

Possibilities for the Application of Alternative Dispute Resolution Methods 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 from 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 characteristics of the current and future legal solutions in administrative cases often involving parties with adverse interests. Conclusions and propositions in the paper may provide contribution to the spreading and correct treatment of alternative decision making methods in the administrative procedure. The publication of this scientific paper supported by the the Ministry of Justice (Hungary) in the program of increasing of the quality of Hungarian legal studies.

Keywords: administrative procedure, ADR, alternative dispute resolution, customer friendly approach

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.

Observing the globally conditions and legal trends, the general administrative structure modifications related to administrative bureaucracy reduction, that are essentially transforming the rules, requirements, and directions of the administrative authority, are in many respects consistent with the earlier development and reform concepts of the administration and also with its fast and inexpensive nature.

These are important goals given that, due to the volume of public administration activities, the administrative proceedings concern a wide range of society, but they cannot, without any other measure of value realize the basic aims of the administrative proceedings.

However, in the administrative proceedings, much more emphasis should be placed on making the decision-making of the authorities based on the full consideration and application of legal requirements and, in addition, taking into consideration

the possibilities, reflect on the real circumstances, the client's aspects, the balance of public interest, and a number of other long-drawn, but only recently-focused, issues.

Looking at European and overseas developmental directions, in states where public administration is developed and operating at a high level, developmental needs are more likely focused on involving the public and local communities in decision-making, social control of public activities and the influence of globalization on the administrative proceedings as well as its adequate management.

In this approach - when the issues of public administration's socialization, transparency and efficiency are of particular importance in terms of administrative practice and regulation of administrative activities - it may be of great importance to what extent the decision of the authority and the process for taking it takes the aspects of the client or aspects of other interested parties into account. The extent of this can have a significant influence on the acceptance and voluntary implementation of the decision by the client, which is also an emphasized element and explicit goal of modern procedural rules.

The question may be even more important if not only the client but also the opposing party are involved in the proceedings. Taking into consideration the standardized aspects of mediating between competing interests, it can undoubtedly result in easier acceptance of the authority's decision and, consequently, consistent implementation of the vast majority of cases.

The apparent disinterest of population and law enforcement on the applicability of alternative dispute resolution methods to administrative actions, cannot be traced back to the low relevance of the problem, but to the lack of legal knowledge of the clients involved in public administration, the lack of information of the public administration in this regard, and the orientation of public administration to other values (inexpensive and fast proceedings).

The main objective of this paper is therefore to identify and analyse the methods that can be integrated into the administrative system to take into account the abovementioned, which, by taking into account the domestic legal systems, but also using international experiences, are legal and can be used in alternative legal dispute resolution methods. The present content unit especially focuses on the practice of mediation in the field of administrative proceedings, with the help of which it intends to provide a client-oriented guidance capable of development regarding the public administration for a wide range of legislators and lawmakers.

Theoretical-historical approach

The applicability of the possibilities of mediation in an administrative authority media can be best investigated by a dual approach: on the one hand, by analysing the theory, practice, and development of alternative dispute resolution methods, and on the other hand by putting them into law enforcement, examining their roles and their effectiveness.

Accordingly, the chapter first deals with the development, scope, and experience of alternative dispute resolution methods, in particular mediation (i.e. ADR methods), and then it analyses these experiences in terms of their insertion into the administrative proceedings.

The prevention and resolution of conflicts and disputes arising from socially renewed challenges facing society and their social, economic, political, and recently environmental and nature conservation have made it necessary to develop alternative versions of dispute resolution methods and to apply them widely (Goldberg, Eric, and Frank, 1985).

The history of conflict management and the use of alternative methods other than traditional solutions are almost identical to the history of humanity (Blake, Browne, Sime, p. 22). In fact, we can say that the judicial, administrative system, and the dispute resolution and legal structure, considered today as traditional, have only appeared as the follow-up of the first methods to resolve disputes today called alternatives. Among the first methods of resolving conflicts with the exclusion of violence, one can mention the conciliation and negotiation, from which only one step was the involvement of an independent third party, thus establishing the archetypes of ADR methods (Barrett, Barrett, 2004). Ancient China was one of the fundamental bases and is currently one of the major representatives of peaceful dispute resolution, where it has gained such a strong social embeddedness that is still a major substitute for the justice system, a key form of conflict resolution (Han, 2012). Based on these, it can be stated that the roots of mediation can have a centuries-old history, their novelty content is rather given by its rediscovery in modern times (Carver, Vondra, 1994).

The first sources of mediation in Europe are from the 15th century, which record several cases during the reign of the Lancaster House, when British noblemen arranged their conflicts in this way (Decastello, 2008,, pp. 14-15). In this respect, the law enforcement in Hungary was no longer behind, and from the 1400's onwards, it gained a growing role in mediating the parties in dispute, first among village communities and judges, and then the rules referring to individual agreements became gradually legally recognized, and finally, the re-emergence of the Habsburg House in the 18th century attempted to complete the practice of mediation in that era

Throughout the world, and especially in Europe, with the establishment and extension of the state monopoly of justice, the originally traditional methods became alternatives and they only returned to the focus of scientific research in the second half of the 20th century as complementary, substitute methods of traditional enforcement of claims.

In parallel to the adjacent development of legal systems, in addition to domestic law, international law also started to apply ADR methods for resolving international disputes, while both mediation and conciliation have been highlighted in this arena and became realistic alternatives to conflict resolution (Ginsburg; McAdams, 2003).

Review of the technical literature

The alternative dispute settlement methods and their applicability are becoming an increasingly important topic in legislation, the application of law and legal sciences.

Nevertheless, the ADR methods (mediation, intermediation, employment of an official mediator, etc.) are rather undervalued in the Hungarian technical literature on public administration and in the practical application of the public administration law and are a topic not researched intensively.

The expansion of the reviews of the applicability in the Hungarian public administration system by the technical literature may be impeded by a previously established apparent problem that the ADR methods and mediation and intermediation, constituting the main topic of this part were used primarily for the settlement of private law, more specifically civil law and labour law disputes and their applicability in public law and public administration law was not analysed for a long time. However, as the previous sections indicate, it is not right and the applicability of these methods should be analysed both in theory and in practice due to their significant practical aspects and their impact on the development of public administration.

In the technical literature synthesis of the chapter, an attempt is made to overcome the deficit of the Hungarian technical literature and the limited applicability in Hungary of certain methods introduced abroad by analysing the features identified during the application of the ADR methods over decades on the basis of their roles played in administrative proceedings.

Main features of mediation

a. Amicable, out of court settlement of a dispute

The authors refer to out of court dispute settlement as one of the most important features of mediation (Hensler, 1994). Naturally, in terms of public administration and, more specifically, administrative proceedings, it means a lot more a reduction in the exhaustion of legal remedies, the final resolution of a case in first instance proceedings (Fiadjo, 2013, p. 1), and pushing the judicial review of an administrative resolution into the background (Harter, 1984, p. 1394).

b. *Simpler and faster proceeding*

It is a frequently used argument in practical mediation and ADR methods that they make easier, simpler and faster (Ábrahám et al., 2013, p. 38) the process of a legal or interest dispute concluded with a decision and thereby may become true alternatives to traditional justice or administrative proceedings.

Looking at the public administration aspect of this feature, the authors use case law analyses and a number of examples illustrating how intermediation may simplify the efforts of administrative proceedings to clarify the facts and provide reasoning for a resolution both within and outside the administrative proceedings (Zack, 2014; Decastello, 2008, p. 47).

c. *Cost efficiency*

One of the most important arguments used by authors promoting mediation as a method is its extreme cost efficiency and the lack of advanced costs (Blake, Browne, Sime 2014, p. 23). All this appears in public administration indirectly, because

for clients the generally faster mediation is a most effective solution in terms of material expenses (postal expenses, photocopying, printing expenses) and personal expenses (travel expenses, loss of income, etc.) associated with administrative proceedings, while

for an authority resources allocated to the case may be released if the case can be 'decided' by the parties even if the authority is still involved and when the case can be settled outside any administrative proceedings with a resolution approved by the authority.

d. Involvement of external, independent and impartial parties

Mediation requires the involvement of an external party who makes it easier for the parties to resolve the dispute by focusing on the solution rather than on the conflict (Blake, Browne, Sime 2014, p. 28; Barrett, Barrett, 2004, p. 20).

In terms of public administration, this requires high-level conflict-oriented and practice centred training of the administrative staff (Manring, 1994, pp. 197-203) with increased openness towards ADR methods. In addition, it also calls for better accessibility of intermediaries and mediators associated with administrative proceedings and up-to-date records kept of them.

e. The framework rules of the proceedings are well defined

Intermediation functions effectively when its borders (Harter, 1984, p. 1404) are clear and the parties also understand their rights and obligations in the proceedings, as it will increase their confidence. This also means that the parties can freely decide on the method of dispute settlement and intermediation within the limits of legal regulations (Carver, Vondra, 1994). This framework is in place in terms of public administration: the basic rules and guarantee provisions of administrative proceedings determine the options in the case of an attempt to make a settlement or intermediation by an external party. However, within that framework the parties have relative freedom in how they intend to resolve their dispute. If, however, intermediation fails, according to the currently effective provisions of the procedural law, the normal procedures continue in first instance proceedings ensuring that the case is closed by an authority.

f. Negative features

The authors of the reviewed technical literature refer to very few negative features that may occur in mediation (Carver, Vondra, 1994, p. 125). The statements concerning administrative proceedings mention 'bad bargains' (Harter, 1984, p. 1396), which relate to the legal effects of the approval of the settlement, more specifically, the radical reduction of legal remedy options and typically relate to the limits of the review of inadequately considered settlement criteria. They also mention extended mediation as another problem (Moore, 2014, p. 105), which in the end is refuted by all authors either logically or empirically.

g. Settlement

Intermediation focuses on a compromise agreement and the settlement resulting from it (Fiadjo, 2013, p. 63). The settlement, regardless its legal form or whether it is recognised with the approval of an authority, is a synthesis of proposals and alternative solutions (Blake, Browne, Sime 2014, p. 290; Barrett, Barrett, 2004, p. 108), which makes it suitable for reconciling the parties and resolving primarily personal and, only secondly and thirdly legal, problems (Lovas, Herczog, 1999, p. 15).

2. The aspects of international technical literature

A number of internationally recognised authors already conducted complex analyses of the role of alternative dispute settlement methods through the public administration practice of other nations. These authors typically argue for the integration of ADR methods into administrative proceedings and the application of the methods in other types of administrative proceedings based on their efficiency, speed and simplicity.

Below we shall take a look at the characteristics of the individual nations and legal cultures through the conclusions of the authors.

The alternative dispute settlement methods continue to play an incredibly important role in China, which has already been identified as the place of origin of mediation in primarily private law disputes beyond public administration (Yanming, 2016),

as well as in other forms closely related to public administrative and administrative proceedings. The Chinese authors focus intensively not only on the clarification of the basic concepts of mediation and the fundamental analysis of the aspects included in it (Bing, 2003), but also the embeddedness of ADR methods into public administration (Liu, 2006; Palmer, 2007). Numerous publications are dedicated to the role of mediation in certain sectors of public administration, which clearly illustrates the importance of the methods for the Chinese society and the operation of public administration. These publications present successes in the application of the method in social administration and administrative proceedings relating to intellectual property rights (Zhu, 2006; Han, 2012).

The other Far East countries also follow the Chinese example: mediation has an important role in their legislation, e.g., in Japan, where the relationship with mediation and its public administration implications were analysed intensively by Ishikawa, one of the most important authors writing about mediative methods (Ishikawa, 1995) and in South Korea (Sohn, 2014), where the ADR methods are in their prime again.

The analysis of European countries do not lag behind in the analyses of this object: this issue is a major issue for authors analysing the French public administration (Brown, Bell, Galabert, 1998, p. 30) but there are also comparative legal works focusing on the three mostly separable legal systems and therefore analysing primarily the French, German and Anglo-Saxon practices (Boyron, 2007, pp. 263-288), pointing out that the ADR methods may be applied, even in a vertical dimension, irrespective of the types of the public administration systems (Salvija, Saudargaite, 2011, pp. 253-261; Litvins, 2013, pp. 66-77).

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 dispute 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.

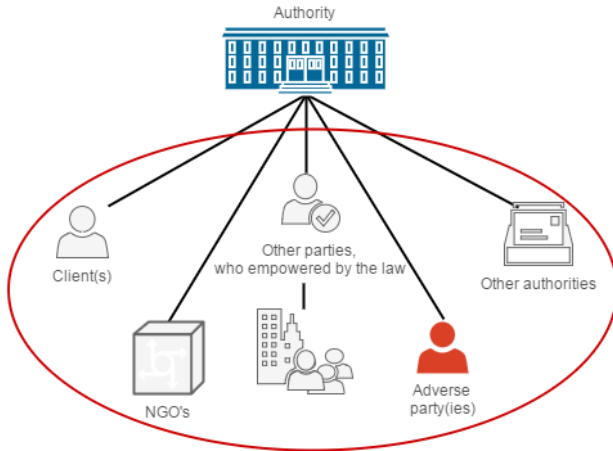


Figure 1. Horizontal dimension of mediation in administrative procedure (constructed by the author)

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.

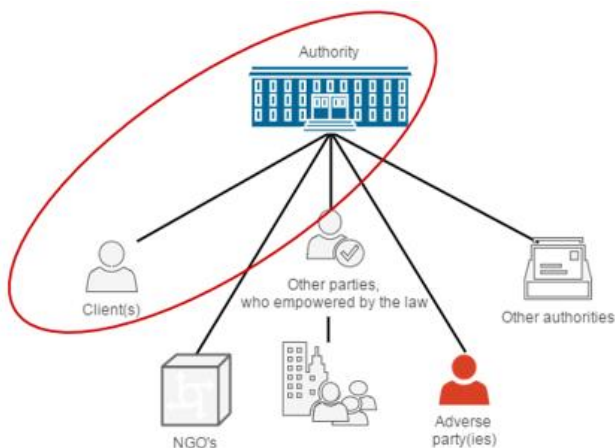


Figure 2. Vertical dimension of mediation in administrative procedure (constructed by the author)

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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