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OPPORTNITIES AND PERSPECTIVES ON THE APPLICATION OF MEDIATION IN THE ACTIVITY OF PUBLIC ADMINISTRATION

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Abstract
The research argues the need to promote mediation in the activity of the public administration by training civil servants in order to prevent and solve extrajudicial (out-of-court) conflicts arisen in the sphere of activity. The effectiveness of the application of mediation in the preliminary procedure is argued by the wide range of beneficiaries of the public administration, typology of the conflicts characteristic to the public administration, specificity of the settlement procedure imposed by the status of the civil servant and issues of administrative contentious. Started on a wide range of topics, the mediation highlights the peculiarities thereof, the issues related to the limits of the application of ADR measures, analyzes the legislation of the Republic of Moldova and the tendency to connect it with the European Union recommendations in the field. The research advocates promoting good EU practices in the field, respecting the national peculiarities of applying the mediation in public service delivery and creates a clear vision of the immediate and lasting impact of this method in the proper management of conflicts, balancing of the climate in the community and quality of public services delivered, aspects which are harmoniously fit in the processes of reforming the public administration both in the European Union countries and in the neighbouring countries.
Keywords: *alternative dispute resolution, European mediator, mediator profession, social mediator, community mediation, local authorities, conflicts, cooperation, reformation, mediators, community mediation centres.*

1. The motivation to apply mediation in the activity of public administration

Over the past 20 years the public sectors of all countries have undergone major change as governments try to respond to the challenges of technological change, globalization and international competitiveness.

More and more we encounter internationalization of the legal provisions in the field, the status of civil servant and the need to save resources and time to overcome conflicts that hinder

public authorities' work in providing services, which has contributed to the widespread use of alternative conflict resolution measures. Mediation skills have become important elements, even as preconditions of efficient reform of the public administration and the orientation of its activity towards the interests of the citizen. The countries in the European Union neighbourhood have harmonized legislation in this particular field in order to adhere to achieve international standards. The motivation to apply mediation in these states derives from the good practices of applying these methods in the administrative activity of the EU member countries, the work of the European mediator in the Council of Europe, specialized in mediating conflicts between public authorities and private individuals, as well as from framing this topic in the modern system of quality management of public services provided. Both the EU Member States and the neighbouring countries have a number of national peculiarities regarding the application of mediation in the field of administrative work. Post-Soviet states face a number of problems on the reorganization of the administrative system and the extension of staff competencies, the politicization of public administration, arbitrariness and rigidity, the inertia of a bureaucratic society inherited from the totalitarian system, etc.

Mediation can offer practitioners in public institutions in all countries the opportunity to have better results in delivering public services, to cooperate with citizens in promoting useful activities for the entire community, supporting public-private partnership and maintaining a favourable climate of internal activity. The new standards of administrative development in the European area call for profound reforms in public administration both in the EU Member States and in the acceding countries of South-Eastern Europe. The scope of this research is to promote mediation as a method of preventing and solving, in a fast and efficient way, conflicts that might arise in the sphere of public administration and the process of reform of public administration, both in the member states of the EU and in the Republic of Moldova. The objectives of the research focus on the impact of this process on the EU states, the capitalization on the good practices that emerge and the provision of solutions to overcome legislative convergence in the field. The starting points for this is the obligation of public administration to cooperate with the beneficiaries when they decide to resort to extrajudicial conflict resolution measures and the necessity of improvement of the quality of services provided to our citizens and the maintenance of quality policies.

1.1. Reflection of mediation in the concept of public administration reform and the particularities of its application

In the European space, the mediation procedure is recommended to the public administration, which the complexity of the activity reports places at a certain moment in various conflicting situations, specific to the civil law relations, for approximation between the administrative authorities and citizens. The conditions for promoting alternative methods were formulated in the recommendations of the Committee of Ministers to the Member States of the European Union, including Recommendation No. 9 of 2001 on alternative ways in settling disputes between administrative authorities and private persons, and the Guidelines for improving the implementation of existing recommendations (CEPEJ) (2007) 14. This normative experience transposed into the national practice of the EU member states and into the neighbourhood's one comes to support the EU's objectives and to help bring the administrative authorities closer to the citizens, to settle the administrative conflicts more quickly, to relieve the courts of certain cases that are likely to be amicably settled, to reduce the costs and reduce the time for solution, to resort to the principle of equity, and not just to

the law. However, the European Parliament and the EU Council have subsequently chosen to leave these issues to be decisively and compulsorily regulated at national level, depending on the national legal and procedural regulation, individualized at the level of each Member State. This increased the diversity of jurisdiction, any uniformity at international level becoming very difficult.[1]

In accordance with international recommendations, the application of mediation in administrative activity requires a series of peculiarities and conditions related to ensuring the right of the parties to adequate information on the possibility of resorting to the alternative ways, ensuring the independence and impartiality of the mediators and judges involved in these processes. Another important moment is the guarantee of a fair procedure that will ensure respect for the rights of the parties, principles of equality, transparency in the use of alternative ways and a certain degree of discretion in ensuring the execution of the solutions found by resorting to them. Except mostly for the particularities of the mediation process in which a public authority is involved, we shall underline that the mediation may be initiated by any party involved in the conflict by a judge in a judicial process or may be mandatory by law as an extrajudicial method. The mediators shall be free to choose strategies, techniques and tactics of work in the mediation process. They may establish separate meetings with each other or may work simultaneously in order to find a commonly accepted solution, may invite the administrative authority to cancel, withdraw or amend the administrative act on grounds of opportunity or legality. In this respect, the European Union proposes as good practices various innovative forms of mediation to stimulate and streamline these procedures and to cover all the problems that may arise in this process. The purpose thereof is to offer to all categories of beneficiaries the right to access to mediation, to choose the most efficient procedure, to save time and resources.

A good EU practice in this area is promoted through the activity of the SOLVIT system, a service provided by the national administrations dealing with cross-border issues related to the incorrect application of EU legislation by the national public administrations within the internal market. There exists a SOLVIT Centre in every EU country, as well as in Norway, Iceland and Liechtenstein, through which the public authorities solve online, free of charge, problems with the participation of citizens and business agencies related to social, tax insurance; internal community market (respecting social security rights; administrative barriers in business). A well-known practice is the activity of the Ombudsman's Government Offices which investigates petitions related to abuses or omissions in the administration activity or in the activity of the Non-government Centre CEDR (Centre for Effective Dispute Resolution), which implements conflict mediation schemes involving local authorities: work conflicts, divergences with product/ service providers, community disputes, local planning. [2] Some states apply mixed systems of mediation, combining it harmoniously with the classical judicial form. In Belgium, for example, although the article 1274 of the Judicial Code prohibits public institutions from participating in mediation, except for cases authorized by Royal Decree or by law, two federal mediators have been appointed to examine complaints about the functioning of administrative and federal authorities. In France, the Ombudsman and

[1] Recommendation No. 9 of 2001 on alternative ways of settling disputes between administrative authorities and private persons; Guidelines for improving the implementation of the Recommendations on Alternative Dispute Resolution Arrangements between Administrative Authorities and Private Persons.// CEPEJ normative acts (2007) 15.

[2] Centre for Effective Dispute Resolution: http://ec.europa.eu/atwork/applying-eu-law/complaints_ro.htm

institutionalized mediators deal with complaints against the authorities (the mediators are organized in committees for friendly settlement of disputes or for disputes concerning public procurement, in regional commissions for conciliation and accident compensation, mediators specialized in education and higher education etc.). They support the parties to reach an amicable and equitable solution to their disputes. Moreover, the administrative courts may recommend mediation within procedural framework in accordance with Law No. 95-125 of February 08, 1995 on the organization of civil, criminal and administrative courts and procedures, in accordance with the Decree No. 96-652 of July 22, 1996 on conciliation and mediation. England and Wales conduct this type of mediation through the Ministry of Justice, an authority responsible for mediation policy, including promotion thereof. In order to ensure the quality of mediation recommended by the court in civil litigations (with the exception of family disputes in the jurisdiction of England and Wales), the authorities coordinated their activity with the Civil Mediation Council (CMC) to introduce an accreditation program. CMC is an organization representing mediators in civil and commercial matters. At the moment, the courts transmit the cases only to the mediators accredited by CMC. Thus, at international level one can see the use on a large scale of different forms of procedures in applying the mediation, with a number of official structures in most of the states that regulated the mediation and formally introduced it as a compromise method by standardizing and regulating it. The acceptance of mediation is provided by normative acts in the field as an option which the parties may or may not follow. However, analysing both the voluntary and compulsory nature of accepting mediation in the general context of all the normative acts governing the public authorities as a whole, as well as the principles that govern the activity of the public authorities, one can conclude the inclusion in the extended attribution of cooperation and the one of acceptance of mediation.

The European practice promotes the community mediation. The community mediation, as a form of dispute settlement at the level of the citizen and local public institutions, is a novelty in the European countries but it is widely spread in the United States of America, Canada, Western European countries, predominantly the United Kingdom and Ireland, South American continent, African continent, especially South Africa and in areas of Central Asia. At international level, there is a widespread use of mediation, with a number of official structures in most of the EU Member States that have regulated the mediation and have formally introduced it as a compromise method by standardizing and regulating it. In the European space, the mediation procedure is recommended to the public administration, which the complexity of the activity reports places at a time in various conflict situations, specific to the civil law relations, for approximation between the administrative authorities and citizens. The European Code of Conduct for Mediators provides guidance to mediators and offers to customers the certainty of professional advice. Different collaboration platforms have been established at European level, in order to promote a unitary understanding of the concept, ethical and deontological standards for the exercise of the profession and, last but not least, minimum standards or minimum training requirements for mediator. [3]

A special place is attributed, within the EU, to the Institution "European Mediator/ European Ombudsman". The concept of mediation and its implementation has involved a long-lasting evolutionary process even in countries with a tradition of mediation, such as the USA, Scandinavian countries, Germany or France. The European Union has also established

[3] European Code of Conduct for Mediators : http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_ro.pdf

a mediation mechanism within the Council of Europe. The Treaty of Maastricht (Article 138E) and the establishment of a European mediator changed the concept of the relationship between the public administration and its citizens. Thus, there has been established a mechanism by which the citizens can defend their interests before the authorities, when all legal ways in the state of origin have been exhausted in defending rights violated by the administrative authorities. This institution was proposed for the EU in 1990 by Denmark, the idea being taken from the tradition of the institution of the ombudsman. The European mediator's office is located in the Palace of Europe in Strasbourg. The mediator is appointed by the Parliament for a term of 5 years with the right to renew the mandate and may be revoked by the Court of Justice (ECJ) at the initiative of the Parliament, supported by 1/10 of the deputies. The European Mediator carries out his/ her work in full autonomy, without the involvement of the authorities, in a respectful environment. The citizens may address any complaints about the functioning of the community administration, followed by an investigation initiated by the mediator on the activity of the incriminated institution. Finally, a report is prepared for the Parliament, petitioner and respective administration where the results of the investigation are communicated. From now on, the mediator has the task of negotiating in order to bring the various points of view closer. In the case of an obvious administrative error, the mediator proposes remedies, and at the time of refusal to cooperate, he/ she can request a parliamentary intervention. [4]

From the above mentioned it is noted that not all European countries have a special law that would regulate the application of mediation. In some countries the mediation is promoted on the basis of some activities of non-governmental organizations or courts and civil procedures, depending on national legal and procedural regulation, individualized at the level of each Member State.

1.1.1. The experience of the Republic of Moldova in the field of mediation

In the Republic of Moldova the mediation is promoted on the basis of the Mediation Law No. 137 of 03/07/2015. The law aims to facilitate access to mediation, establishment of conditions for accession to the profession, establishment of a body of qualified mediators, delimitation of the competences of the Ministry of Justice and of the Mediation Council, the body responsible for mediation with the Ministry of Justice of the Republic of Moldova. According to the Law, the Mediation Council proposes the development of policies and improvement of the regulatory framework and the Ministry of Justice coordinates the implementation of the policy documents.[5] The new mediation provisions provide a series of facilities related to the possibility of solving conflicts outside the judicial process as well as within the judicial process according to the Civil Procedure Code of the Republic of Moldova No. 225/2003 by Chapter XIII 1 Judicial Mediation.[6] The persons involved in a pending conflict in the court may also request the support and assistance of a mediator, and they may benefit from certain state tax exemptions. If the case is in the court of first instance and the conflict has been solved amicably with the help of the mediator, the state fee shall be fully refunded. According to the legislation of the Republic of Moldova, the mediation can be

[4] Statute of the European Ombudsman: http://www.euro-ombudsman.eu.int/glance/ro/default.htm

[5] Law of the Republic of Moldova on Mediation No. 137 of 03/07/2015// Official Gazette of the Republic of Moldova No. 224-233 of 21/08/2015, art.8, 9, 25, 30.

[6] Civil Procedure Code of the Republic of Moldova No. 225/2003// Official Gazette of the Republic of Moldova No. 130-134 of 21/06/2013, Chapter XIII 1, Judicial Mediation.

promoted within the public administration by training the officials or in the format of extrajudicial mediation. The process of implementing the modernization of public administration in our country is in conflict with some convergence because of a gap between the theoretical implementation and practical implementation due to contextual factors: degree of executive centralization, administrative and legal traditions etc. De jure, the basic purpose of modernization of public administration in the Republic of Moldova is oriented towards predictability, accountability and efficiency. The objectives of the quality management in public administration must fit perfectly into this modernization process by increasing the quality of public services and modernization thereof. De facto, the Moldovan public administration faces a number of problems that affect the quality of services: it needs stability and continuity, it is politicized, arbitrary and rigid, subjected to an inertia of a bureaucratic society inherited from the totalitarian system that we am lived in the '90s, where the formalism substitutes the public interest, and various conflicts become more and more possible. The area of beneficiaries of public services has grown: citizens, private persons, public associations, representatives of trade unions, political parties. There are often conflicts that can only be solved through the administrative contentious procedure.

According to legal recommendations, in the disputes arising from administrative contentious relations the provisions of the Law on Mediation of the Republic of Moldova shall apply to the extent they do not contradict the legislation governing the negotiation of transactions with the participation of legal entities governed by public law and conditions for the conclusion of such transactions. The public authorities and mediation organizations that organize mediation services in the area of administrative contentious litigations may establish additional criteria for the qualification of mediators to be trained in mediating such disputes, and may approve lists of mediators involved in resolving qualified conflicts as administrative contentious conflicts.

The particularities of the application of mediation in the activity of the public administration are closely related to the current context of activity of the public administration determined by the evolution and quality of the legal regulations in the respective field, improvement of the quality of the public services offered to the citizen, opening to cooperation and active participation thereof in the administrative act. The status of civil servant and the professional ethics and deontology limits of civil servants institutionally define the responsibilities of the human element within an administrative system so that it may become functional, responsible and efficient. The obligation of public authorities to cooperate with beneficiaries in mediation is an attribution in the public authorities' tasks. The need to quickly resolve or prevent the conflict, saving time, largely linked to the status of civil servant, requires the need to overcome the professional conflict situation within time limits. The specific and vast typology of administrative conflicts (conflicts regarding legality, conflicts of competence, conflicts of interests, labour conflicts, conflicts between public administration and private persons), the broad spectrum of actors involved in the activity of public institutions (officials or agents representing public authorities, private persons, public associations, representatives of political parties, justice professionals, economic agents etc.) require specialization of mediators in this field. The area of negotiable subjects (financial, economic, fiscal, of social equity, legal etc.), the presence of the national, socio-political element, inter-ethnic conflicts etc., the activity under multiparty system demands a special effort and a change of strategy in the activity of the public administration.

In such situation, the purpose of applying mediation is to contribute to reforming the administrative system through the promotion of modern and efficient quality management activities, and the objectives of applying mediation in the activity of public administration are related to the framing of these alternative mechanisms of prevention/ settlement of conflicts from the sphere of activity of public administration in the concept of modernizing the Public Services by streamlining and improving the quality of services with maximum positive impact on the citizen. Such alternative method is an important mechanism in modernizing public administration by providing an emotional balance in the collective, a focus on work tasks and a more efficient activity of the whole institution. The training of civil servants to solve conflicts through mediation brings advantages through the ability to prevent possible conflicts, solve them by themselves, or to call on a specialist mediator in the case provided by the law. The concept of mediation and the idea of amicable settlement of conflicts are in close connection with the Law on public positions (functions) and statute of civil servant, Code of conduct for civil servant, Concept on personnel policy in the public service, other normative acts reflecting the basic principles of public service, rights and obligations of civil servants, service relations etc. The mediation allows solving the politicized confrontations of the administration by promoting the national interest in the settlement of conflicts related to infrastructure, social protection, limiting the effects of pollution etc. The skilful shift through social contradictions to solve any amicable conflict shall ensure the efficiency of the external and internal activity of the public authorities and guarantees the efficiency of the collaboration of the entire system of the public administration. [7]

However, in the Republic of Moldova the administrative mediation is accepted more in the form of professional mediation (extrajudicial or judicial proceedings), as well as in community mediation (extrajudicial). The civil servants do not receive specialized training in mediation field and thus they cannot be trained in preventing or solving conflicts in the provision of public services or in solving internal conflicts within working groups. In our opinion, the current normative framework, in the field of mediation, is extremely placed in the legal field of activity, and the training of the specialists is very fragmented and passed in the more pedagogical curricular area with elements of law than in an area of specialization and fortification of the working practice. Many of the trained mediators encounter certain problems in promoting certain types of mediation, in setting work strategies, techniques and tactics within a mediation procedure. Without a coherent, coordinated training of specialists in organizing and promoting the mediation process, we cannot talk about the trust of public authorities or citizens in this form of alternative conflict resolution.

CONCLUDING REMARKS

In conclusion, the national normative acts stipulate the obligation of the public authorities to cooperate with the beneficiaries, as a peculiarity in the application of this mechanism for preventing or solving conflicts. The cooperation is currently an attribution in the public authorities' task, which ensures, from respect for the citizen (alone or organized in different ways of activity), the participation in the mediation of a public authority. It is recommended that this initiative be accepted unconditionally by the public authority invited in mediation, especially since mediation involves costs that are significantly lower than

[7] Law No. 158 of 04/07/2008 regarding the public position (function) and the status of civil servant// in the Official Gazette of the Republic of Moldova, No. 230-232 of 23/12/2008, art.14-25.

classical justice or other means of alternative settlement of misunderstandings. The costs shall be reflected in the budget of the public authority, and the settlement through mediation shall be reflected in the degree of respect towards the citizen and towards the attributions given by the law to these public authorities. [2] Besides, the extrajudicial, judicial, community mediation or mediation promoted through the training of civil servants in administrative institutions falls within the modern system of quality management of public services provided, anticipating the changes that will assign to the mediation a significant role within the alternative dispute resolution methods in the administrative sector and preparation of future civil servants. The co-operation of authorities and public service quality management are part of the component of increasing the efficiency and qualities of services provided by public administration at local level, and contribute to strengthening the administrative capacity and supporting good governance.

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