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Correlation of mediation as an alternative way to protect civil rights and interests and tort liability

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Abstract

The trends and challenges of modern society stimulate a review of the features and characteristics that define law as a set of social norms and shape its image through the provision of legal norms either with means of coercion, or by encouraging the use of other, alternative methods. Changes of a global nature, which are connected not only with the war in Ukraine, are accompanied by alternative methods of protecting the rights of participants in civil relations. The purpose of this study was to establish the legal and scientific and practical principles of the mediation procedure as one of the alternative ways of protecting civil rights and interests. Philosophical, specifically hermeneutic, and general scientific methods of scientific cognition (generalization, logical, praxeological, prognostic and modelling, as well as bibliographic) were used in this study. Special legal methods were also applied: formal legal and comparative legal. Modern positions in the understanding of legal categories, such as civil protection and civil liability and the influence of modern conditions of society on them, have been established. Various approaches to the mediation procedure were presented, and the prerequisites for its occurrence in Ukraine and the world were revealed. The study investigated how the categories "protection of civil rights and interests", "tort liability", and

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"mediation" interact. The modern trends of the civil doctrine regarding the protection of civil rights and interests were examined, the specific features of tortious liability and the possibility of introducing the principles of restorative justice regarding the protection of violated property rights were covered. The legal and practical bases of the application of mediation were determined, the advantages of its application in various spheres of social relations were established. The study analysed the judicial practice regarding the procedure for stopping proceedings in a case due to transfer of the dispute to mediation. The given materials and research results can be used in practical activities by participants in civil legal relations for further scientific research, as well as mediators, teachers, students of various educational degrees, representatives of state authorities and local self-government bodies

Keywords: civil procedure; civil liability; property rights; dispute, restorative justice; mediator

Introduction

Contradictions and disputes are a part of human existence, inherent in any society. Ways to overcome them are mediated both by the level of development of an individual and society in general, and by the form of its organization. Out-of-court methods of resolving disputes are gaining increasingly more supporters. At the same time, the question of a collaborative lawyer arises, which helps choose the most favourable way of protecting violated rights and interests for a person who has suffered or may suffer a corresponding violation. Among the most priority topics for legal research is the question of the formation of the rule of law and the development of civil society, which is directly related to the equally important topic of protecting human rights and interests. Effective protection of human rights and interests is impossible without the "immersion" of civil society in all areas of state building, without balancing the institutions of civil society and the state, with the education of a socially active personality. Among the signs of civil society, the theory of the state and law mentions the provision of self-organization and structuring of the population into the people as a sovereign and integral subject of law thanks to a complex of communicative legal institutions (Topolevskyi & Fedina, 2020). The degree of implementation and protection of rights and interests is the criterion that determines the category "state of civil society". The legal system of the state includes the full list of rights defined in international treaties.

Modern mediation is an alternative way to resolve disputes, specifically to protect civil rights and interests, since the Pound Conference in 1976, when Harvard Law School professor Frank Sander presented criteria for dividing disputes into judicial and procedural disputes, and such that can be regulated through facilitation, mediation, and arbitration (Farkas & Traum, 2017). According to the latest figures (for the year before March 31, 2020) from the Centre for Effective Dispute Resolution (CEDR), the civil and commercial mediation market in England and Wales was around 16,500 cases a year, which is 38% (or 12,000 cases) more than in 2018 (Massie, 2021).

The scientific output of Ukrainian and foreign scientists had a considerable impact on the current state of the implementation of the mediation procedure and the solution of various theoretical and practical tasks related to the

implementation of mechanisms for the protection of civil rights and interests. R.A. Maidanyk (2019) explored the nature of civil liability and the unification of tort provisions; determined the essence of such responsibility in the deprivation of a subjective civil right or the imposition of a new added property obligation on the debtor. And "the unification of general provisions on civil liability for damage compensation by extending the general grounds and conditions for damage compensation according to the rules of tort liability to all cases regarding damage compensation, unless otherwise provided by sanctions for non-performance of a contractual obligation; in case of violation of civil law, tortious liability is applied". O.O. Kot (2019) investigated the issue of the correlation between the protection of rights and civil liability; of interest is the position that "civil law embodies the spirit of individual freedom and creativity in the broadest sense of the word as the ability to create, while law (through the instrument of deeds) is mediated directly in the method of civil law regulation and the principles of civil law through the categories of "freedom", "dispositivity", "free judgment", etc. The issue of pre-contractual liability as a type of civil liability is currently relevant. The mechanisms and principles of negotiations play a decisive role at this stage of the formation of civil rights and interests. M.D. Pleniuk (2020) expressed an interesting position regarding this type of liability: "by its essence, pre-contractual liability arises from the general obligation to conduct negotiations in good faith and is aimed at compensating the damages incurred by a party as a result of the dishonest behaviour of the other party at the negotiation stage, if the injured party acted, relying on such good faith". S.Ya. Fursa *et al*. (2021) carried out a comprehensive study of the legal phenomenon "dispute about the law" in the civil procedure and covered the essential features of disputes arising in notarial, civil, and executive processes. Scientific positions on restorative justice deserve special attention, moreover, within the limits of tortious liability, their number is insignificant. Mostly, this issue is dealt with within the framework of criminal proceedings. M. Sirotkina (2020) notes that "achieving a reconciliation agreement between the victim and the suspect (accused) is an effective compromise way of resolving a legal dispute". L. García-Raga *et al*. (2017) investigated the purpose of mediation not only as conflict resolution, its "prevention", but also personal strengthening and an impetus to social cohesion; mediation promotes free decision-making and one's obligations, which leads to the democratization of society in general. B.H. Brummans *et al*. (2022) reviewed mediation as a widely used form of third-party conflict management, mostly focusing on the role and status of the mediator.

The purpose of this study was to investigate the theoretical and legal foundations of the application of mediation as an alternative way of protecting civil rights and interests and its relationship with the categories "protection of civil rights and interests" and "tort liability".

Materials and Methods

The sources of the study primarily included the norms of Ukrainian legislation, namely the Civil Code of Ukraine (2003), the Civil Procedural Code of Ukraine (2004), the Labour Code of Ukraine (1971), the Code of Administrative Procedure of Ukraine (2005), the Laws of Ukraine "On Mediation" (2021), "On International Commercial Arbitration" (1994), "On Arbitration Courts" (2004), "On Social Work with Families, Children, and Youth" (2001), "On Social Services" (2019); Decree of the President of Ukraine "On the Strategy

for the Development of the Justice System and Constitutional Justice for 2021-2023" (2021). The methodological framework also included international legal acts: Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters (2008), United Nations Convention on International Settlement Agreements Resulting from Mediation (Singapore Convention on Mediation) (2019). The provisions of sub-legislative regulations were also investigated, including the Order of the National Agency of Ukraine on Civil Service "On Approval of the Methodological Recommendations on Conflict Management in State Bodies" (2022), the Order of the National Agency of Ukraine on Civil Service "On Approval of the Methodological Recommendations on Conflict Management in State Bodies" (2022), the Order of the Coordination Centre for Legal Aid Provision "On Approval of the Methodological Recommendations on the Organization of Free Legal Aid Provision by Local Centres for the Provision of Free Secondary Legal Aid" (2023), and the Order of the Ministry of Social Policy of Ukraine "On Approval of the State Standard of Social Service of Mediation" (2016). Information from the official websites of Ukrainian Mediation Centre, UMC (n.d.), National Association of Mediators of Ukraine, NAMU (n.d.), Civil Mediation Council in England and Wales, CMC (n.d.), UK Centre for Effective Dispute Resolution, CEDR (2023).

The application of the method of analysis and generalization made helped cover the legal categories under study and concepts in the field of protection of civil rights and interests. As a result, conclusions were formed using the synthesis method. The formal-legal method was used to analyse Ukrainian legislation, international regulations that govern the issue of alternative protection of civil rights and interests. A comprehensive analysis of areas for the application of mediation according to the national legislation was carried out. This method was helpful for establishing the content of the norms of the relevant codes, legislative and sub-legislative regulations, regarding the grounds for applying the mediation procedure, its principles and standards of provision. The formal-legal method helped establish the inconsistency of the concepts used in the contractual forms of providing mediation services within the framework of the implementation of the legislation on social services.

The comparative legal method was used to investigate, compare, and review relevant scientific positions, sources of law that were aimed at solving the tasks of this study, establishing the content of legislation on the protection of civil rights and interests. The hermeneutic method was used to analyse the categories of tort, civil liability, and ways of protecting civil rights and interests. The hermeneutic method also helped cover the mediator's functions, its role in the implementation of alternative ways of protecting civil rights and interests and established their correlation with the category "tort liability". The praxeological, prognostic, and modelling methods were used to outline further ways and prospects for the use of mediation as a method of reconciliation between the victim and the offender in various areas, specifically for the introduction of the principles of restorative justice to individuals who caused property damage. The method of generalization helped formulate conclusions and proposals based on the results of the relevant research, establish prospects for further scientific research. The bibliographic method was used to establish and form a bibliographic description of laws, sub-legislative regulations, international standards and directives that govern mediation as an alternative way of protecting civil rights and interests.

Results and Discussion

Nature of civil liability and protection of rights and interests

Protection of civil rights and interests is a category that is still being discussed today. Of particular importance is the investigation of questions concerning the correlation between ways of protecting civil rights and interests, specifically alternative ones, such as mediation, with civil liability. The conditions in which the entire Ukrainian society, the state itself, and the limited level of protection of the rights and interests of citizens are all the result of a large-scale war. The civilistic doctrine distinguishes between the concepts of protection and security: the principle of ensuring the implementation of civil rights is the basis of legal protection, while protection is aimed at restoring a particular subjective right and removing obstacles to its implementation (Spasibo-Fatieieva *et al*., 2014). The very methods of protection in civil studies mean the application of sanctions in civil legal relations, which can create adverse consequences for a person, but are not related to the condemnation of their behaviour (Bezklubyi, 2014).

"The right to defence (not only judicial, but also extrajudicial, including the right to self-defence of the violated right and interest) in the general theory of law and in the science of civil law is considered by the majority of scientists as one of the powers that is part of subjective law" (Bodnar, 2020). The dynamics of the development of society also determines changes in concepts, specifically civil protection must be considered as a set of measures (Kot, 2017), carried out both by the subject whose right has been violated, and by bodies representing the state or another body, and which are aimed at eliminating violations of law or interest. The question of the involvement of the subjects of legal relations themselves in the protection of their violated or disputed rights, namely through mediation, negotiations, is gaining increasingly more scientific attention. N. Loizides *et al*. (2022) identify that these procedures "enable negotiators to maximize benefits in related mediations, minimize critical uncertainties, and create reliable commitments for future interactions". K. Beardsley *et al*. (2019) argue that mediation can substantially reduce violence in two ways. Firstly, mediators facilitate the path to a peaceful settlement and by establishing the validity of the appointment of mediation, the probability of resolving the conflict through negotiations increases. At the same time, mediators regulate the flow of information, for instance by facilitating communication and establishing facts, which ultimately overcomes uncertainty and mistrust between the parties. L.H. Grant *et al*. (2022) argue that it is worth considering the fact that "peace negotiations are usually associated with a long and difficult process of de-escalation; in part, this is mediated by the considerable psychological barriers that arise during protracted conflict that justify the continuation of the conflict, as well as hinder its de-escalation and resolution."

The formation of civil society and the general development of law led to the emergence of procedures for the protection of violated rights, which in the scientific literature were called "forms of protection of civil rights". "The form of protection reflects how the authorized person will exercise their right to protection – independently or involving a certain authorized body in this procedure. The first of the two forms of protection given was called the non-jurisdictional form of protection, the second – the jurisdictional form of protection. Therewith, a common feature of both specified forms of protection is that the exercise of the right to protection is initiated by the bearer of the violated subjective right in any case" (Yanchuk, 2016).

The procedure of protecting civil rights and interests is carried out using methods of protection, namely compensation for damage caused by illegal actions, and non-conventional methods of protection, which can be used only with the voluntary agreement of the parties. These are the mechanisms of negotiations, mediation, arbitration, etc. Next, the correlation between tort liability and mediation will be explored.

It is here that the degree of development of civil society and legal culture plays its role. Admittedly, some authors do not include legal culture among the elements of the mechanism of legal regulation, leaving it outside the boundaries (Bandurka *et al*., 2018), but we support the position regarding the definition of law as such that includes the rights and obligations of a person, legal awareness, and legal relations. In contrast to the fragmented study of individual areas of legal activity, a holistic awareness of it is now proposed, specifically "the need to combine systemic, structural-functional approaches to the study of legal reality with a normative-valued, axiological approach" (Baran, 2015).

For the Anglo-American system of law, the role of tort is the adjustment of losses and their final distribution. Tort obligations are established by legislation that is not agreed between the parties. Their functions include compensatory, restraining, and educational. A tort is an act or inaction that results in harm, and is accordingly a civil offence, which results in the imposition of responsibility by the courts on the offender. In tort law, "causing harm" means "intrusion into any legal right", while "harm to another person" means "expenses or actual damage suffered by a person": "A tort is an act or inaction that gives rise to injury or harm to another person and amounts to a civil wrongdoing for which courts impose liability. In the context of torts, "injury" describes the invasion of any legal right, whereas "harm" describes a loss or detriment in fact that an individual suffers" (Council of the American Law Institute..., 1959). Basic to the tort law of this legal system is the provision of aid to injured parties, the imposition of responsibility on guilty individuals, and the prevention of others from committing harmful acts. According to the Principles of European Tort Law (the Principles), "a person who is legally found to have caused damage to another person shall be obliged to compensate for this damage" (European Group on Tort Law, 2005). The Civil Code of Ukraine (2003) establishes the general tort rule: "Property damage caused by wrongful decisions, actions, or inaction to the personal non-property rights of an individual or legal entity, as well as damage caused to the property of an individual or legal entity, shall be compensated in full by the person who inflicted such damage". These provisions are implemented through the civil procedure – as a legally regulated activity of the courts regarding the resolution of civil cases, and "the task of the civil judiciary is the fair, impartial, and timely consideration and resolution of civil cases for effective protection of violated, unrecognized, or contested rights, freedoms, or interests of individuals, rights and interests of legal entities, interests of the state" (Civil Procedural Code of Ukraine (2004)). At the same time, a norm has been established that prescribes the possibility of reconciliation between the parties through mediation at any stage of the court procedure (Part 7 of Article 49 of the Civil Procedural Code).

Theoretical and legal principles of mediation

According to the Law of Ukraine "On Mediation" (2021), mediation is "an out-of-court voluntary, confidential, structured procedure, during which the parties through a mediator(s) try to

prevent the occurrence or settle a conflict (dispute) through negotiations". It is also introduced at the level of several regulations, namely Article 2221 of the Labour Code of Ukraine (1971), Article 1581 of the Land Code of Ukraine (2001), Part 7 of Article 46 of the Commercial Code of Ukraine (2003), Part 7 of Article 49, Part 5 of Article 198, Part 1 of Article 253 of the Civil Procedural Code of Ukraine (2004), Part 5 of Article 47 of the Code of Administrative Procedure of Ukraine (2005), as well as some laws of Ukraine: Part 1 of Article 30 "On International Commercial Arbitration" (1994), Article 33 "On Arbitration Courts" (2004), Part 1 of Article 13 "On Social Work with Families, Children, and Youth" (2001), Article 16 "On Social Services" (2019).

Back in the early 2000s, the Council of the European Parliament adopted conclusions "on alternative dispute resolution methods governed by civil and economic legislation, noting that establishing basic principles in this area is a necessary step towards ensuring the proper development and functioning of out-of-court procedures for resolving disputes in civil and commercial legal relations, with the purpose of simplifying and improving access to justice. Mediation can provide a cost-effective and speedy out-of-court settlement of disputes in civil and commercial matters based on procedures that factor in the needs of the parties" (Directive 2008/52/EC…, 2008). A key point is that mediation should not be considered as a weaker alternative to litigation for the enforcement of mediation agreements, depending on the consent of the parties. Evidently, the member states must provide the parties with the opportunity to implement the agreements reached.

The above-mentioned position (Bezklubyi, 2014) on the understanding of the correlation between the methods of protection in civil law and civil liability lies in the imposition (in case of application of liability) for the guilty person not only of sanctions, but also of condemnation of their behaviour; helps to single out the common features of these legal categories as well. Specifically, the following are common to the methods of protection and civil liability: all civil law means of influence (coercion) are related to the concept of sanction; coercion is not a mandatory feature of the sanction (it can be implemented voluntarily); protection and responsibility are aimed at legal restoration and are implemented within the framework of protective legal relations. However, in contrast to the methods of protection, responsibility involves the limitation of rights or the establishment of other duties.

Still, the question arises, whether the person who has suffered material damage always interested in the subjective side of the issue – the condemnation of the person who caused the damage. Value judgments are usually complex and ambiguous, they do not provide full-fledged "correction" of the person who acted illegally. This position is confirmed by the provisions of the Strategy for the Development of the Justice System and Constitutional Judiciary for 2021-2023 (Decree of the President of Ukraine…, 2021) on the development of alternative (out-of-court) and pre-trial settlement of disputes by introducing for certain categories of cases the obligation mandatory pre-trial settlement procedure using mediation and other practices. Analysis of the latest judicial practice indicates that the number of decisions on the implementation of the obligation to stop proceedings by courts has increased considerably after the adoption of the Law of Ukraine "On Mediation" (2021), for instance: Decision of the Economic Court of Odesa Region in Case no. 916/647/21 (2022), Decision of the Zhydachiv District Court of Lviv Region in Case no. 443/650/17 (2022). Yu.D. Prytika uses

conciliation procedures as an approach to resolving legal conflicts from the standpoint of interests (Bozhuk & Diachenko, 2019). Accordingly, this method is based on establishing and considering the mutual interests of the parties and, most importantly, is aimed at reaching an agreement beneficial to all parties, according to which there is no "losing" party ("win-win" concept).

The United Nations Convention on International Settlement Agreements Resulting from Mediation (2019) defines mediation as a procedure, "regardless of the expression used or the basis on which it is carried out, by which the parties attempt to reach an amicable settlement of their dispute through a third person(s) ("mediator"), who does not have the authority to impose a certain decision on the parties to the dispute".

Currently, a major area is the introduction of restorative justice, which is a way of ensuring gradual acceptance by society of the institutionalization of the practice of mediation between victims and offenders. The relevant project "Implementation of restorative justice in Ukraine" has been implemented under the aegis of the United Nations Democracy Fund (UNDEF) since May 1, 2019 (Implementation of restorative justice…, n.d.). The founders of this field laid a broader understanding of restorative justice, "bad actions or gaps in human interaction create needs and obligations for the immediate participants of the action, as well as for the wider society where the action(s) takes place" (Menkel-Meadow, 2007). Creative is the position of C. Menkel-Meadow (2018), who defines mediation as a "meme" or "sensibility" that can transform the way people resolve disputes and conflicts with each other.

The dispositivity of civil legal relations and their diversity is decisive in the widespread use of mediation. However, opinions are expressed regarding "the problem of a clear understanding of mediation, which is directly related to the legal model that is reflected in the law or can become a means of constructing the law" (Shishka, 2021). According to the conclusions of the European Commission on the Efficiency of Justice, it is judges who have a decisive role in the formation of a culture of peaceful conflict resolution and should have the authority to recommend alternative methods to the parties to court proceedings, specifically mediation (Maan *et al*., 2020). There are normative examples of the use of mediation not only in the private sphere, but also in the civil service and in local self-government bodies as "an auxiliary tool in dealing with conflicts that arise within a state body, including for the prevention, detection, and resolution of conflicts, can be used to reduce and/or eliminate conflict tension between civil servants, other employees of the state body … before, during, and after disciplinary proceedings" (Order of the National Agency…, 2022; Order of the Coordination Centre…, 2023).

The spread of mediation as an alternative way of protecting rights and interests, the adoption of the Law of Ukraine "On Mediation" (2021) cause the need to improve the rules of the State Standard of Social Services of Mediation (Order of the Ministry of Social Policy…, 2016), which regulates one of the types of social services prescribed by the Law of Ukraine "On Social Services" (2019). The standard was adopted even before the law on mediation, so it does not distinguish between the categories of "intervention" and "mediation"; has an incorrect wording of the types of contractual structures used in the mediation procedure.

In recent years, the concept has become widespread in the doctrine of civil law, according to which the methods of protection of civil rights and interests are divided into liability and other means. Evidently, liability, including tort liability, is a narrower concept compared to other

methods (Guyvan, 2021). The position of T.S. Kivalova (2008) is that civil liability for causing damage is a type of protected legal relationship where one party (the causer of damage) must bear the adverse consequences prescribed by the norms for the offence committed by them in the form of compensation at their own expense for the damage caused to another person, and, accordingly, the other party is entitled to compensation for such damage.

The positions of scientists regarding the institution of protection of civil rights and interests are common regarding its importance and priority in building a legal state and civil society because without proper and effective protection, all these rights turn into a fiction. The position of O.O. Kot (2019) is expedient, who states that "the idea of a functional-purpose criterion for distinguishing measures of responsibility and other measures of protection of subjective civil rights is promising, considering that the purpose of responsibility is not to punish the offender", it may refer to the compensatory function of civil liability, which is directed only towards the victim's property. The opinion expressed in the monograph edited by I.A. Bezklubyi (2014) appears to be well-founded. He states that responsibility for violation of civil rights, although it does not cover all coercive measures, occupies a decisive place in the system, performs the function of a method of protection of violated rights and plays a significant role in the procedure of legal regulation of civil relations in general. Worthy of attention is the opinion of B.H. Brummans *et al*. (2022) that mediators are generally considered as central mediators or intermediate links through which disputants can find ways to resolve their differences "on their own". Accordingly, to avoid more adverse consequences that will necessarily "appear" in case of the application of civil liability, primarily tort liability. According to the Centre for Effective Dispute Resolution (CEDR) (2023) and the Civil Mediation Council in England and Wales, CMC (Official website of the Civil Mediation Council… n.d.), there has been an increase in special appeals and mediation activities supported by leading employers, the Court of Appeal, and other courts of Great Britain, and the number of decisions contained in the court register of Ukraine on the suspension of cases based on the parties' transition to the mediation procedure. This indicates a substantial spread of mediation as a way of alternative protection of civil rights and interests. Prospects for the use of this method of conflict resolution between participants in civil legal relations can be extrapolated to a wide range of social relations. This will enable a more effective implementation of not only the protection of civil rights and interests, but also an opportunity to act on the prejudice of many disputed situations, using mediation to resolve pre-contractual relations, pre-partnership relations, and many others.

Conclusions

Thus, Ukrainian private legislation contains a sufficient legal basis for the application and development of mediation as an alternative way of protecting civil rights and interests. According to the results of the research, the category "responsibility" is established as a subjective legal obligation, which can arise both forcibly and within the scope of protective legal relations in addition to what existed before (specifically, was established by contractual constructions) or the perpetrator of a tort. The legal principles of mediation as an alternative way of protecting civil rights and interests are established through the analysis of legislation and the practice of applying mediation procedures, court practice. The relationship between the principles of mediation, which fully

embody and at the same time relay the vectors of civil society, and the "broad" understanding of law inherent in the natural-law school of law is established. The study showed the effectiveness of mediation both as a method of protecting already violated civil rights and interests (arising from contractual constructions and from tortious legal relations), as well as a method of protection that will serve as a prevention of disputes and conflicts. The effectiveness of the legal regulation of mediation is determined by the fact that it was formed over a long period of time and absorbed a considerable number of international practices. The issue of legal regulation and the application of restorative justice requires further scientific research through detailing and expanding the scope of legal relations where it can be applied, specifically in civil legal relations for causing damage. This will enhance involvement in restorative justice procedures, both individual and societal perceptions of empowerment, fairness, legitimacy, satisfaction, and social justice. An important area of further research should be the results of the execution of court decisions on the suspension of proceedings in cases due to the application of the mediation procedure, in terms of its effectiveness. Another subject of further scientific research may be the search for ways to eliminate contradictions in the application of methods of protection of civil rights and interests, which will directly affect the level of enjoyment of the rights and interests of all participants in civil legal relations.

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Conflict of Interests

None.

References

[1] Bandurka, A.M., Golovko, O.M., Perederii, O.S., Slinko, D.V., Pohribnyi, I.M., Kritsak, I.V., Shulga, A.M., Murakhovska, T.Ye., Volosheniuk, O.V., Burdin, M.Yu., Kholod, Yu.A., Kalenichenko, L.I., Brusakova, O.V., Paida, Yu.Yu., & Tiapkin, A.S. (2018). *Theory of state and law*. Kharkiv: Kharkiv National University of Internal Affairs.

[2] Baran, A.V. (2015). Understanding of law: Epistemological analysis. *Journal of the Polytechnic National lviv University. Series of Legal Sciences*, 827, 120-127.

[3] Beardsley, K., Cunningham, D.E., & White, P.B. (2019). Mediation, peacekeeping, and the severity of civil war. *Journal of Conflict Resolution*, 63(7), 1682-1709. doi: 10.1177/0022002718817092.

[4] Bezklubyi, I.A. (Ed.). (2014). *Responsibility in private law*. Kyiv: Gramota.

[5] Bodnar, T.V. (2020). Some problem aspects of implementation and protection of property rights of spouses. *Journal of the National Academy of Legal Sciences of Ukraine*, 27(1), 72-88. doi: 10.37635/jnalsu.27(1).2020.26-38.

[6] Bozhuk, I., & Diachenko, S. (2019). Court practice of applying alternative dispute resolution methods. *Entrepreneurship, Economy and Law*, 12, 11-15. doi: 10.32849/2663-5313/2019.12.02.

[7] Brummans, B.H., Higham, L., & Cooren, F. (2022). The work of conflict mediation: Actors, vectors, and communicative relationality. *Human Relations*, 75(4), 764-791. doi: 10.1177/0018726721994180.

[8] Centre for Effective Dispute Resolution (CEDR). (2023). *The Tenth mediation audit: A survey of commercial mediator attitudes and experience in the United Kingdom*. Retrieved from https://www.cedr.com/wp-content/uploads/2023/02/Tenth-CEDR-Mediation-Audit-2023.pdf.

[9] Civil Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/435-15#Text.

[10] Civil Procedure Code of Ukraine. (2004, March). Retrieved from https://zakon.rada.gov.ua/laws/show/1618-15#Text.

[11] Code of Administrative Procedure of Ukraine. (2005, July). Retrieved from https://zakon.rada.gov.ua/laws/show/2747-15#Text.

[12] Commercial Code of Ukraine. (2003, January). Retrieved from https://zakon.rada.gov.ua/laws/show/436-15#Text.

[13] Council of the American Law Institute Draft No. 7 "Restatement (Second) of Torts". (1959, November). Retrieved from https://heinonline.org/HOL/LandingPage?handle=hein.ali/restate0009&div=1&src=home.

[14] Decision of the Economic Court of Odesa Region in Case no. 916/647/21. (2022, December). Retrieved from https://reyestr.court.gov.ua/Review/108024721.

[15] Decision of the Zhydachiv District Court of Lviv Region in Case no. 443/650/17. (2022, June). Retrieved from https://reyestr.court.gov.ua/Review/104798740.

[16] Decree of the President of Ukraine No. 231/2021 "On the Strategy for the Development of the Justice System and Constitutional Justice for 2021-2023". (2021, June). Retrieved from https://zakon.rada.gov.ua/laws/show/231/2021?find=1&text=медіац#w1_3.

[17] Directive 2008/52/EC of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters. (2008, May). Retrieved from http://data.europa.eu/eli/dir/2008/52/oj.

[18] European Group on Tort Law. (2005). *Principles of European tort law: Text and commentary*. Vienna: Springer-Verlag. doi: 10.1007/3-211-27751-X.

[19] Farkas, B., & Traum, L. (2017). The history and legacy of the Pound conferences. *Cardozo Journal of Conflict Resolution*, 18, 677-698.

[20] Fursa, S.Ya., Fursa, Ye.I., & Dyka, A.O. (2021). *Law dispute in civil procedure: Notary, court, enforcement proceedings*. Kyiv: Alerta.

[21] García-Raga, L., Grau, R., & López-Martín, R. (2017). Mediation as a process for the management of conflict and the improvement of coexistence in educational centres. a study based on the perceptions of secondary school students. *Procedia – Social and Behavioral Sciences*, 237, 465-47. doi: 10.1016/j.sbspro.2017.02.091.

[22] Grant, L.H., Maoz, I., & Keysar, B. (2022). Lingua franca as a hidden barrier to conflict resolution. *Journal of Conflict Resolution*. doi: 10.1177/00220027221123316.

[23] Guyvan, P. (2021). Civil liability as an element of protective material legal relationship. *Law Herald*, 1, 143-150. doi: 10.32837/yuv.v0i1.2092.

[24] Implementation of restorative justice in Ukraine: Brief description of the project. (n.d.). Retrieved from http://ipcg.org.ua/upload/korotkiy-opis-proektu-vprovadgennya-vp.pdf.

[25] Kivalova, T.S. (2008). *Obligations of damages compensation under Ukrainian civil law: Theoretical problems* (Doctoral thesis, Odesa National Academy of Law, Odesa, Ukraine).

[26] Kot, O.O. (2017). *Exercise and protection of subjective civil rights: Problems of theory and judicial practice*. Kyiv: Alerta.

[27] Kot, O.O. (2019). The relationship of rights protection and civil liability. In R.A. Maidanyk, E.M. Hramatskyi, & V.V. Tsiura (Eds.), *Modernization of civil liability (Matvieiev's civic readings): Materials of international science and practice conference* (pp. 89-93). Kyiv: Taras Shevchenko National University of Kyiv.

[28] Labor Code of Ukraine. (1971, December). Retrieved from https://zakon.rada.gov.ua/laws/show/322-08#Text.

[29] Land Code of Ukraine. (2001, October). Retrieved from https://zakon.rada.gov.ua/laws/show/2768-14#Text.

[30] Law of Ukraine No. 1701-IV "On Arbitration Courts". (2004, May). Retrieved from https://zakon.rada.gov.ua/laws/show/1701-15#Text.

[31] Law of Ukraine No. 1875-IX "On Mediation". (2021, November). Retrieved from https://zakon.rada.gov.ua/laws/show/1875-20#Text.

[32] Law of Ukraine No. 2558-III "On Social Work with Families, Children and Youth". (2001, June). Retrieved from https://zakon.rada.gov.ua/laws/show/2558-14#Text.

[33] Law of Ukraine No. 2671-VIII "On Social Services". (2019, January). Retrieved from https://zakon.rada.gov.ua/laws/show/2671-19#Text.

[34] Law of Ukraine No. 4002-XII "On International Commercial Arbitration". (1994, February). Retrieved from https://zakon.rada.gov.ua/laws/show/4002-12#Text.

[35] Loizides, N., Psaltis, C., Morgan-Jones, E., Sudulich, L., Popp, R., & Baykiz, T. (2022). Citizens and peace mediations in divided societies: Identifying zones of agreement through a conjoint survey experiment. *Journal of Conflict Resolution*, 66(9), 1619-1649. doi: 10.1177/00220027221108221.

[36] Maan, B., van Ree, R., Serhieieva, A., Sergeyeva, S., Romanadze, L., & Rodchenko, V. (2020). *Gap analysis of the implementation of the mediation institute in Ukraine*. Retrieved from https://www.pravojustice.eu/storage/app/uploads/public/5f5/f7d/2a9/5f5f7d2a9b5cb356474501.pdf.

[37] Maidanyk, R.A. (2019). Modernization of civil and legal liability in Ukraine: Trends and directions. In R.A. Maidanyk, E.M. Hramatskyi, & V.V. Tsiura (Eds.), Modernization of civil liability (Matvieiev's civic readings): Materials of international science and practice conference (pp. 134-141). Kyiv: Taras Shevchenko National University of Kyiv.

[38] Massie, G. (2021). *The Ninth mediation audit: A survey of commercial mediator attitudes and experience in the United Kingdom*. London: Centre for Effective Dispute Resolution.

[39] Menkel-Meadow, C. (2007). Restorative justice: What is it and does it work? *Annual Review of Law and Social Science*, 3(1), 161-187. doi: 10.1146/annurev.lawsocsci.2.081805.110005.

[40] Menkel-Meadow, C. (2018). Mediation and its applications for good decision making and dispute resolution: Public lecture on the occasion of the receipt of an honorary doctorate in human sciences. In *Mediation and its applications for good decision making and dispute resolution* (pp. 9-48). Cambridge: Intersentia. doi: 10.1017/9781780687568.002 10.1017/9781780687568.002.

[41] Official website of the Civil Mediation Council in England and Wales. (n.d.). Retrieved from https://civilmediation.org/what-is-the-cmc/.

[42] Official website of the National Association of Mediators of Ukraine. (n.d.). Retrieved from http://namu.com.ua/en/.

[43] Official website of Ukrainian Mediation Center. (n.d.). Retrieved from https://ukrmediation.com.ua/en/.

[44] Order of the Coordination Center for Legal Aid Provision No. 2 "On Approval of the Methodological Recommendations on the Organization of Free Legal Aid Provision by Local Centers for the Provision of Free Secondary Legal Aid". (2023, January). Retrieved from https://zakon.rada.gov.ua/rada/show/v0002419-23#Text.

[45] Order of the Ministry of Social Policy of Ukraine No. 892 "On Approval of the State Standard of Social Service of Mediation (Mediation)". (2016, August). Retrieved from https://zakon.rada.gov.ua/laws/show/z1243-16#Text.

[46] Order of the National Agency of Ukraine on Civil Service No. 46-22 "On Approval of the Methodological Recommendations on Conflict Management in State Bodies". (2022, June). Retrieved from https://zakon.rada.gov.ua/rada/show/v0046859-22#Text.

[47] Order of the National Agency of Ukraine on Civil Service No. 47-22 "On Approval of the Methodological Recommendations on Conflict Management in State Bodies". (2022, June). Retrieved from https://zakon.rada.gov.ua/rada/show/v0047859-22#Text.

[48] Pleniuk, M.D. (2020). On the issue of the place of pre-contractual liability in the updated Civil Code of Ukraine. In *Problems of civil law and process: Abstracts of the reports of the participants of the scientific and practical conference dedicated to the 95th anniversary of the birth of Oleksandr Anatoliiovych Pushkin* (pp. 68-71). Kharkiv: Kharkiv National University of Internal Affairs.

[49] Shishka, N.V. (2021). The concept of "mediation" as an alternative form of dispute resolution: To the problem of legal understanding. *Juridical Scientific and Electronic Journal*, 4, 297-301. doi: 10.32782/2524-0374/2021-4/72.

[50] Sirotkina, M. (2020). Initiation of conciliation agreement in criminal proceedings. *Entrepreneurship, Economy and Law*, 8, 291-296. doi: 10.32849/2663-5313/2020.8.48.

[51] Spasibo-Fatieieva, I.V., Sibiliev, M.N., & Yarotskyi, V.L. (2014). *Kharkiv civil school: Protection of subjective civil rights and interests*. Kharkiv: Pravo.

[52] Topolevskyi, R.B., & Fedina, N.V. (2020). *Theory of the state and law*. Lviv: Lviv State University of Internal Affairs.

[53] United Nations Convention on International Settlement Agreements Resulting from Mediation. (2019, March). Retrieved from https://www.acerislaw.com/wp-content/uploads/2020/12/Singapore-Convention-on-Mediation.pdf.

[54] Yanchuk, A. (2016). Participants in the protection of civil rights. *Entrepreneurship, Economy and law*, 3, 65-70.

Співвідношення медіації як альтернативного способу захисту цивільних прав та інтересів і деліктної відповідальності

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Анотація

Тренди та виклики сучасного суспільства стимулюють до перегляду особливостей та ознак, що визначають право як сукупність соціальних норм та формують його образ через забезпеченість правових норм або засобами примусу, або спонукаючи застосовувати інші, альтернативні способи. Зміни глобального характеру, що пов'язані не лише з війною в Україні, супроводжуються застосуванням альтернативних способів захисту прав учасників цивільних відносин. Мета статті – установити правові та науково-практичні засади процедури медіації як одного з альтернативних способів захисту цивільних прав та інтересів. У дослідженні використано філософські, зокрема герменевтичний, та загальнонаукові методи наукового пізнання (узагальнення, логічний, праксеологічний, прогностичний та моделювання, а також бібліографічний). Застосовано й спеціально-юридичні методи: формально-юридичний та порівняльно-правовий. Встановлено сучасні позиції в розумінні правових категорій, як-от цивільно-правовий захист та цивільно-правова відповідальність і вплив на них сучасних умов існування суспільства. Наведено різні підходи до процедури медіації і розкрито передумови її виникнення в Україні та світі. Досліджено, як взаємодіють категорії «захист цивільних прав та інтересів», «деліктна відповідальність» та «медіація». Вивчено сучасні тенденції цивілістичної доктрини щодо захисту цивільних прав та інтересів, розкрито особливості деліктної відповідальності та можливості запровадження принципів відновного правосуддя щодо захисту порушених майнових прав. Визначено правові та практичні основи застосування медіації, установлено переваги її застосування в різних сферах суспільних відносин. Здійснено аналіз судової практики щодо процедури зупинення провадження у справі через передачу спору на медіацію. Наведені матеріали та результати дослідження можуть використати в практичній діяльності учасники цивільних правовідносин для подальшого наукового пошуку, а також медіатори, викладачі, слухачі різних освітніх ступенів, представники органів державної влади та місцевого самоврядування

Ключові слова: цивілістичний процес; цивільно-правова відповідальність; майнові права; спір; відновне правосуддя; медіатор