [Legal regulation of mediation in the resolution of foreign economic disputes] [Unpublished doctoral dissertation]. Russian Academy of National Economy and Public Service under the President of the Russian Federation.
[17] Kirtlty, A. (1998). Confidentiality in Mediation. *Dispute Resolution Magazine*, 5(2), 5-8.
[18] Kovach, K. H. (1994). *Mediation: Principles and Practice.* West Publishing Co.
[19] Krasilovska, Z. (2017). *Stanovlennia instytutu mediatsii v systemi publichnoho upravlinnia: teoretyko-pravovyi aspekt* [Establishment of the institute of mediation in the system of public administration: theoretical and legal aspects] [Unpublished doctoral dissertation]. National Academy of Public Administration under the President of Ukraine.
[20] Liubchenko, Y. P. (2018). *Alternatyvni sposoby vyrishennia pravovykh sporiv: teoretyko-pravovyi aspect* [Alternative methods of legal disputes resolution: theoretical and legal aspects] [Unpublished doctoral dissertation]. Yaroslav Mudryi National Law University.
[21] Matsumoto, S. (2011). Duration of analysis of alternative environmental dispute resolution in Japan. *Ecological economy*, *70*(4), 659–666.
[22] Mazaraki, N. A. (2019). *Teoretyko-pravovi zasady zaprovadzhennia mediatsii v Ukraini* [Theoretical and legal principles of media protection in Ukraine] [Doctoral dissertation, Institute of Legislation of the Verkhovna Rada of Ukraine Institute of Legislation of the Supreme Council of Ukraine]. Institute of Legislation of the Verkhovna Rada of Ukraine. http://instzak.rada.gov.ua/uploads/documents/31793.pdf
[23] McEwen, G., & Mainman R. (1984). Mediation in Small Claims Court: Achieving Compliance through Consent. *Law and Society Review*, 18(1), 11-49.
[24] Mediation Akt. Malta Mediation Centre *2004*, https://justice.gov.mt/en/mmc/Documents/Chapter_474t.pdf
[25] Melenko, O. (2020). Mediation as an Alternative Form of Dispute Resolution: Comparative-Legal Analysis. *European journal of law and public administration, 7*(2), 46-63. https://doi.org/10.18662/eljpa/7.2/126
[26] Mernitz, S. (1980). Mediation of environmental disputes. Praeger.
[27] Mnookin, R. H. (2002) Alternative Dispute Resolution. In P. Newman (Eds.), *The New Palgrave Dictionary of Economics and the Law*. https://link.springer.com/referenceworkentry/10.1007/978-1-349-74173-1_14
[28] Mozhaikina, O. S. (2017). *Poniattia ta zmist osnovnykh pryntsypiv mediatsii v tsyvilno-pravovykh vidnosynakh* [The concept and content of the basic mediation principles in civil law relations]. *Actual problems of domestic jurisprudence*, *5*, 55-58.
[29] *O medyatsyy: Zakon Respublyky Belarus 12 yiulia 2013, c.h. № 58-Z* [On mediation: Law of the Republic of Belarus dated July 12, 2013, No. 58-Z]. http://pravo.by/document/?guid=3871&p0=H11300058

[30] *O medyatsyy: Zakon Respublyky Kazakhstan ot 28 yanvaria 2011, hoda №c. 401-IV* [On mediation: Law of the Republic of Kazakhstan dated January 28, 2011, No. 401-IV]. https://online.zakon.kz/document/?doc_id=30927376

[31] *O medyatsyy: Zakon Respublyky Moldova ot 14.06.2007, c. N. 134* [On mediation: Law of the Republic of Moldova dated 14 June, 2007, No. 134]. http://lex.justice.md/viewdoc.php?action=view&view=doc&id=326255&lang=2

[32] *Ob alternatyvnoi protsedure urehulyrovanyia sporov s uchastyem posrednyka (protsedure medyatsyy): Federalnыi zakon ot 27.07.2010 N, c. 193-FZ* [On Alternative Dispute Resolution Procedure with Mediator (Mediation Procedure): Federal Law of July 27, 2010 N 193-ФЗ]. https://ppt.ru/docs/fz/193-fz-81581

[33] Ohrenchuk, H. O. (2014). *Dobrovilnist ta konfidentsiinist yak osnovopolozhni pryntsypy mediatsii* [Voluntariness and confidentiality as fundamental mediation principles]. *Our right*, *10*, 177–183.

[34] Ohrenchuk, H. O. (2016). *Pravove rehuliuvannia zastosuvannia mediatsii pry vyrishenni tsyvilnopravovykh sporiv* [Legal regulation of mediation application at the decision of civil law disputes], [Doctoral dissertation, National Academy of Internal Affairs of Ukraine]. National Academy of Internal Affairs of Ukraine. http://surl.li/cryhp

[35] *On certain aspects of mediation in civil and commercial matters*. Directive 2008/52/EC of the European Parliament and of the Council. https://zakon.rada.gov.ua/laws/show/994_a95

[36] *On mediation: Law of the Malta dated 21 December 2004*. https://justice.gov.mt/en/mmc/Documents/Chapter_474t.pdf

[37] Onishchenko, N. M. (2002). *Pravove rehuliuvannia zastosuvannia mediatsii pry vyrishenni tsyvilnopravovykh sporiv* [Theoretical and methodological principles of formation and development of the legal system] [Unpublished doctoral dissertation]. Institute of State and Law named after V.M. Koretskyi.].

[38] *Pro informatsiiu: Zakon Ukrainy vid 02.10.1992 №, c. 2657-XII* [On information: Law of Ukraine of 02.10.1992No. 2657-XII]. http://zakon.3.rada.gov.ua/laws/show/2657-12

[39] *Pro mediatsiiu: Proekt zakonu Ukrainy 2020* [On Mediation: Draft Law of Ukraine]. http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=68877

[40] *Pro mizhnarodnyi komertsiinyi arbitrazh: Zakon Ukrainy vid 24.02.1994, № c. 4002-XII* [On International Commercial Arbitration: Law of Ukraine of 24.02.1994 No. 4002-XII]. http://zakon2.rada.gov.ua/laws/show/4002-12

[41] *Pro treteiski sudy: Zakon Ukrainy vid 11.05.2004, № c. 1701-IV* [On Arbitration Courts: Law of Ukraine of 11.05.2004 No. 1701-IV]. http://zakon2. rada.gov.ua/laws/show/1701-15

[42] Prytyka, Y. D. (2011). Zmist ta klasyfikatsiia pryntsypiv mediatsii [Content and classification of mediation principles]. *Bulletin of the Ministry of Justice of Ukraine, 10*, 86-92.

[43] Reshetnikova, I., & Koliasnikova, Y. (2007). Medyatsyia y arbytrazhnyy protsess [Mediation and the arbitration process]. *Arbitration and civil proceedings*, *5*, 29-31.

[44] Riveros, C., & Coester-Waltjen, D. (2019). Alternative dispute resolution in family disputes in Europe and Chile: mediation. *Direito GV Law Review*, *15*(2), https://doi.org/10.1590/2317-6172201914

[45] Semenova, N. V. (2002). *Konflyktnaia yurydycheskaia deiatelnost: problemы teoryy y metodolohyy* [Conflict legal activity: problems of theory and methodology] [Unpublished doctoral dissertation]. Yaroslavl State University named after P.G. Demidova.

[46] Sevastianov, G. (2009). Teoretycheskye osnovы alternatyvnoho razreshenyia sporov: kontseptsyia chastoho protsessualnoho prava v Khrestomatyia alternatyvnoho razreshenyia sporov [Theoretical foundations of alternative dispute resolution: the concept of frequent procedural law]. *ANO - Arbitration Court, 1*(12) http://arbitrage.spb.ru/jts/bibl/hrestomatiya.html

[47] Shipilov, A. I. (2002). Yskusstvo medyatorstva v deiatelnosty kadrovyka [The art of mediation in the activities of personnel]. *Kadry predpriyatiya*, *6*. http://kapr.ru/articles/2002/6/438.html

[48] *Standardy prowadzenia mediacji i postępowania mediatora. 26 czerwca 2006, c.21* [Standard of mediation and mediator proceedings. June 26, 2006, c.21]. http://surl.li/crykj

[49] Sushko, O. V., & Krasnogir N. S. (2009). *Posrednyk urehulyroval spor s hosudarstvennыm orhanom* [The mediator settled the dispute with the state body]. *Herald of the Supreme Economic Court of the Republic of Belarus, 21*, 53-55.

[50] Typical (Model) Law of UNCITRAL for International Commercial Arbitration dated June 21, 1985. http://zakon2.rada.gov.ua/laws/show/995_879

[51] UNCITRAL Conciliation Regulations of 1976, c.1-01-01. https://zakon.rada.gov.ua/laws/show/995_063#Text

[52] UNCITRAL Model Law on International Commercial Conciliation and Guidelines for Adoption and Application 2002. http://www.uncitral.org/pdf/russian/texts/arbitration/ml-conc/03-90955_Ebook.pdf

[53] United Nations Convention on International Settlement Agreements Resulting from Mediation 2018, c.14. http://simc.com.sg/the-singapore-convention-on-mediation

[54] Valdebenito, C. (2013). *Presencia de los niños y niñas en la Mediación Familiar en Chile*. http://revistafacso.ucentral.cl/index.php/rumbos/article/view/138/134

[55] Yenin, M. N, Makarenko, D. V, Severinchik, O. P. (2019) *Mediatsiia v osvitnomu prostori zakladiv vyshchoi osvity: u poshukakh modeli ta sposobiv orhanizatsii* [Mediation in the educational space of higher education institutions: in search of a model and ways of organisation]. *VISNYK NTUU "KPI". Politolohiia. Sotsiolohiia. Pravo*, *3*(43), 59-64.

[56] Yosypenko, S. T. (2015). *Pryntsypy mediatsii u pryvatno-pravovykh vidnosynakh* [Principles of mediation in private law relations]. *Scientific Bulletin of Uzhhorod National University. LAW series*, *35*(1), 130-133.

[57] On the operation principles of the out-of-court bodies involved in the compromise of consumer dispute resolution. Commission Recommendation 2001/310/EC of 4 April, 2001 (OB L 109, 19.4.2001, 56-57). http://data.europa.eu/eli/reco/2001/310/oj