



ISSN 1392–6195 (print)
ISSN 2029–2058 (online)
JURISPRUDENCIJA
JURISPRUDENCE
2011, 18(1), p. 251–265.

MEDIATION IN DISPUTES BETWEEN PUBLIC AUTHORITIES AND PRIVATE PARTIES: COMPARATIVE ASPECTS

Salvija Kavalnė

Mykolas Romeris University, Faculty of Law,
Department of Administrative Law and Procedure
Ateities 20, LT-08303 Vilnius, Lithuania
Telephone (+370 5) 271 4545
E-mail kavalne@gmail.com

Ieva Saudargaitė

Mykolas Romeris University, Faculty of Social Policy,
Department of Mediation
Ateities 20, LT-08303 Vilnius, Lithuania
Telephone (+370 5) 271 4608
E-mail ievasaudargaite@gmail.com

Received 15 February, 2011; accepted 29 March, 2011

Abstract. *This article deals with an analysis of mediation practice in disputes between public authorities and private parties based on examples of the application of different types of mediation in administrative disputes in France, the United Kingdom and Belgium. The application of mediation in countries under consideration is investigated through the evaluation of legal acts related to the subject and through the assessment of available official data provided by relative institutions. The historical development of the application of mediation and the significance of the application of mediation in the administrative sphere in Lithuania are considered as well.*

Keywords: *mediation, mediator, alternative dispute resolution, administrative disputes, complaint.*

Introduction

The development of modern society as well as the growth of the range of relationships of legal nature have gradually influenced quantitative augmentation of legal conflicts, whereas the observed increase in caseload of courts, the expansive length of court hearings predetermined the emergence of the objective to use methods alternative to court. Thus, the initiative of the application of the means of alternative dispute resolution emerged and was successfully materialized in different legal spheres.

It must be noted that there are various types of alternative dispute resolution, such as mini-trial, informal arbitration, conciliation, mediation¹ that, dependently on the legal system in question, have been properly implemented in civil, family and even criminal matters.

The purpose of this article is to analyse the possibility and the practice of the application in the sphere of public administration of one of the methods of alternative dispute resolution—mediation—as a leading alternative highly promoted not only by legal practitioners but also international institutions.² The usage of mediation in disputes between public authorities and private parties was partially stimulated by the Recommendation Rec(2001)9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties of the Council of Europe³ (the Recommendation). Furthermore, the choice of this type of analysis was also influenced by the finding that at the same time France, Germany and England were all investigating mediation as an alternative to solving administrative law disputes.⁴ The necessity to review the practice of the application of mediation in the mentioned sphere became even more evident due to the fact that there has been no relative common practice in the Member States of the European Union, and a lack of common discussion concerning the application of mediation in administrative law disputes⁵ on the level of the European Union is observed.⁶ Therefore, the exigency to review the practice of the application of mediation

1 *A Dictionary of Law*. 5th ed. Oxford University Press, 2002, p. 24.

2 For example, the European Parliament and the Council adopted a directive relative to mediation in civil and commercial matters—Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters. [2008] OL, L136. This was also testified by the adoption of the European Code of Conduct for Mediators (European Code of Mediators [interactive]. [accessed 13-08-2010]. <http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf>.

3 Recommendation Rec(2001)9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties [interactive]. [accessed 05-08-2010]. <<https://wcd.coe.int/ViewDoc.jsp?id=220409&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackCoorL ogged=FFAC75>>.

4 Boyron, S. Mediation in administrative law: the identification of conflicting paradigms. *European Public Law*. 2007, 13(2): 263.

5 The term ‘administrative law dispute’ in this article is used regardless of the differences of this notion in separate legal systems, having in mind disputes between public authorities and private parties arising in the sphere of public administration.

6 Schmitz, T. The transformation of administrative law in Europe/La mutation du droit administratif en Europe. *European Journal of International Law*. 2008, 19(3): 625.

in administrative disputes in the European Union countries as well as the possibility to apply this method in Lithuania has arisen.

Due to the limited extent of the research, this article, first of all, focuses on comparative aspects related to the practice of mediation in disputes between public authorities and private parties in three countries—France, the United Kingdom and Belgium. The choice of the countries investigated was directly influenced by the divergence of their practice, by the degree of the application of mediation in these countries as well as the differences of their legal systems⁷ and systems of administration. The review focuses on the brief analysis of the practice of different types of mediation (court-based mediation, mediation in central and local administration, activities of independent mediators) applied in the sphere of disputes between public authorities and private parties. Moreover, the necessity for and possibilities of the application of this institute in Lithuania are also discussed.

Despite the growing importance of the application of mediation in the administrative sphere and the need of the introduction of practice applied in foreign countries, scientific interest in this issue in Lithuania could be considered far from adequate. There is an obvious lack of complex research concerning relative mediation practice in foreign countries, including the analysis of the legal basis, documentation related to the practice in question. Moreover, although certain attention to the question in issue is paid in the legal jurisprudence of foreign countries, it is, with some exceptions,⁸ usually focused on the practice of one country or on general issues related to mediation. Therefore, the present article is aimed at providing examples of the application of different types of mediation in disputes between public authorities and private parties in France, the United Kingdom and Belgium. The objective of providing generalized conclusions related to the mentioned practice and, partially, to the application of mediation in Lithuania is pursued as well.

The historical method, the method of systemic analysis as well as the method of documentary analysis were applied for the achievement of the intended objective.

1. Mediation in Disputes between Public Authorities and Private Parties in France

Firstly, it should be stressed that a long tradition of alternative dispute resolution exists in France as well as a relatively long-standing practice of the usage of mediation to resolve disputes.⁹ It is also worth mentioning that in France, as a country belonging to the continental system and having a separate system of administrative courts which deal exclusively with administrative cases, *droit administratif* is a highly specialized science administered by the judicial wing of *Conseil d'État* and by a network of local tribunals

7 While France and Belgium belong to the civil law system, the United Kingdom is an illustration of countries belonging to the common law system, having some salient features.

8 For example, Boyron, S., *supra* note 4.

9 Gaillard, E.; Edelstein, J. Mediation in France. *Dispute Resolution Journal*. 2000, 55(4): 1 [interactive]. [accessed 06-07-2010]. <www.questia.com/reader/printPaginator/2128>.

of first instance.¹⁰ Therefore, the analysis of mediation practice in this country must be considered of great importance.

There has been a traditional view in France that it was against the public interest for the administration to submit to the jurisdiction of anyone but the judge established by the law.¹¹ However, the Prime Minister passed a circular in the year 1995 on the treatment of complaints addressed to the administration.¹² This circular was adopted following the report of *Conseil d'État*, which identified insufficient attention of the administration to the claims addressed to it. This circular stressed the importance of paying attention to submitted complaints not only when they are already examined in the court, noting that such complaints could be seen as a reason to attentively overview the considerations and circumstances that influenced the adoption of the argued measure. Moreover, the creation of special organs to deal with the complaints in the institutions was strongly encouraged. The abovementioned circular proves the expression of the strong will of changes in the public administration.¹³

As a consequence to the improvements in dealing with complaints addressed to public administration, various mediators of public utility were created. For example, in the year 2002, the Mediator of the Ministry of the Economy, Finance and Industry (Fr. *Médiateur du ministère de l'Economie, des Finances et de l'Industrie*) was founded to apply mediation in the field related to the taxation of private individuals, the taxation of professionals, the payment of taxes and others.¹⁴ The annual report of the year 2008 of the Mediator of the National Education and Higher Education (Fr. *Médiateur de l'éducation nationale et de l'enseignement supérieur*) certifies that mediation is also applied in the field of public education.¹⁵

On 5 April 2004, the Charter of Mediators of Public Utility was signed by the mediators of administration, enterprises, institutions and collectives responsible for the ser-

10 Wade, H. W. R.; Forsyth, C. F. *Administrative Law*. Oxford University Press, 2004, p. 9–13.

11 Bell, J.; Boyron, S.; Whittaker, S. *Principles of French Law*. 2nd ed. Oxford University Press, 2008, p. 52–54.

12 Circulaire du 9 février 1995 du Premier ministre relative au traitement des réclamations adressées à l'administration. JORF n°39 du 15 février 1995 page 2522.

13 This circular is considered to be a reminder to the administration of the importance of using alternative methods to resolve disputes (Bell, J.; Boyron, S.; Whittaker, S., *supra* note 11).

14 Médiateur du ministère de l'Economie, de l'Industrie et de l'Emploi et du ministère du Budget, des Comptes publics et de la Fonction publique. *Rapport annuel 2008*. p. 24 [interactive]. [accessed 10-08-2010]. <http://www.budget.gouv.fr/directions_services/mediateur/rap_mediateur_2008.pdf>.

It must be also mentioned that after the execution of a structural reform, the Mediator of the Ministry of the Economy, Finances and Industry became the Mediator of the Ministry of the Economy, Industry and Employment and the Ministry of the Budget, Public Accounts and Reform of Public Function (Fr. *Médiateur du ministère de l'Economie, de l'Industrie et de l'Emploi et du ministère du Budget, des Comptes publics et de la Fonction publique*) and afterwards—the Mediator of the Ministry of the Economy, Industry and Employment and the Ministry of the Budget, Public Accounts and State Reform (Fr. *Médiateur du ministère de l'Economie, de l'Industrie et de l'Emploi et du ministère du Budget, des Comptes publics et de la Réforme de l'État*).

15 Mediation was mainly conducted in the spheres related to career of the staff, pensions, etc. (Médiateur de l'éducation nationale et de l'enseignement supérieur. *Rapport 2008* [interactive]. [accessed 14-08-2010]. <<http://lesrapports.ladocumentationfrancaise.fr/BRP/094000294/0000.pdf>>.

vices for the public.¹⁶ This Charter was aimed at serving as a framework of reference for their action, in compliance with valid particular rules applicable for the exercise of their activities. The Charter stated the clear necessity of particular status of *médiateurs institutionnels* (institutional mediators) as the main guaranty of their impartiality in alternative dispute resolution.¹⁷ Certain instructions regarding the process of mediation and the principles of procedure related to recourse to mediation were embodied as well.

It can be concluded that the model of mediation in central and local administration and public bodies, involving the activities of the so-called institutional mediators, was implemented and widely applied in France. Moreover, this model can be evaluated as being highly structured and regulated, since, despite the fact that not all rules concerning the application of mediation in different spheres of administration are available, the tendency of the formalization of the mediation procedure can be observed.

The conducted review of mediation in the administrative sphere in France would not be considered full if proper attention to the institution of *Médiateur de la République* had not been paid. In the 1970s, when countries all over the world adopted their own versions of the Scandinavian institution of ombudsman, the institution of *Médiateur de la République*¹⁸ (previously called *Médiateur*) has become a very important figure in the administrative sphere. It should be noted that *Médiateur de la République* exercises various functions, including the submission of proposals for administrative reforms, certain functions in the sphere of human rights.²⁰ However, aiming at the improvement of relations between natural or legal persons and administration, one of the most important fields of his activity is mediation.²¹ The objectives of *Médiateur de la République* are

16 It must be mentioned that this Charter was framed by *Le Club des Médiateurs du Service Public*, consisting of, *inter alia*, *médiateurs institutionnels* from the Ministry of the Economy, Finances and Industry, Ministry of the National Education, Higher Education and Researches (Charte des médiateurs du service public [interactive]. [accessed 09-08-2010]. <www.mediateur-republique.fr/fic_bdd/pdf_fr_fichier/1176890798_Charte_.pdf>.

17 This independence was seen to be guaranteed by not directly belonging to the structure of particular institution or enterprise.

18 Brown, L. N.; Bell, J. S. *French Administrative Law*. 4th ed. Oxford: Clarendon Press, 1993, p. 29–31. The establishment of *Médiateur* was favoured by the adoption of Loi n° 73-6 du 3 janvier 1973 instituant un médiateur. JORF du 4 janvier 1973, p. 00164.

19 It must be noted that the replacement of *Médiateur de la République* by *Défenseur des droits* (Defender of the rights) is intended to be executed during the year 2010 (entering into force in the year 2011). After the execution of this reform, *Défenseur des droits* will exercise the functions of *Médiateur de la République*, in addition, his/her competence will be extended to include the functions of *Défenseur des enfants* (Defender of Children) and *Commission nationale de déontologie de la sécurité* (National Commission of Deontology of Safety) (Le Médiateur de la République [interactive]. [accessed 13-08-2010]. <<http://www.mediateur-republique.fr/fr-citoyen-01-02-04>>.

20 Médiateur de la République, *Rapport annuel 2009* [interactive]. [accessed 10-08-2010]. <http://www.mediateur-republique.fr/fic_bdd/pdf_fr_fichier/Mediateur_RA09_DEF.pdf>.

21 Even though the historic routes of *Médiateur de la République* are found in the ombudsman's institution, it does not mean that the function of mediation is not relevant to his/her status. Whereas in certain countries as well as in the European Union it is the ombudsman who is entitled to intervene as a mediator in the conflicts of law between administration and those who are administered (Niemi, M. Quelques remarques sur les alternatives à l'action en justice entre les autorités administratives et les particuliers en Finlande. *Les*

achieved with the assistance of his delegates (Fr. *les délégués du Médiateur de la République*).²² The importance of this institution is visibly affirmed by its practice, since, according to the available statistical data, central services received 13,222 claims in the year 2009, whereas the estimated mediation success rate constituted 93 per cent. The main fields of intervention were related to healthcare security and safety, pensions of public agents, social issues as well as justice.²³ Therefore, the importance of *Médiateur de la République* is unquestionable, his/her role is admitted to be of significant importance in the French legal system.

However, when it comes to mediation in court, a small amount of information is available. Even though many initiatives to promote mediation in courts have been taken and *Conseil d'État* seems to support the expansion of mediation in the administrative courts, the reform has been met with resistance from the judges themselves. It is noticed that mediations are organized sporadically and, although there is no published empirical research, there appears to be no more than three mediations per year in most administrative courts. This situation is explained by the fact that there were no attempts to train judges. Moreover, the caseload brake on the development of mediation as administrative courts tend to concentrate on clearing the backlog of cases rather than trying new models of dispute resolution.²⁴

In conclusion, despite the fact that mediation cannot be considered as widely and successfully applied in administrative courts, the system of institutional mediators as well as the institution of *Médiateur de la République* and their practice serve to the finding that the practice of mediation in disputes arising between public authorities and private parties is well established in France. This system tends to be yet one of the best examples of the implementation of mediation in the administrative sphere.

2. Mediation in Disputes between Public Authorities and Private Parties in the United Kingdom

The research concerning mediation in disputes between public authorities and private parties would not be complete if proper attention to certain actions and acts adopted and executed in the United Kingdom was not paid. As it was already briefly mentioned, the system of administrative law of the United Kingdom has some salient characteristics, which mark it off sharply from the administrative law of other European countries. The outstanding characteristic of this system is that the ordinary courts, and not special

solutions alternatives aux litiges entre les autorités administratives et les personnes privées: conciliation, médiation et arbitrage. Conférence multilatérale, Lisbonne (Portugal), 31 mai – 2 juin 1999. Allemagne: Editions du Conseil de l'Europe, 2000, p. 127).

22 At the end of the year 2009, there were 281 delegates helping to approach the institution to those in need of its help (*Médiateur de la République*, *supra* note 20, p. 79).

23 *Ibid.*, p. 9.

24 Boyron, S., *supra* note 4, p. 272.

administrative courts, decide cases involving the validity of governmental actions.²⁵ The peculiarities of this system influence a slight difference in the application of mediation in disputes concerning public administration and private parties.

England is said to have been at the forefront of the alternative dispute resolution movement for a while, leading to the recognition of the usefulness of alternative dispute resolution for administrative law disputes. The application of mediation in administrative law is related to the usage of mediatory skills of ombudsman, as the Parliamentary Ombudsman has began investigations of citizens' complaints concerning maladministration in central government departments since 1967, followed by the appearance of many other ombudsmen in other areas of public administration.²⁶

Whereas in the year 2001, Lord Chancellor issued the Pledge Commitments on the settlement of government disputes through alternative dispute resolution²⁷, inter alia, declaring the commitment of government departments and agencies to use alternative dispute resolution in all suitable cases concerning departments and agencies, wherever the other party accepts it.²⁸

The Annual Pledge Report 2008/09 on Monitoring the Effectiveness of the Government's Commitment to Using Alternative Dispute Resolution confirms that alternative dispute resolution during the period in question has been used in 314 cases with 259 leading to settlement. Despite the fact that alternative dispute resolution was attempted in fewer cases, as compared to 374 in the year 2007–08, the will to settle the disputes between administration and citizens without addressing the court is more than obvious. The provided examples of illustrative cases prove that the most frequently recourse was made to mediation as a method of alternative dispute resolution. For example, in the year 2008–09 the Ministry of Defence through the use of mediation settled the dispute with the parents of a soldier who was killed as a result of military training, whereas the Treasury Solicitor's Department resolved a series of disputes related to prisoners' claims against the Prison Service by applying mediation. Certain cases concerning unpaid taxes were solved through mediation with the conduction of Her Majesty's Revenue and Customs as well as those involving allegations of wrongful actions by the Customs.

The provided examples of the application of mediation in the disputes arising between citizens and administration illustrate that mediation in central and local administration is quite widely applied in the United Kingdom. Furthermore, this type of media-

25 Wade, H. W. R.; Forsyth, C. F., *supra* note 10.

26 For example, the Local Government Ombudsman, the Prison Ombudsman, the Health Service Ombudsman and others (Boyron, S., *supra* note 4, p. 26–269).

27 The Lord Chancellor's Pledge Commitments of 23 March 2001. Ministry of Justice. *The Annual Pledge Report 2008/09 Monitoring the Effectiveness of the Government's Commitment to using Alternative Dispute Resolution* [interactive]. [accessed 14-08-10]. <<http://www.justice.gov.uk/publications/docs/alternative-dispute-resolution-08-09.pdf>>.

28 Boyron, S. describes this pledge as a resort to administrative dispute resolution, mainly mediation, when decisions of government department are first challenged by citizens (Boyron, S., *supra* note 4, p. 269). It must be noted that even though the commitment for the application of mediation is not directly embodied in the pledge, 'resort to mainly mediation' is obviously evidenced by the statistical data provided in the Annual Pledge Report 2008/09.

tion is encouraged not only by the execution of various projects, when, for example, prisoners are trained to mediate disputes,²⁹ but also by the courts³⁰ and the launch of mediation awareness training programmes for claim managers. Thus, even though the lack of clarity in regard to the exact structures and processes in the application of mediation is observed,³¹ the fact of widely applied institutional mediation in the disputes between citizens and public authorities can be stated.

In the year 2004, the Secretary of State for Constitutional Affairs and Lord Chancellor by Command of Her Majesty presented to Parliament a White Paper *Transforming Public Services: Complaints, Redress and Tribunals* (the White Paper) which, inter alia, suggested the transformation of Council on Tribunals to Administrative Justice Council.³² It also embodied a proposition of evolution of the mentioned council into an advisory body for the whole administrative justice sector, one of its aims being the assurance that the relationships between the courts, tribunals, ombudsmen and other alternative dispute resolution routes satisfactorily reflect the needs of users. It must be noted that the creation of this White Paper was directly influenced by the adoption of the Recommendation.³³ Following the White Paper, the Administrative Justice and Tribunals Council was set up by the Tribunals, Courts and Enforcement Act 2007 to replace the Council on Tribunals. Its Annual report 2008/2009 confirms the will of stronger promotion of alternative dispute resolution modes, including mediation, in administrative justice.³⁴

Furthermore, certain actions towards the application of court-based mediation must be pointed out. An experiment in quasi-compulsory mediation (the parties to certain types of claims were required either to attend a mediation appointment or to give reasons for objecting to doing so) was being executed in the Central London County Court between April 2004 and March 2005, also a voluntary mediation scheme which has been

-
- 29 According to the Annual Pledge Report 2008/09, 12 staff members and 12 prisoners at the Full Sutton Prison in York have been trained to mediate disputes, as disputes about misconceptions of race often arise (The Lord Chancellor's Pledge Commitments of 23 March 2001, *supra* note 27, p. 8).
- 30 The use of alternative dispute resolution instead of proceedings for judicial review is encouraged by the courts. Under the Civil Procedure Rules in England and Wales, courts are under a duty to encourage the use of alternative dispute resolution (often mediation) in appropriate cases, and may take account of whether the parties considered this when making case management decisions and ordering costs (Department for Constitutional Affairs (2004), *Transforming Public Services: Complaints, Redress and Tribunals*. White Paper. p. 8 [interactive]. [accessed 14-08-2010]. <<http://www.dca.gov.uk/pubs/adminjust/transformfull.pdf>>).
- 31 Boyron, S. admits that very little is known regarding the structures and the processes which are used, the degree of independence of the structure of mediation from the relevant government department, the staff who is involved in mediation, etc. (Boyron, S., *supra* note 4, p. 269).
- 32 Department for Constitutional Affairs (2004), *Transforming Public Services: Complaints, Redress and Tribunals*. White Paper, *supra* note 30, p. 53–54.
- 33 European Commission for the Efficiency of Justice Working Group on Mediation, *Analysis on Assessment of the Impact of Council of Europe Recommendations Concerning Mediation*. Strasbourg, 3 May 2007, p. 165 [interactive]. [accessed 06-08-10]. <<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=274087&SecMode=1&DocId=1129304&Usage=2>>.
- 34 Administrative Justice and Tribunals Council, *Annual Report 2008/09* [interactive]. London, 2009 [accessed 14-08-2010]. <<http://www.ajtc.gov.uk/docs/Final.pdf>>.

operating in the court since 1996 and was last evaluated in 1998.³⁵ Following the White Paper, judicial mediation service was piloted in three regions of England (Newcastle, Central London and Birmingham) by the Employment Tribunal Service.³⁶ Thus, even though court-based mediation is still not a widely spread method of alternative dispute resolution, actions taken towards its implementation testify the growing need of its application in practice.

In conclusion, it must be stated that, despite the lack of strictly formulated practice in certain areas, the usage of mediation as an alternative dispute resolution method in solving disputes between citizens and public authorities is continually applied in the United Kingdom. Moreover, the analysis of recently adopted documents by the public authorities confirms a prospective application of mediation in disputes between public authorities and private parties.

3. Mediation in Disputes between Public Authorities and Private Parties in Belgium

In order to have a full picture of the mediation practice in administrative sphere in Europe, relative practice of Belgium must also be analysed. It can be said that Belgium has a relatively long-standing practice of the application of mediation in administrative cases. In Belgium, the institution of mediator exists in both public and private sectors and their task is to seek an out-of-court settlement between the parties, also to provide them with information, undertake inquiries and draw up recommendations.³⁷ When analysing the practice of mediation in administrative disputes in Belgium, the attention should be focused on the role of federal mediators.

Following the Law of 22 March 1995, two federal mediators (les médiateurs fédéraux) were established.³⁸ The mission assigned to them, inter alia, consisted of the examination of complaints relative to the functioning of federal administrative authorities,³⁹ the formulation of recommendations and reports concerning the functioning of

35 Genn, D. H., et al. *Twisting arms: court referred and court linked mediation under judicial pressure* [interactive]. Ministry of Justice Research Series 1/07, 2007, p. i [accessed 10-08-2010]. <<http://www.justice.gov.uk/publications/docs/Twisting-arms-mediation-report-Genn-et-al.pdf>>.

The biggest amount of mediated cases consisted of personal injury cases, including the employers' liability cases (*Ibid.*, p. 73).

36 The pilot was for Employment Tribunal's discrimination cases starting between June 2006 and March 2007 (Urwin, P., et al. *Evaluating the use of judicial mediation in Employment Tribunals* [interactive]. Ministry of Justice Research Series 7/10, 2007, p. i [accessed 10-08-2010]. <<http://www.justice.gov.uk/publications/docs/evaluating-judicial-mediation-march10.pdf>>.

37 Explanatory memorandum on the Recommendation Rec(2001) xx on alternatives to litigation between administrative authorities and private parties, Article 165 [interactive]. [accessed 04-08-2010]. <[http://www.coe.int/t/e/legal_affairs/legal_co-operation/administrative_law_and_justice/texts_%26_documents/Conv_Rec_Res/Recommendation\(2001\)9.asp](http://www.coe.int/t/e/legal_affairs/legal_co-operation/administrative_law_and_justice/texts_%26_documents/Conv_Rec_Res/Recommendation(2001)9.asp)>.

38 The implemented system was directly influenced by the specificity of the Belgium system of government. Therefore, one of the federal mediators is French-speaking and the other one Dutch-speaking.

39 This mission is explained as being mediation *stricto sensu*, as in this case the mediator executes the role of an intermediary between the person and federal administration when a disagreement occurs (Prasman, H. État

administrative authorities. The abovementioned law also embodied the right of all interested persons to lodge a written or oral claim to mediators subject to acts or functioning of administrative authorities; however, before addressing to mediator, a person had to contact the administration. According the Annual Report of the Federal Mediator of the year 2009, complaints were received in the main spheres of finance and social sector.⁴⁰ After the intervention of the mediator, if the reclamation is being properly based, the full or partial correction of the disputed administrative act can be made.⁴¹ It should be noted that, according to the law, the examination of a complaint is suspended when the dispute is decided in court or is being administratively analysed. However, mediators have a right to examine a complaint related to the administrative decision which has already become definitive.⁴²

Having briefly reviewed the legislative base and data concerning relative practice, a conclusion that the institute of les médiateurs fédéraux is a good example of mediation related to administrative issues should be made. Its clear impartiality, reflected through the independence of les médiateurs fédéraux from other institutions, as well as appreciated results in the sphere of disputes arising between private parties and administration probably have an impact on the choice of implementation of other types of mediation. Thus, there is no particular and comprehensive official data concerning the application of court-based mediation in Belgium. However, as it was already concluded, les médiateurs fédéraux fulfil their aims and execute missions in such a manner, that no basis for a conclusion of manifest insufficient application of mediation in administrative sphere could be found.

4. Mediation in Disputes between Public Authorities and Private Parties in Lithuania

Having analysed the application of mediation in disputes between public authorities and private parties in foreign countries, special attention to perspectives of its application in Lithuania must be paid.

First of all, it must be stressed that instant social changes stimulate rapid development of administrative law,⁴³ whereas a manifest quantitative growth of administrative disputes as well as an increase in the case-load of administrative courts indicate the need of changes related to the implementation of alternative dispute resolution in practice.

de la question en droit belge. *Les solutions alternatives aux litiges entre les autorités administratives et les personnes privées: conciliation, médiation et arbitrage*. Conférence multilatérale, Lisbonne (Portugal), 31 mai – 2 juin 1999. Allemagne: Editions du Conseil de l'Europe, 2000, p. 116).

40 According to this report, in 92.6% cases of proceeded reclamations the activity of mediators was successful and gave positive results (Médiateurs fédéraux, *Rapport annuel 2009*. 2010, p. 30, 33 [interactive]. [accessed 10-058-2010]. <http://www.federaalombudsman.be/sites/default/files/09_Francais.pdf>.

41 *Ibid.*, p. 32.

42 Prasman, H., *supra* note 39, p. 118.

43 Urmonas, A. Administracinė teisė socialinių pokyčių erdvėje [Administrative law in the context of social changes]. *Jurisprudencija*. 2006, 5(83): 46.

It is commonly accepted that when the dispute is closely related to the request and to the execution of interest of parties, alternative dispute resolution can be considered as a more effective mechanism of resolving dispute than solving a case in court.⁴⁴ Moreover, as it was already justified by the conducted analysis, the application of mediation in administrative disputes is a widespread practice in the member states of the European Union.

When it comes to Lithuania, the general conclusion that mediation is not applied in the administrative sphere can be drawn. There is neither any regulations nor practice related to the application of this method in disputes between public authorities and private parties. However, the situation related to the necessity of the application of mediation in administrative disputes in Lithuania does not differ much from the context of other European countries. According to the Annual report 2009 of the Supreme Administrative Court of Lithuania, a constant augmentation of the case-load of the court was observed during the past five years.⁴⁵ Furthermore, the practice of the Supreme Administrative Court of Lithuania proves the existence of need to meet the requirements of rapidly changing society and relations of legal nature⁴⁶ by referring to methods of peaceful settlement of administrative disputes.

In conclusion, an apparent need of the application of mediation in administrative disputes exists in Lithuania. The divergent practice of the application of mediation in the administrative field in other countries influences the increase in the need for successive discussions related to the specific model of mediation applicable in the administrative sphere of Lithuania as well as concerning conditions for its implementation and functioning. However, this issue requires a subsequent comprehensive research.

Conclusions

Having briefly reviewed the practice of mediation applied in the administrative sphere of France, the United Kingdom and Belgium, regardless the limited scope of the analysis and in some aspects a small scale of available information, several conclusions can be drawn:

1. In general, mediation is applied to solve disputes between public authorities and private parties in all four countries. However, the conducted research has shown that the mode of application of this institute differs subject to the specific features of every legal

44 Kaminskienė, N. Alternatyvus ginčų sprendimas [Alternative dispute resolution]. *Jurisprudencija*. 2006, 9(87): 90.

45 Supreme Administrative Court of Lithuania. *Annual report 2009* [interactive]. Vilnius, 2010 [accessed 05-08-2010]. <http://www.lvat.lt/media/27572/lvat_metinis_pranesimas_2009.pdf>.

46 This conclusion is justified by the fact that, although there are no legal provisions related to the ratification of conciliation agreement concluded between the parties to the dispute, the court has ratified such an agreement, stating that this kind of practice is in compliance with public interest and does not contravene the regulatory norms of imperative character (Ruling of the Supreme Administrative Court of Lithuania 29 October 2009 in the case *J. D. and others v. the Republic of Lithuania, represented by the Government of the Republic of Lithuania* (case No A⁸²²-1064/2009)).

system, the system of public and local administration as well as the existing practice of the solution of the said disputes. The strong objective of the promotion of application of mediation in administrative disputes between public authorities and private parties is observed.

2. Mediation in the analysed sphere is usually applied within the body of public administration which adopts the contentious measure (act) or executes actions. The tendency of the establishment of special organs of mediation within the public institutions is estimated. In addition, in France and Belgium, a separate institution of a mediator which is independent from other authorities is created. The available data reveals the successful practice of the mediation of such institutions in the sphere of disputes between public authorities and private parties.

3. According to the accomplished review, court-based mediation is rarely applied in administrative disputes. In the countries where the said type of mediation is implemented, this kind of practice is either executed sporadically or has not produced the results pursued. However, this situation in a way differs in the United Kingdom, since court-based mediation seems to be progressively applied in this country. This context can be influenced by the differences of its legal system.

4. The Conducted analysis justifies the need for the application of mediation in disputes between public authorities and private parties in Lithuania. The consequential discussion in the mentioned sphere should be directed towards the search for a particular model of mediation applicable in Lithuanian legal system.

References

- A Dictionary of Law*. 5th ed. Oxford University Press, 2002.
- Administrative Justice and Tribunals Council, *Annual Report 2008/09* [interactive]. London, 2009 [accessed 14-08-2010]. <<http://www.ajtc.gov.uk/docs/Final.pdf>>.
- Bell, J.; Boyron, S.; Whittaker, S. *Principles of French Law*. 2nd ed. Oxford University Press, 2008.
- Boyron, S. Mediation in administrative law: the identification of conflicting paradigms. *European Public Law*. 2007, 13(2): 263–288.
- Brown, L. N.; Bell, J. S. *French Administrative Law*. 4th ed. Oxford: Clarendon Press, 1993.
- Charte des mediateurs du service public [interactive]. [accessed 09-08-2010]. <www.mediateur-republique.fr/fic_bdd/pdf_fr_fichier/1176890798_Charte_.pdf>.
- Circulaire du 9 février 1995 du Premier ministre relative au traitement des réclamations adressées à l'administration. JORF n°39 du 15 février 1995, page 2522.
- Department for Constitutional Affairs (2004). *Transforming Public Services: Complaints, Redress and Tribunals*. White Paper [interactive]. [accessed 14-08-2010]. <<http://www.dca.gov.uk/pubs/adminjust/transformfull.pdf>>.
- European Commission for the Efficiency of Justice Working Group on Mediation. *Analysis on assessment of the impact of Council of Europe recommendations concerning mediation*. Strasbourg, 3 May 2007 [interactive]. [accessed 06-08-2010]. <<https://wcd>

- coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=274087&SecMode=1&DocId=1129304&Usage=2>.
- Explanatory Memorandum on the Recommendation Rec(2001) xx on alternatives to litigation between administrative authorities and private parties, Article 165 [interactive]. [accessed 04-08-10]. <[http://www.coe.int/t/e/legal_affairs/legal_co-operation/administrative_law_and_justice/texts_%26_documents/Conv_Rec_Res/Recommendation\(2001\)9.asp](http://www.coe.int/t/e/legal_affairs/legal_co-operation/administrative_law_and_justice/texts_%26_documents/Conv_Rec_Res/Recommendation(2001)9.asp)>.
- Gaillard, E.; Edelstein, J. Mediation in France. *Dispute Resolution Journal*. 2000, 55(4) [interactive]. [accessed 06-08-2010]. <www.questia.com/reader/printPaginator/2128>.
- Kaminskienė, N. Alternatyvus ginčų sprendimas [Alternative dispute resolution]. *Jurisprudencija*. 2006, 9(87): 84–91.
- Loi n° 73-6 du 3 janvier 1973 instituant un médiateur. JORF du 4 janvier 1973, page 00164.
- Médiateur de l'éducation nationale et de l'enseignement supérieur. *Rapport 2008* [interactive]. [accessed 14-08-2010]. <<http://lesrapports.ladocumentationfrancaise.fr/BRP/094000294/0000.pdf>>.
- Médiateur de la République [interactive]. [accessed 13-08-2010]. <<http://www.mediateur-republique.fr/fr-citoyen-01-02-04>>.
- Médiateur de la République. *Rapport annuel 2009* [interactive]. [accessed 10-08-2010]. <http://www.mediateur-republique.fr/fic_bdd/pdf_fr_fichier/Mediateur_RA09_DEF.pdf>.
- Médiateur du ministère de l'Économie, de l'Industrie et de l'Emploi et du ministère du Budget, des Comptes publics et de la Réforme de la Fonction publique. *Rapport annuel 2008* [interactive]. [accessed 10-08-2010]. <http://www.budget.gouv.fr/directions_services/mediateur/rap_mediateur_2008.pdf>.
- Médiateurs fédéraux. *Rapport annuel 2009* [interactive]. [accessed 10-08-2010]. <http://www.federaalombudsman.be/sites/default/files/09_Francais.pdf>.
- Ministry of Justice. *Annual Pledge Report 2008/09 Monitoring the Effectiveness of the Government's Commitment to using Alternative Dispute Resolution* [interactive]. [accessed 14-08-2010]. <<http://www.justice.gov.uk/publications/docs/alternative-dispute-resolution-08-09.pdf>>.
- Niemivuo, M. Quelques remarques sur les alternatives à l'action en justice entre les autorités administratives et les particuliers en Finlande. *Les solutions alternatives aux litiges entre les autorités administratives et les personnes privées: conciliation, médiation et arbitrage*. Conférence multilatérale, Lisbonne (Portugal), 31 mai – 2 juin 1999. Allemagne: Editions du Conseil de l'Europe, 2000.
- Prasman, H. État de la question en droit belge. *Les solutions alternatives aux litiges entre les autorités administratives et les personnes privées: conciliation, médiation et arbitrage*. Conférence multilatérale, Lisbonne (Portugal), 31 mai – 2 juin 1999. Allemagne: Editions du Conseil de l'Europe, 2000.
- Genn, D. H., et al. *Twisting arms: court referred and court linked mediation under judicial pressure*. Ministry of Justice Research Series 1/07, 2007 [interactive]. [accessed 10-08-2010]. <<http://www.justice.gov.uk/publications/docs/Twisting-arms-mediation-report-Genn-et-al.pdf>>.
- Ruling of the Supreme Administrative Court of Lithuania 29 October 2009 in the case *J. D. and others v. the Republic of Lithuania, represented by the Government of the Republic of Lithuania* (case No A⁸²²-1064/2009).
- Schmitz, T. The transformation of administrative law in Europe/La mutation du droit administratif en Europe. *European Journal of International Law*. 2008, 19(3): 625–631.
- Supreme Administrative Court of Lithuania. *Annual report 2009* [interactive]. Vilnius, 2010 [accessed 05-08-2010]. <http://www.lvat.lt/media/27572/lvat_metinis_pranesimas_2009.pdf>.
- Urmonas, A. Administracinė teisė socialinių pokyčių erdvėje [Administrative law in the

context of social changes]. *Jurisprudencija*. 2006, 5(83): 37–47.

Urwin, P., et al. *Evaluating the use of judicial mediation in Employment Tribunals* [interactive]. Ministry of Justice Research Series

7/10, 2007 [accessed 10-08-2010]. <<http://www.justice.gov.uk/publications/docs/evaluating-judicial-mediation-march10.pdf>>.

Wade, H. W. R.; Forsyth, C. F. *Administrative Law*. Oxford University Press, 2004.

MEDIACIJA GINČUOSE TARP VIEŠOJO ADMINISTRAVIMO SUBJEKTŲ IR PRIVAČIŲ SUBJEKTŲ: LYGINAMIEJI ASPEKTAI

Salvija Kavalnė, Ieva Saudargaitė

Mykolo Romerio universitetas, Lietuva

Santrauka. *Modernios visuomenės raida, besiplečiantis sukuriamų teisinių santykių ratas atitinkamai lėmė laipsnišką teisinių konfliktų skaičiaus didėjimą. Tuo tarpu didėjantis teismų darbo krūvis, ilgėjantys bylų nagrinėjimo terminai turėjo įtakos, jog didėjo alternatyvių ginčo sprendimo būdų svarba. Yra keletas alternatyvių ginčo sprendimų būdų, tačiau, atsižvelgiant į teisės mokslininkų ir tarptautinių organizacijų susidomėjimą mediacijos taikymu, sprendžiant ginčus tarp viešojo administravimo subjektų bei privačių šalių, į tai, jog vienu metu Anglija, Prancūzija ir Vokietija ėmė svarstyti mediacijos taikymo administraciniams ginčams spręsti galimybę, tikslinga apžvelgti būtent mediacijos, kaip alternatyvaus ginčų sprendimo būdo, taikymo praktiką pasirinktose užsienio valstybėse. Siekiant pakankamai visapusiškai apžvelgti tokią mediacijos taikymo praktiką, pasirinktos trys valstybės – Prancūzija, Jungtinė Karalystė ir Belgija.*

Remiantis taikytiniais užsienio valstybių teisės aktais, oficialiais valstybės institucijų pateikiamais duomenimis, susijusiais su nagrinėjama mediacijos taikymo praktika, straipsnyje pateikiama trumpa taikomų mediacijos būdų apžvalga. Pateikiami teisminės mediacijos, mediacijos, kai ji atliekama atitinkamoje institucijoje veikiančio nepriklausomo mediatoriaus, atskirai įsteigtos mediaciją atliekančios institucijos, praktikos, sprendžiant administracinius ginčus, pavyzdžiai. Taip pat vertinama situacija Lietuvoje, konstatuojant, jog, nors mūsų valstybėje nėra mediacijos administraciniuose ginčiuose praktikos ir su tuo susijusio teisinio reguliavimo, tačiau akivaizdus poreikis taikyti tokį alternatyvų ginčų sprendimo būdą.

Remiantis atlikta apžvalga, daroma išvada, jog bendrąja prasme mediacija užsienio valstybėse yra taikoma spręsti ginčams tarp viešojo administravimo subjektų ir privačių šalių, bet skiriasi taikomos mediacijos rūšys, priklausomai nuo kiekvienos teisinės sistemos ypatybių. Iš esmės mediacija administraciniams ginčams spręsti įgyvendinama konkrečioje institucijoje veikiančio mediatoriaus, tačiau Prancūzijos ir Belgijos praktika, kai mediacijai atlikti papildomai įsteigiama speciali institucija, patvirtina, jog toks modelis yra itin sėkmingas. Tuo tarpu teisminė mediacija, nors ir taikoma remiantis prienamais duomenimis, kol kas neduoda pageidaujamo rezultato. Išimtimi šiuo požiūriu iš dalies galima vadinti Jungtinę Karalystę, kurioje pastebima gausėjant teisminės mediacijos taikymo praktikos. Taip

pat konstatuojama, jog tolesnė diskusija dėl mediacijos administraciniuose ginčiuose taikymo Lietuvoje turėtų būti orientuojama į konkretaus mediacijos modelio paiešką.

Reikšminiai žodžiai: mediacija, alternatyvus ginčų sprendimas, mediatorius, administraciniai ginčai, skundas.

Salvija Kavalnė, Mykolo Romerio universiteto Teisės fakulteto Administracinės teisės ir proceso katedros lektorė, socialinių mokslų daktarė. Mokslinių tyrimų kryptys: administracinė teisė, Europos Sąjungos teisė, lyginamoji teisė.

Salvija Kavalnė, Mykolas Romeris University, Faculty of Law, Department of Administrative Law and Procedure, lecturer, doctor of social sciences. Research interests: administrative law, European Union law, comparative law.

Ieva Saudargaitė, Mykolo Romerio universiteto Socialinės politikos fakulteto Mediacijos katedros doktorantė. Mokslinių tyrimų kryptys: alternatyvus ginčų sprendimas, administracinė teisė.

Ieva Saudargaitė, Mykolas Romeris University, Faculty of Social Policy, Department of Mediation, doctoral student. Research interests: alternative dispute resolution, administrative law.