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LAW STUDIES '17 / International Conference on Law and Legal Studies
DYING AND DEATH '17 / International Interdisciplinary Conference on Dying and Death in Art, Philosophy, Law and Politics
VIOLENCE STUDIES '17 / International Interdisciplinary Conference on Documentation, Experience and Description of Violence

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LAW STUDIES '17 / INTERNATIONAL CONFERENCE ON LAW AND LEGAL STUDIES

THE ROLE OF ALTERNATIVE DISPUTE RESOLUTION IN THE ADMINISTRATIVE PROCEDURE

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Abstract
The public administration, in particular to the administrative procedure follows a firm objective: to create of the customer friendly approach. Also, there is more and more emphasis recently on improving the efficiency and speed of the procedure. These are the two most important keywords of the decision planning and documentation.
The aim of the research in this scientific paper is to detect and analyse the decision-making methods, concurrently being ready to incorporate them into the national administrative procedure systems. These methods are to provide lawful and effectively applicable alternative dispute settlement methods ready to use in Hungarian legal system and also to assist - apart form the aim to reach the basic aims of the administrative procedure - to create a fundament of the decisions made by the authority, having regard to circumstances in real life cases, viewpoint of customers and other parties, and the balance of the public interest.
The scope of the paper also covers the theoretical and practical aspects of general mediation and mediation in administrative procedure, in view with the appearance of the topic within the renewing and current administrative procedural law regime. While examining the mediation in administrative procedure in a novel point of view, this work also analyses the role of this special type of mediation in terms of efficiency and charactesistics of the current and future legal solutions in administartive cases often involving parties with adverse interests.
Conclusions and proposions in the paper may provide contribution to the spreading and correct treatment of alternative decision making methods in the administrative procedure.
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Introduction
A dual approach seems most effective to assess the applicability of mediation in administrative procedure: an analysis of the theory, practice and development of alternative dispute resolution methods and review of their integration into administrative application of the law and the role and effectiveness of such methods.
Consequently, first we should take a look at the development, scope of application and experience of alternative dispute resolution methods, including especially mediation (otherwise known as ADR methods) (Allison, 1989; Fiadjoe, 2013, p. 2), and then such experience should be analysed in terms of its integration into the administrative procedure.

History of application of alternative dispute resolution methods
The continuously changing challenges to society and the prevention and resolution of conflicts and legal disputes triggered by their impacts on society, economy, politics and, recently, the environment and nature conservation, called for the development and wide application of alternative dispute resolution methods (Goldberg, Eric, and Frank, 1985).
The history of conflict management and therefore also the application of unconventional alternative methods goes back in time almost as much as the history of mankind (Blake, Browne, Sime, p. 22). In fact, we can say that the justice and public administration system as well as dispute resolution and the shaping of legal relationships, currently deemed conventional, all grew out from the very first dispute resolution methods, currently described as alternative methods. Among the first procedures aimed at resolving conflicts without violence, discussions and negotiations should be mentioned first, from which the involvement of an independent third party was only a step away. Therefore, these methods may be considered the archetypes of the ADR methods (Barrett, Barrett, 2004).

The ancient China was and is still one of the fundamental bases and is the main representative of amicable dispute resolution (Han, 2012). It has been integrated into society so strongly that it is still one of the main substitutes of the justice system and is the main form of conflict resolution. Consequently, it may be concluded that the roots of mediation have a history of hundreds of years. What gives their innovative feature is their re-discovery, which started in recent times (Carver, Vondra, 1994).

Basic concept of mediation

Mediation (also introduced into the technical literature and the legislative environment as such) may be defined as a consultation (Ábrahám et al., 2013, p. 37; Bing, 2003), where the main component is a natural third party (mediator) who proceeds, either upon the initiative or with the consent of the parties, in a legal or interest dispute of the opponents (at least two or more) with the objective of assisting in the resolution of the dispute.

Various authors assigned a number of functions to mediation, of which the approach applied by Ishikawa (2001, pp. 1-15) is the most complex, grasping the essence of mediation the best. In general, the author deemed de-legalisation, de-professionalisation and de-formalisation functions of outstanding importance in the practice of alternative debate resolution methods and especially in mediation. On the basis of Ishikawa's theory and by interpreting and further developing it, we can state that:

- in the mediation practice, apart from the legal norms a lot of emphasis is laid on other aspects, which must be stressed and taken into account in the process of reaching an agreement (de-legalisation function),
- nonetheless, the legal norms provide the framework of the procedure and they cannot and should not be disregarded either because they constitute part of the basis of the procedure (de-legalisation limit),
- primarily individuals experienced in dispute resolution and not experts with legal qualifications take part in conflict resolution as impartial third parties. The degree of professionalism may vary by country and also by procedure within countries (de-professionalisation function),
- mediation and the ADR methods are the least formalised dispute resolution options, but it does not mean that the framework rules of the procedure cannot be established or there are no minimum rules for the good practice of the procedure (de-formalisation function).

In this context, the main responsibility of the mediator (Bush and Folger, 1994) is to identify the basis and nature of the legal or interest dispute and to assist the parties in reaching a consensus. The process involves the identification of the common interests of the parties and the definition strengthening and confirmation of potential key points in the evolving agreement.

As mediation, i.e., an alternative dispute resolution method, is extremely important in out-of-court agreements and in avoiding court procedures, a mediation procedure must satisfy the following requirements (Folberg and Taylor, 1986; Moore, 2014) in order to achieve its goals and functions:

- a well structured approach, which can encourage the parties to find a common solution with the help of communication and other methods to ultimately reach an agreement,
- the differences between the parties in power and influence need to be reduced in order to reach a decision with adequate content,
- in the majority of cases, the procedure must be based on voluntary participation, as only that can lead to reasonable solutions. If the procedure is based on any force, the parties will be much less open to finding a common solution,
- the procedure must be adjusted to the parties and their aspects should drive the process towards an agreement (and the legal regulations should only provide a framework for the procedure as an ultimate aspect),
- even though the procedure must come up with an answer to events of the past, its main objective is to regulate future conduct.
- The mediation must reflect the following principles (European Judicial Network, 2004) in order to be successful:
- independence - mediation may only be successful when the individual acting as mediator (and the organisation employing and commissioning them) is independent from the parties and has not, or did not have, any previous economic, personal or any other relationship with them,
- impartiality - apart from independence, mediation cannot be partial and may not create an agreement in which the views of one party are in unlimited dominance depressing the views of the other party,
- secrecy - the procedure is based on confidence, which can only be maintained when the parties can make sure that the data provided by them during the procedure cannot be disclosed to a 3rd party without authorisation or their consent,

- confidentiality (Bush and Folger, 1994, p. 231) - the parties' agreement can only be reached if they fundamentally trust the mediator (the individual and their professional knowledge) in the course of mediation and they also trust each other with the help of the mediator.

ADR methods in public administration

On the basis of the technical literature references indicated above, mediation is primarily applied in various civil law and, primarily, labour law disputes. The applicability of ADR methods in public or administrative law has never occurred in any legal or legislative approach for a long time. The methods were generally focused on resolving a legal or interest dispute and, as such, could not be interpreted in the administrative relationship between an authority and a customer, as the customer was always in a subordinated position and the parties could not be equal.

One of the expressions of the open nature expected from public administration (Doornbos, 2001, p. 101) and, within that, from the administrative procedure with increasing professional interest was the rigid role which necessarily stemmed from the subordination in administrative legal relationships and in the modern times could no longer be consistent with the expectations for public administration.

During the law enforcement-type public administration period it would have been unimaginable that any public administration performing almost all public power functions of the state would take into account the interests of legal subjects who then had the subject status but have developed into clients by now or would try to reach a consensus between the parties of the procedure, or within authorities and individuals.

The alternative dispute resolution options had to be introduced into public administration to bring a fundamental change in the methods of exercising public power in administrative proceedings (Radnor, Osborne, and Glennon, 2016). That is why certain public administration systems no longer approached customers from their original power position as a concept (Kettl, 2000, pp. 488-497) and less felt the need to enforce and protect public interests, identified as the fundamental function of public administration, at any cost, even by applying legal or physical force and compulsion. However, that required a relatively long period even on a historic scale (Rosenbloom and Goldman, 1993), and a customer-centred development in law enforcement-type administration as well as scientific assessment followed by practical application of innovative approaches (Bingham, Nabatchi, O'Leary, 2005, pp. 547-558; Liu, 2006) such as governance (Kettl, 2015) and its impact.

Horizontal dimension of mediation and other ADR methods in administrative procedure

The ADR methods are applied horizontally when they are used in an administrative procedure between customers. In such cases, there are two parties with identical or closely identical positions in terms of their procedural rights and obligations. Multi-positions also occur very often, when a number of parties and, apart from the ordinary customers of administrative proceedings, occasionally a number of organisations representing public interests, social groups or some other interest, act in support of one or the other opponent and their interests.

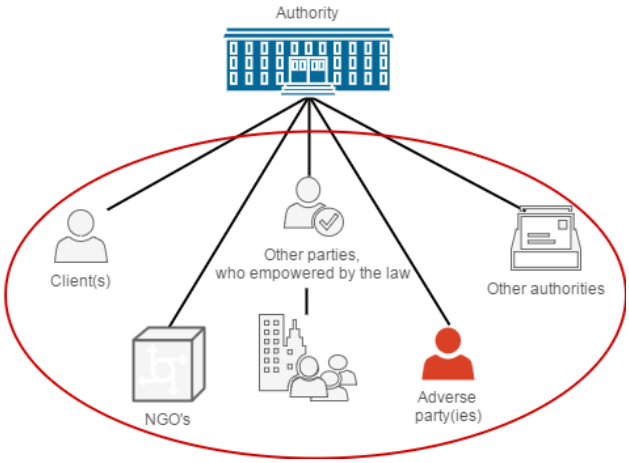

Figure 1. Horizontal dimension of mediation in administrative procedure (constructed by the author)

In such a case, the main responsibility of the authority is to assist the parties of different interests in reaching a compromise, either within or outside the procedure. The authority usually enters the agreement reflecting the mediation result into a resolution or authenticates it in some other way, thus guaranteeing the execution of the agreement.

Vertical dimension of mediation and other ADR methods in administrative procedure

While the horizontal approach to mediation was extremely close to the original scope of application of the method, as in fact only the involvement of an authority and recognition represented a surplus compared to the methodology applied in private law, the vertical approach to mediation may open completely new interpretation issues.

In this approach, the agreement is reached between a customer and an authority and not between individual customers or persons and organisations with similar statuses. Consequently, the previously outlined strong rights of an authority, which even extend to the application of force, can be applied less in such a relationship than in an ordinary administrative procedure.

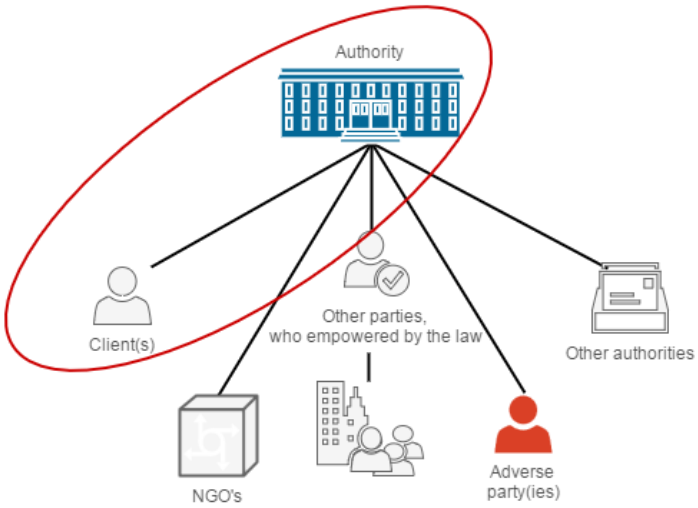

Figure 2. Vertical dimension of mediation in administrative procedure (constructed by the author)

The role of the authority changes a lot compared to what it is in the horizontal version: in this context the authority is not only responsible for trying to assist the parties in reaching an agreement but will also be a part of it. The solution, which is on the borderline between public law and private law will lead to a fundamental effect that the authority will be a quasi contracting party and not an authority in the relationship and will use compelling tools of mainly private law nature as a result of the agreement in the case examined within the administrative procedure. It will return to its role as an authority with the help of the public law compelling and enforcement tools provided by law only when the previously mentioned tools have failed.

In this role, the authority will not only have to enforce a public interest and consistently apply the law, it must also pay attention to the interests of the other parties of the procedure irrespective of whether or not they take part in the mediation process.

The agreement is often assisted by an external layman, or by a qualified external independent third party. Thus in the Hungarian procedural law this role is played by a mediator proceeding in administrative mediation as described in detail below.

According to the final outcome of mediation, there may be a traditional agreement, but in many other cases the outcome could be an extremely special administrative contract reflecting the process of its establishment (Chen, 2013) and containing both private and public law features.

Summary
Public administration in the 21st century is compelled to permanent adaptation due to the constantly changing conditions of life and global challenges.
The process can be viewed with an approach where the new conditions are negative tendencies, focusing on the additional resources required for public administration and on its system-alien nature, which can definitely be felt during its introduction.
However, when the new conditions are considered the most important development engines of public administration and an opportunity instead of a necessary task, the innovative methods introduced to manage changes will become an important innovation factor in making the current public administration system more effective.
The application of alternative dispute resolution methods, i.e., mainly mediation, seems the most appropriate with this approach: prima facie, it is a solution which is extremely alien to public administration and especially administrative application of the law, operating with strong private law components and seemingly not compatible with the traditional elements of an administrative legal relationship.
However, approaching the effectiveness of ADR methods from the final solution in a matter constituting the subject of an administrative procedure, a strong legitimacy effect of an agreement, more easily acceptable to the parties and reflecting their own aspects, as well as the reduction of the administrative force, the methods become an important part of administrative decisions, which is already partially present with incredible development opportunities.

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