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# DRIVING INTEGRATIONAL CHANGES
## Vol. III

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The collective monograph is devoted to the actual issues concerning the implementation of the Association Agreement between Ukraine and the member states of the European Union. In particular, the monograph examines the theoretical and practical aspects of various spheres of joint activities, as a commitment to economic development in Ukraine.

Created for scholars, research workers, postgraduates and students of higher education institutions, as well as for all those interested in the implementation of the Association Agreement.

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# PART III

# JUSTICE, FREEDOM AND SECURITY

*Association agreement: driving integrational changes*

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# Formation of institute of mediation in transitive development of Ukrainian society

Recently, the Institute of Mediation has become increasingly important in shaping the legal culture of dispute resolution in Ukraine which is gaining in popularity. In today's context, Ukrainian society requires mediation in almost all legal relationships. This is evidenced by the creation in Ukraine of several NGOs that distribute mediation in Ukraine. The term "mediation" comes from the Greek medos (neutral, party-independent), as well as from the Latin terms mediatio (mediation) and mediare (to mediate). Mediation facilitates the accelerated development of civil society institutions, where a person with the whole system of his needs, interests and values is the main subject. Modern Ukrainian society is characterized by instability, high socio-economic dynamics and an uncertain "vector" of change, which makes it possible to consider it transitive. Transitive changes taking place in modern society involve all social institutions in cardinal transformations. For the success of social transformations and the completion of the state of transitivity, the organization of social process management is of importance. It should be noted that until recently many lawyers, psychologists, specialists in various fields and ordinary citizens either did not know the term "mediation" and its meaning, or were skeptical, arguing that for the legal culture and mentality of Ukrainian society, mediation is not suitable as a way of resolving conflicts. However, in the current context, mediation in Ukraine is developing rapidly. The mediation institute is inherently innovative for the modern Ukrainian mentality, and in the process of becoming an institute there are difficulties associated with the fact that it is beginning to be treated with some degree of distrust, as with many innovations in society.

Analysis of recent research and publications. Problems and prospects of formation and development of domestic institute of mediation as an alternative way of conflict resolution is a topical topic of research and subject of study of many scientists, practitioners (mainly lawyers and psychologists), as well as students who consider both general issues of the essence of mediation and problems of introduction of mediation rights (T. Barabash, A. Girnyk, N. Gren, R. Denisova, Y. Remeskov, L. Romanadze, N. Krestovskaya, T. Shinkar and many others). The works of modern researchers form the scientific basis for further research of the mediation institute in Ukraine, actualize the problem of legislative regulation of the legal institute of mediation and its integration into the modern legal system of Ukraine.

The purpose of the article is to analyze and investigate the problems related to establishment and implementation of the Mediation Institute in

the conditions of transitive development of Ukrainian society, to determine the importance of the Mediation Institute for improving the mechanisms of protection of human and citizen's rights in Ukraine.

Perception of the main research material. Mediation is often seen as an innovation, although it has a long history in many cultures and civilizations. Involving reputable people in the role of mediator has been known since ancient times. In Ancient China, Ancient Greece, Persia, in the Arab countries, there was a tradition of recourse to authority to overcome differences and resolve conflicts. The rulers of the world, who were administering justice in their possession, considered the settlement of a dispute between their vassals in certain cases more desirable than the sentencing (Girnik 2010).

The elements of reconciliation and restorative justice have been closely linked in the Ukrainian legal tradition since ancient times, as evidenced by the normative support and practice of restorative justice and reconciliation in Kyivan Rus. In their beginning, they had non-punitive social means of influencing the offender, intertwined with pre-Christian customs, religious norms, and political practices, found to be indemnified by the offender's harm, twinning procedures, godly kissing, which ended and consolidated the conciliation agreement.

In the Middle Ages, popes, emperors, papal legates, bishops were the mediators in international and domestic strife. In conflicts between and within families, priests were often mediators. For example, the famous Dominican preacher Vincent Ferrer (cf. 1350 / 57-1419) stopped disputes and reconciled enemies, and the notaries who accompanied him drew up disputes (Girnik 2010).

Many peoples of Europe, including the Germans, Poles, and Ukrainians, had a tradition of "restorative justice" that was enshrined in codes of custom. In Eastern Ukraine it lasted until the middle of the 19-th century, and in Western Ukraine (especially in the Carpathians and Carpathians) customary law was in force until 1939, i.e. before the coming of Soviet power. The customary right was exercised in the activity of assembly (land) courts, which were held twice a year and in which all the adult population (or only male) participated. The purpose of the assembly courts was to establish justice and maintain peace in the community, so reconciliation was welcomed (Girnik 2010).

Mediation in its modern sense began to develop in the second half of the XX century, and especially in the countries of Anglo-Saxon law - the USA, Australia, Great Britain. In the countries of the continental system of law - France, Belgium, Germany, Austria, Italy, Switzerland, the Netherlands, mediation became known mainly in the late 80's - early 90's of the XX-th century. The experience of modern countries shows that the process of resolving conflicts involving a professional mediator is very effective. For

example, in Japan and China, litigation is considered a good practice and encouraged.

The introduction of the Institute of Mediation in Ukraine connects the contemporary development of the legal system of Ukraine with the European legal systems, values and priorities of development of the modern civilized world. The formation and development of mediation in Ukraine has been going on for decades and it can be argued that this method of dispute resolution has already acquired the status of a social institution. The peaceful settlement of disputes is always inherent in the Ukrainian nation, with the drawbacks of the domestic judicial system forcing citizens to seek and apply alternative dispute resolution procedures. Moreover, there is a persistent social demand for reform of the judiciary, improved access to justice, and reduced levels of conflict in society. One of the organic additions to the state judicial system is considered to be the mediation institute, which has gained considerable development in foreign countries, whose experience in the legal regulation of mediation gives the opportunity to choose a balanced approach to the introduction of mediation into the Ukrainian legal and judicial system.

At this stage of mediation implementation in Ukraine, the creation of specialized legislation in the field of mediation. Since 2010, Ukrainian mediators have enlisted the support of parliamentarians and registered with the Verkhovna Rada of Ukraine ten draft bills on mediation. However, due to the unstable political situation, constant changes in governments and parliamentary elections, the law has not yet been adopted (Denisova 2018). The development of alternative ways of resolving disputes is envisaged by the Strategy for the Reform of Judiciary, Judiciary and Related Legal Institutions for 2015-2020, approved by Presidential Decree No. 276 of 20.05.2015, neither in the Ukrainian legislature nor in the society has an understanding of the effective mechanism of alternative incorporation into the legal system of the state (Presidential Decree on the Strategy for Reform 2015). Mediation is considered to be the simplest, most widespread in the world, most accessible to people, the cheapest, given the limited resources of modern Ukrainian society, an alternative to official justice. Mediation, as a pre-trial dispute settlement process, has many benefits for the parties, as opposed to long-term litigation.

At the same time, there is much controversy under the current conditions regarding the introduction of the role of mediation at the legislative level. There are many discussions regarding the implementation of the Mediation Institute in Ukraine. Many bills have been submitted to mediation, which were registered by the Verkhovna Rada and, unfortunately, the Law was never adopted. Thus, on February 28, 2019, the Verkhovna Rada of Ukraine rejected the bill No. 3665 “On Mediation”, which was considered in the second reading. The bill envisaged the formation of the legal basis and procedure for mediation as an out-of-court conflict resolution procedure, the principles of mediation, and the mediator’s status. It was determined that

mediation could be applied in any conflict, including civil, family, labor, economic, administrative, criminal proceedings, minor or moderate offenses, and in the private prosecution provided for in Art. 477 of the CPC of Ukraine, and cases of administrative offenses (Draft Law of Ukraine on mediation 2015). Another draft law "On mediation activities" No. 10425 was removed from consideration in connection with the dissolution of the Verkhovna Rada (Draft Law of Ukraine on mediation activities 2019). Thus, the last period is characterized by high activity of the subjects of the legislative initiative aimed at regulating mediation in Ukraine.

Despite the fact that the law on mediation in Ukraine has not yet been adopted, Ukraine is in a situation where the practice of using the mediation procedure is ahead of legal regulation. Mediation is real and already assists the parties in resolving disputes on the basis of the Code of Ethics of the Mediator of the National Association of Mediators of Ukraine (Code of Ethics of the mediator of the National Association of Mediators of Ukraine), developed in accordance with the provisions of the European Code of Conduct for Mediators (European Code of Conduct for Mediators). In the absence of a special law, sectoral legislation provides certain opportunities for introducing mediation into legal and legal aid practice in Ukraine. Thus, with part 6 of Article 16 of the Law of Ukraine "On Social Services" (entry into force from 01.01. 2020), mediation is recognized as the basic social service (On Social Services 2019), and part 2 of Article 7 of the Law of Ukraine "On Free Legal Aid". It is enshrined that free primary legal aid includes such legal services as providing assistance in accessing a person to mediation (Law of Ukraine on free legal aid 2018).

In August 2019, Ukraine signed the UN Convention on Mediation in Singapore, which seeks to resolve, in the future, cross-border commercial disputes more often through mediation and through amicable settlement (Sussman 2018). The signing of the Singapore Convention by Ukraine enhances the authority and confidence of the mediation process as an alternative means of dispute settlement alongside the court and has a positive impact on the country's image in the international arena, as well as on the development of international trade and business in Ukraine.

Therefore, at the present stage of establishment and development of a mediation institute in Ukraine, there are a number of problems that stand in the way of institutionalizing the practice of mediation. Among the most pressing problems, current researchers highlight: the imperfection of the legal framework of mediation in Ukraine; lack of a corps of qualified mediators and low awareness of the population on mediation.

Despite the lack of specific legislation, Ukraine has experience in the use of mediation procedures, which confirms the high efficiency of this institution in the process of conflict resolution. According to the Ministry of Justice of Ukraine, since 2003 experiments have been actively conducted in the courts (Kyiv, Kharkiv, Ivano-Frankivsk, Odessa). There are a number of Regional

Mediation Groups operating in Ukraine, which have merged into the Association of Mediation Groups of Ukraine and the Ukrainian Center of Understanding, which is actively engaged in the implementation of programs of reconciliation of victims and offenders and educational activities in this area, i.e. the Institute of Mediation and Community Functions.

Council of Europe Committee of Ministers Committee of Ministers Recommendation Acts propose to include in the codes of conduct of lawyers a duty or recommendation to take measures to provide relevant information and, where possible, to invite parties to engage in mediation, including between a victim and an offender. petition to refer the case for mediation to a duly authorized body. Attorneys and law firms are encouraged to have a list of mediation providers and distribute them to attorneys. Yu. Remeskova believes that in Ukraine mediation should be recognized as a special type of advocacy, which should find its consolidation at the level of the current legislation on advocacy. Mediation attorneys, who are a potential source of offender referrals for participation in restorative justice programs, have significant opportunities and perspectives in providing legal assistance to criminal proceedings participants in mediation. They should play an important role in explaining to the parties the benefits of participating in restorative justice procedures, and thus ensure that their right to reconciliation is exercised in cases established by law (Remeskova 2015). In mediation, the lawyer is neither a person authorized to resolve a dispute (conflict) nor a representative or consultant of only one party to the dispute. The mediator is obliged to mediate the dispute in accordance with the principle of neutrality and without prejudice to the parties and the subject matter of the dispute.

A lawyer who knows and understands the mediation process, its principles, rules, and differences from other dispute resolution methods can play a positive and constructive role in mediation, stimulating the case forward, tracking the meaningful part of the process, helping the parties to be flexible. Most often, lawyers are involved in mediation in the civil process, in commercial conflicts, in the division of property in family conflicts. Lawyers should respect the principle of self-determination of parties, which allows parties to make decisions that are not always based on a legal position, but reflect the interests of the parties and satisfy both parties.

Lawyers' interest in mediation is driven by the search for new fields of activity and the need for advanced training. L. Romanadze emphasizes that in Ukraine more and more lawyers are “diving” into the topic of mediation and trying to find out its effectiveness for their clients. The author believes that mediation opens up new opportunities for lawyers in their professional activity: first, mastering the mediator’s skills increases the lawyer's professional prowess; secondly, mediation opens a new way in professional activity of a lawyer - support of a client in the mediation procedure; third, the lawyer can perform the mediator’s function (Romanadze), which is explicitly

provided for in Part 2 of Art. 21 Rules of Attorney Ethics. In this case, in addition to the rules of lawyer ethics, the lawyer's actions must comply with the internationally recognized ethical principles of mediation (Rules of Attorneys Ethics 2017).

Therefore in modern conditions, mediation is a kind of alternative dispute resolution, a method of their settlement with involvement of (facilitator) mediator, which helps the conflict's parties to adjust the communication process and analyze the conflict situation so that they themselves can choose the solution that would satisfy interests and needs of all parties conflict. Unlike a formal litigation or business process, the parties reach an agreement during mediation - the mediator does not decide for them. Mediation as one of the alternative ways of managing legal conflicts is an important tool for improving the legal culture of society. It is a difficult process, however, thanks to it, a professionally trained mediator can find a profitable solution for both parties. Its development can be carried out only in the conditions of voluntary consent and awareness of the rational participation of the mediator interested in the resolution of conflict situations, reaching a single solution based on the mutual consent of the parties to the dispute, which does not allow any physical influence or manipulation. Any mechanism for informing the parties to a dispute should be based on a developed system of mediation and mediators, which requires recognition by the state and its support for this method of dispute resolution.

An effective mechanism for the introduction of a mediation institute in modern Ukraine should be the legislative establishment of mediation principles, the establishment of a clear procedure for mediation, the definition of the rights, duties and responsibilities of a mediator, the requirements for the mediation contract and its implementation, as well as special provisions for the mediation of various conflicts: civil, family, labor, economic, conflicts related to consumer protection, mediation in criminal proceedings and administrative cases active offenses.

In addition, the institution of mediation, which is gaining more and more recognition of civil society, can be used, in our view, not only as an independent procedure for effective conflict resolution, but also as a purposeful social program for creating a purposeful value space for revitalizing and shaping socially important landmarks. society.

**Conclusions**. It can be stated that, without legislative basis, mediation in Ukraine nevertheless becomes a social institution, which is formed through an objective need for an auxiliary justice system, which will allow to unload the judicial system, ensure its effective functioning, resolve existing disputes in a fast, moderate cost-effective, confidential and efficient. In our view, the legislative regulation of the mediation procedure will broaden alternative ways of resolving disputes and will allow the parties to resolve the dispute out of court, which will help to improve the mechanisms of protection of human rights and citizens in Ukraine. What is important is that, unlike a court

dispute settlement procedure, in which there is always a party that is not satisfied with the court's decision, the parties independently make a decision in the mediation procedure that satisfies both parties to the dispute.

To summarize, let us note that the introduction of a mediation institute in Ukraine as a form of protection of citizens' rights creates conditions for finding extraordinary, viable, sustainable solutions. Under the current conditions, the mechanism of introduction of the Institute of Mediation is gaining momentum. Scientists, judges, lawyers, and civil society representatives all agree that mediation is an effective alternative to litigation. The development of the pre-trial procedure in Ukraine is becoming increasingly popular and will facilitate the rapid emergence of civil society, within which citizens can truly regulate conflicts without government involvement and control. In addition, mediation should be seen as a form of dialogue philosophy that can be used not only as a way of resolving conflict, but also as a form of productive communication when actively using the techniques that the mediator must possess.

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