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THE HISTORY OF THE MEDIATION INSTITUTE IN INTERNATIONAL PUBLIC LAW IN THE PRE-WESTPHALIAN PERIOD

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ІСТОРІЯ ІНСТИТУТУ МЕДІАЦІЇ У МІЖНАРОДНОМУ ПУБЛІЧНОМУ ПРАВІ У ДОВЕСТФАЛЬСЬКИЙ ПЕРІОД

АНОТАЦІЇ (ABSTRACTS), КЛЮЧОВІ СЛОВА (KEY WORDS)

Problem statement. The analysis of the history of legal regulation of mediation in relations between various subjects of International Law in the pre-Westphalian period helps to clarify the legal nature of this institution as one of the means of peaceful settlement of international disputes in modern International Law and its significance to resolve those conflicts, which, unfortunately, still threaten the peaceful coexistence of states and peoples, undermine the foundations of International Law. Even though mediation has been and remains the subject of study of many domestic and foreign scholars, there are no special studies of its formation in the pre-Westphalian period. The **purpose** of the article is to study the peculiarities of the use of mediation procedures to resolve international disputes in the pre-Westfalian period; to determine the features and role of mediation in different periods of human history before the conclusion of the Westphalian Peace Treaty in 1648. **Results**. It is established that mediation in public International Law is an institution and one of the means of peaceful settlement of international conflicts, which in the most general form involves the intervention of a third party to reconcile the parties by putting forward their proposals for a mutually acceptable compromise settlement. Mediation is one of the oldest means of resolving international disputes known to mankind. Along with other means of peaceful settlement of international disputes/conflicts, mediation reflects the development of human civilization, characterized by the transition from force-oriented relations to relations, which are subject to certain rules. **Conclusion.** It was mediation, the foundations of which were formed since ancient times, that played an extremely important role in the conclusion of the Peace of Westphalia of 1648, which became the starting point in the history of modern international law and laid the foundation for the implementation of the principle of the peaceful settlement of international disputes, which is the legal basis for all means of international disputes resolving.

Key words: *mediation; international public law; peaceful means of resolving international disputes; pre-Westfalian period*

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Постановка проблеми. Аналіз історії правового регулювання медіації у відносинах між різними суб'єктами міжнародного права у довестфальський період допомагає з'ясувати правову природу цього інституту як одного із засобів мирного вирішення міжнародних спорів у сучасному міжнародному праві та його значення для врегулювання тих конфліктів, які, на жаль, все ще загрожують мирному співіснуванню держав і народів, підривають основи міжнародного права. Незважаючи на те, що медіація була і залишається предметом вивчення багатьох вітчизняних і зарубіжних учених, спеціальні дослідження її становлення в довестфальський період відсутні. **Метою статті** є дослідження особливостей використання процедур медіації для вирішення міжнародних спорів у довестфальський період; встановлення особливостей та ролі посередництва в різні періоди історії людства до укладення Вестфальського мирного договору 1648 року. **Результати.** Встановлено, що посередництво Медіація у міжнародному публічному праві – це інститут та один із засобів мирного вирішення міжнародних конфліктів, який у найзагальнішому вигляді передбачає вступ третьої сторони у спір з метою примирення сторін шляхом висування своїх власних пропозицій щодо взаємо-

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прийнятного компромісного врегулювання. Медіація є одним із найдавніших засобів вирішення міжнародних суперечок, відомих людству. Поряд з іншими засобами мирного врегулювання міжнародних суперечок/конфліктів медіація відображає розвиток людської цивілізації, що характеризується переходом від силових відносин до відносин, які підпорядковуються певним правилам. **Висновок.** Саме посередництво, основи якого складалися з найдавніших часів, відіграло надзвичайно важливу роль у укладенні Вестфальського мирного договору 1648 р., який став відправною точкою в історії сучасного міжнародного права та заклав основу для впровадження принципу мирного врегулювання міжнародних спорів, який є правовою основою для всіх засобів вирішення міжнародних спорів.

Ключові слова: *медіація; міжнародне публічне право; мирні засоби вирішення міжнародних спорів; довестфальський період*

Problem statement

It is known, the study of the evolution of any social phenomenon is the basis for revealing its deep essence, identifying patterns and contradictions of the influence of certain internal and external factors on its current state and prospects for development. That is why the analysis of the history of legal regulation of mediation in relations between various subjects of International Law in the pre-Westphalian period is important to clarify the legal nature of the institution of public mediation as one of the means of peaceful settlement of international disputes in modern International Law and its significance to resolve those conflicts, which, unfortunately, still threaten the peaceful coexistence of states and peoples, undermine the foundations of International Law.

A retrospective analysis of the institution of mediation in public International Law is usually carried out in the context of the formation and consolidation in International Law of the principle of peaceful settlement of international disputes, the content of which is the obligation of states to use various methods to settle disputes without using a force. It should be taken into account that the formal legal consolidation of the obligation to resolve disputes exclusively peacefully as a principle of International Law was carried out first in the Hague Conventions of 1899 and 1907, and later in the UN Charter in 1945. In turn, mediation, as well as arbitration procedures were actively used in international practice long before that.

The history of the formation and development of the institute of international public legal mediation is mainly considered by both foreign and domestic scholars in the context of the study of peaceful means of settling international disputes. Among the scholars who studied mediation in International Law at various times and thus addressed the evolution of this institution can be named A. Abashidze, J. Allain, L. Anisimova, S. Bailey, D. Berkovich, R. Bilder, I. Blyshchenko, C. Bourely, M. Brockhaus, M. Bruce, F. Vicuña, C. Vukovic, M. Garcia, D. Davidenko, G. Dam, Oppenheim, A. Cassese, D. Keron, D. Collier, M. O 'Connel, A. Ladyzhensky, S. Lazarev, M. Lebedeva, D. Levin, R. Mackenzie, J. Merrills, N. Samartseva, T. Samvelyan, Y. Semkina, E. Pushmin, R. Khorolsky, Z. Tropin, M. Trunk-Fedorova, R. Caesar, R. Shabtai, G. Shinkaretskaya, G. Sharmazanashvili, D. Wilkenfield. M. Yanovsky, S. Yuval and others.

However, particular studies of the history of the formation of the international public law mediation institution in the pre-Westphalian period in the national science of International Law have not been conducted, which is the purpose of the article. Its novelty consists in obtaining new knowledge about the use of mediation in international relations in the pre-Westphalian period to settle disputes; the establishment of the features of the development of this institution; the impact of mediation on the conclusion of the Westphalian Peace Treaty.

The article aims to study the history of the use of the institution of mediation in the pre-state, antique periods, and the feudal period before1648.

Mediation as one of the means of peaceful settlements of disputes

Considering the formation of legal regulation of the principle of peaceful settlement of international disputes in the pre-Westphalian period, it can be argued that intermediary or International Public Law mediation is one of the oldest means of resolving international disputes that have been used and continue to be used in international relations[1].

It should be noted that mediation as a technique of resolving a dispute is characteristic of both domestic and international public law; it is applied in various national jurisdictions and, as practice shows, is becoming more widespread, in particular

[1] The de facto principle of the peaceful settlement of international disputes developed as a response and the principle of the natural continuation of the prohibition of the use of force or threat in international relations. Their interrelationship shows the desire of the international community to establish not only the illegitimate use of force in international communication but also the mechanisms that can ensure the peaceful coexistence of the state and the international legal order.

in private law relations. Taking into account the existing approaches, we can state that the concept of mediation is used as a general term to denote various forms of mediation, which allows achieving the settlement of conflicts in various spheres of human activity.

Mediation in public International Law is an institution and one of the means of peaceful resolving of international conflicts, which in the most general form involves a third party entering into a dispute to reconcile the parties by proposing a mutually acceptable compromise settlement, along with other means of peaceful settlement of international disputes [1, p.13; 2, p.54; 3, p.28], and as J. Jackson rightly points out, serves as a reflection of the development of human civilization as a transition from force-oriented relationships to relationships that are subject to certain rules [4, p.109].

Mediation in legal science is considered as a way to resolve a dispute between the conflicting parties with the participation and under the guidance of a neutral third party – a mediator who is not empowered to make a decision that is binding on the parties [5, p.47; 6, p.45]; as the mechanism for settling disputes and disputes, which aims to develop mutually beneficial or mutually acceptable conditions for their resolution and voluntary imprisonment by the parties to the agreement in accordance with the terms [7, p.10], as the conciliation procedure between the conflicting parties by entering into voluntary negotiations with an uninterested third party, called a mediator or mediator, who assists the parties in the negotiations and facilitates an agreement between them [8, p.33], as the procedure of active participation in the conflict of a neutral disinterested party, which has authority over all conflicting parties and makes active efforts for mutually beneficial settlement of the dispute [6, p.8], as a method that allows the parties to the conflict, with the assistance of a neutral and impartial third party mediator, to develop on a voluntary basis a mutually beneficial and mutually acceptable solution that suits their interests [9, p.8], as the process by which the parties to a conflict, through a neutral mediator, systematically identify problems and seek ways and means of resolving them, sometimes alternative, and seeking to reach a consensus that suits their interests; it is the participation in the conflict of a neutral disinterested party that is authoritative for all conflicting parties [10, p.34].

The purpose of International public-law mediation is to settle the dispute in such a way as to ensure the preservation of peace and security. At the same time, it is desirable to settle disputes without the use of force.

Currently, mediation in the objective sense, as an institution and one of peaceful means of resolving international disputes, combines substantive and procedural rules of law (including soft law) that govern social relations arising from the fact that the conflict is resolved by voluntarily reaching an agreement between the parties on mutually beneficial legal and (or) actual actions (inaction), which are designed to eliminate the contradictions underlying the conflict.

Currently, mediation in an objective sense, as an institution and one of the peaceful means of resolving international disputes combines material and procedural rules of law (including soft law) that regulate social relations arising from the fact that the conflict is resolved through the voluntary resolution of the conflict is resolved by the voluntarily reaching agreement between the parties on mutually beneficial legal and (or) actual actions (inaction), which are designed to eliminate the contradictions underlying the conflict.

In a subjective sense, public law mediation as one of the types of peaceful means of resolving international disputes is a legally secured activity of the parties to the conflict and other participants in the reconciliation process, aimed at using a set of legal and other (psychological, axiological, etc.) means to resolve the conflict/ dispute, by voluntarily reaching agreement by the parties on mutually acceptable legal and (or) actual actions (inaction), which in turn are aimed at eliminating the contradictions underlying the conflict/dispute.

It should be noted that the social role of mediation as one of peaceful means of conflict resolving is not only to restore and maintain social harmony but also to cultivate a sense of stability and confidence in the participants in public relations in the existing legal order. The possibility of using international legal public mediation to resolve international disputes is one of the important guarantees for ensuring the stability of international relations and international legal order. At the same time, unlike mediation in private law relations, within the framework of public law international, the mediation main functions are not only the preservation of friendly relations between the parties (in our case, the subjects of international law, more often states) but also the promotion of peace and the prevention of armed conflicts in general.

Assumption of the existence of some mediation practices in the pre-state period

Mediation has its roots in the depths of human history. Without going into discussions about the origin of International Law and its periodization, we can agree with the opinion of Ukrainian researcher O. Butkevych, who notes that the main genetic developments in international relations and International Law were created in intergroup, intercommunal communication, and some of them survived to the stage emergence of international relations and international proto-law (leadership, early state) and formed their basis [11, p.157]. Among such "developments" was mediation. The author points out that at the stage of local groups in their relationship there are some elements of future institutions of International Law, such as *mediation in conflicts* (most often these functions were performed by a leader elected and responsible to the group as a whole "….", proxenia "…." [11, p.160].

O. Butkevych notes that in the described period the formation of primarily "most necessary" norms and institutions of International Law begins, and the existence of international relations would not be possible in absence of such norms and institutions [11, p.160]. Similarly, in his work "History of European Law", which has already become a classic of the history of state and law, Swedish researcher E. Anners believes that the practice of dispute resolution in the early stages of human civilization was of paramount importance for the formation of law itself [12, p.6]. Such considerations are based on the results of research in many sciences.

Mediation practices in the antic period

L.V. Davydenko writes about mediation as one of the types of conciliation procedures in primitive, traditional societies in his work "Amicable Dispute Resolution in the European Legal Tradition". In this work, the author provides a thorough description of various types of mediation for conflict resolution in the history of Europe, including public and private, church and secular, mediation of nobles, officials, businessmen. L.V. Davydenko notes: "The next most important step in the evolution of human society was the formation of a special peacekeeping power. In tribal society, leaders and elders were given the function of conciliators" [13, p.35].

By the way, according to this researcher, in the historical and legal literature, traditionally, much more attention is paid to the settlement by the mediation of international public disputes, mainly interstate, than to conciliatory procedures in the settlement of private disputes. Confirming this thesis, he points out that in the XVII century a treatise specifically devoted to mediation in international disputes appeared. This is a work on mediation in international disputes, written by Johann Wolfgang Textor, a famous German lawyer. In this paper, the author describes in great detail the situations that may require mediation[2], as well as the mediation procedure, the consequences of the mediator's actions, the characteristics that the mediator must meet [14].

According to another well-known English researcher Roebuck D., who is the author of numerous studies based on primary sources, mediation (mediation) and arbitration in ancient times are *almost the only means* of peaceful settlement of conflicts [15, p.136]. In support of this, from the works of the famous historian Herodotus, it can be concluded that mediation was one of the practiced ways of resolving conflicts, including even war [16, p.78; 17, p.25].

Who was empowered to mediate in ancient times? The mediators of that time, as a rule, were the most authoritative members of society, who enjoyed honor and power. Mediation was also carried out by relevant bodies and individual officials, politicians, and the military (in ancient Greece – amphictyonya, Oracle of Delphi, political and military associations "symmachia", politicians, winners of the Olympic Games; in Ancient Rome - the Roman people, the senate, kings, emperors, other statesmen, ambassadors). According to the method of implementation, preference was given to individual mediation, although slave-owning states also used a collective form of mediation. At that time, international practice and doctrine began to establish a distinction between mediation and arbitration, the criterion of which was the subject matter of the dispute and the legal force of the influence of third parties on the settlement of the dispute. However, no clear distinction was made between these institutions in slave-owning international law, as evidenced, for example, by the almost widespread use by ancient authors of the terms "arbitral" and "arbitration".

As an illustration, we can give an example from the book of Xenophon "Kiropedia" (ancient Greek Κύρου παιδεία; "Education of Cyrus"; IV c. BCE.) which describes the mediation of Cyrus II (a Persian king of the Achaemenid dynasty who ruled in

[2] Although this document had no legal force, its doctrinal and practical significance is not in doubt, and is certainly evidence of the development of the mediation mechanism in those days.

559-530 BCE) between the Armenians and the Chaldeans, who were constantly at war. The Chaldeans are mountain people whose lands bordered on the lands of the Armenians, and who were in constant conflict. Cyrus inflicted a military defeat on them, and then offered their ambassadors an agreement under which the Chaldeans were given the right to cultivate land in Armenia subject to the payment of taxes to the Armenian king, and also decided to independently control the mountain fortresses by agreement with the parties [4, p.168].

One of the important historical examples of mediation in the ancient period is the participation of leading ancient Greek cities in resolving the conflict between the Aetolian League and Macedonia during the First Macedonian War in 209 BCE. Notwithstanding the goals pursued by these cities, it should be noted that attempts at mediation on their part took place every year from 209 to 206 BCE, and eventually ended in peace [10, p.268].

A similar practice of engaging a mediator to resolve the conflict existed in ancient China and Persia. Gradually, this practice is gaining popularity and recognition, and the rules that are being created at this time are becoming formalized and systematized. Thus, we can conclude that mediation, which is known in the early stages of the formation of historical communities of people, along with other future institutions of public communication, was important for the formation of the foundations of international law.

In almost all modern studies of the institution of mediation, both in public international law and in the domestic law of states, an example is "proxenia", a social and legal institution that existed in ancient Greece [6, p.32]. The term "proxenia" (ancient Greek προξενία) meant hospitality. In ancient Greece proxenia meant appealing to a mediator to establish and maintain connections, negotiate, and interact with individuals, families, clans, tribes, and even city-states. Such a mediator was named proxenetas. This was a person capable of constructive communication and endowed with common sense, who was guided by the principal to establish or maintain friendly relations and enjoyed hospitality, privileges, honor, and respect in the host family, clan, state [13, p.168]. This person, due to custom, had responsibilities both to the principal and to the host party, had to take care of the interests of both parties and contribute to their implementation. Achieve this proxenetas could only by facilitating the reconciliation of interests and reaching agreements between the sender and the host party. It can be assumed that among the significant number of functions it performed proxenetas (care for the accommodation of foreigners; mediation between foreign officials and institutions; certification of wills made by foreigners; determining the order of liquidation of the foreigner's inheritance, if he had no legal heirs; mediation in trade; providing foreigners with access to temples for religious ceremonies), he could also to take a direct part in resolving disputes that have arisen between the parties to the relationship. In Ancient Greece itself, the institution of proxenia became widespread and was borrowed from other countries of the ancient world, entering the practice of international relations [18, p.234].

In the early feudal period, mediation was used both for the settlement of international disputes, frictions and for inter-feudal strife (about possession, about the boundaries of principalities, dignity, and honor, titles, etc.). This is due to the peculiarities of feudal, in particular industrial relations.

Mediation as the instrument of peaceful settlement of international disputes in the Middle Ages

During the Middle Ages, popes, emperors, papal legates, and bishops often acted as mediators in international and domestic strife. In general, at this time, due to the great influence of the Roman Catholic Church, the idea was preached that Europe was the only "Christian state" led by a father and emperor, in connection with which the latter is, so to speak, *ex officio* mediators and supreme arbitrators in all international and inter-feudal disputes [19, p.12]. Among the historical examples is the participation of Pope Alexander VI in the settlement of the confrontation between Portugal and Spain in their struggle for the establishment of rule over the colonies in the late XV century (1493-1494). We are talking about the papal bull "*Inter caetera*" from 04.05.1493 on the territorial division between Spain and Portugal of possessions in the Atlantic. One of the results of the adoption of the bulls was the conclusion on 07.06.1494 in the city of Tordesillas (Spain) Tordesillas agreement between Spain and Portugal on the division of territories in the newly discovered lands.

It should be noted that in Kievan Rus', representatives of the Orthodox Church also acted as mediators in disputes between rulers of states, and in inter-feudal inter-princely internal disputes. Thus, in 1357, Metropolitan Oleksii, at the request of the Grand Duke of Moscow Ivan Ivanovich, went to the Horde, where, acting as a mediator, held successful negotiations with Khan Berdybek, who as a re-

sult of these negotiations refused to pay a new tribute and stopped threatening war [20, p.53; 21, p.15]. Oleksii also acted as an arbitrator between Prince Dmitry of Moscow and Prince Mikhail of Tver (Tverskoy) in 1367, and Bishop Euthymius of Tver (Tverskoy) was a mediator in negotiations between the same princes in 1375 [22, p.131, 145].

In medieval Christian Europe (Respublica Christiana) the special authority to ensure the preservation of peace between Christian peoples belonged to the popes and the emperor, they were mediators ex officio in various international conflicts [20, p.54]. The intervention of the pope, rarely the emperor, in international disputes with a view to their peaceful settlement through good offices, mediation or arbitration was perceived by the peoples of Europe as appropriate and necessary. Known cases of resolving interstate disputes by the Pope or his representatives (cardinals, nuncios, etc.) through good services or mediation are peace between France and England (1360), peace between Charles VII of France and Duke Philippe of Burgundy (1435).

An illustration of successful mediation efforts can be considered the conclusion of peace between Ivan the Terrible and Stefan Batory in 1582 in the Zapolska Cave through the mediation of the papal ambassador Possevino. In 1617, Truce of Yam-Zapolsky, a peace treaty between Sweden and Russia was concluded with the mediation of the British ambassador Duwson Merike (in some sources Ivan Ulyanov) [20, p.63].

In the period of absolutism, the mediation from the predominantly individual (carried out by popes and legates), passed to the collective mediation of sovereigns and diplomats carried out by them at international congresses and conferences. This time can be considered the heyday of mediation. As a desirable means of facilitating the peaceful settlement of disputes that may arise, the use of mediation was enshrined even in individual treaties, mostly bilateral. It should be noted that the development of the institution of international public mediation is caused by the need to end the centuries-old wars between states. It is interesting that in the period of absolutism there is a distinction between mediation, international arbitration, and good services [23, p.96].

Mediation ultimately played an extremely important role in resolving one of the longest-running conflicts in Europe at the turn of the Middle Ages and modern history. This was the Thirty Years' War (1618–1648) in the Holy Roman Empire, in which almost all European states were involved.

Considering that from 4.5 to 8 million people died in the Thirty Years War, and continuous wars did not stop for decades, the need for peace became increasingly apparent. Reconciliation took place in 1648, and treaties were signed (Münster and Osnabrück on May, 15 and October, 24, respectively), which are widely known as the Treaty of Westphalia. The mediators were Fabio Kigi, the Papal Nuncio to Cologne, and the Venetian envoy Alvise Contarini.

The signing of this historically significant treaty was a turning point and the starting point in the history of modern International Law, many concepts of which (official recognition, mediation, etc.) were first formulated during the negotiations in Münster and Osnabrück. Treaty laid the foundation for the implementation of the principle of peaceful settlement of international disputes, which is the legal basis for all means of resolving international disputes.

Conclusions

The study of the formation and development of mediation procedures as means of peaceful settlement of international disputes in the pre-Westphalian period, suggests that mediation is one of the oldest means of conflict resolution, known to human communities since ancient times.

Despite the assumption that the elements of mediation existed in the so-called "pre-state" period, historical monuments show that mediation was actively used as a procedure of reconciliation in the ancient period. It is at this time that the rules of mediation begin to take shape, which is still applied today. The development of the foundations of the institution of mediation in the early feudal period, and the active participation of the Roman Catholic Church as an international mediator is an objective reflection of the evolution of European civilization, which is gradually beginning to realize the need for peaceful settlement of international disputes.

The period of absolutism marked the transition of mediation from predominantly individual (carried out by popes and legates) to collective mediation of sovereigns and diplomats, carried out by them at international congresses and conferences. This time can be considered the heyday of mediation.

Mediation itself played an extremely important role in the conclusion of the Treaty of Westphalia in 1648, which became the starting point in the history of modern international law and laid the foundation for the implementation of the principle of

peaceful settlement of international disputes, which is the legal basis for all international disputes.

Conflict of interest

The author declares no conflict of interest.

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