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The tradition of ADR (Alternative Dispute Resolution) as an alternative form of justice in the American legal culture

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Introduction

The growing process of the functional and social differentiation of social systems makes weaken the importance of the universality of the legal proceedings. One of the effects of more spectacular complexity and unpredictability of social phenomena and increasing of axiological pluralism is the “relaxation” of procedures under which disputes are resolved and agreements are made¹. They need to be more open and flexible to meet the growth and differentiation of social changes. In response to these challenges there are changes in the language, structure of the legal system and the procedures for its use. One manifestation of this trend is the emergence of “alternative forms of justice”. They are generally less formal. They allow the parties to have a greater impact on the course and outcome of the proceedings. They also take into consideration the subjective interests of the parties. The term “alternative form of justice” is rather ambiguous. There are at least three varied meanings of that term. Firstly, it may include the alternative forms of judicial proceedings in relation to the traditional procedure, for example in non-litigious proceedings and various separate proceedings. Secondly, it refers to all forms of proceedings that are not based on judicial decision-making mode, for example, judicial settlement procedure, conciliation or arbitration². Two types of alternatives presented above – taking into

¹ The article presented here has appeared with some changes on-line <[http://lawconference.sk/bpf/_index.php?page=14 &lang=en](http://lawconference.sk/bpf/_index.php?page=14&lang=en)>.

² The essence of judicial proceedings is: binding decisions and supporting the system with legal sanctions, depriving the parties of the influence on the choice of a judge and determining material rules and procedures for adjudication, ensuring them the opportunity to actively participate in the proceedings mainly by quoting the relevant arguments, evidence and reporting applications, presenting evidence and other procedural demands. L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, Warszawa 2003, p. 213.

account the place of the course of legal proceedings – are described as internally alternative. In the third meaning, the alternative to the court proceedings will be all forms of over judicial conflict resolutions and decision-making in individual cases. This type of alternatives is described as external alternatives³.

In the presented article the third perspective of the “alternative forms of justice” is taken into account, especially in the context of issues related to solving and resolving conflicts⁴. Today, the basic concept of the area is the Alternative Dispute Resolution (abbreviated ADR) which is “each separable dispute resolution procedure, based on certain assumptions and determining the parent sequence of behaviors organized parties and – possibly – other parties involved in the dispute”⁵. ADR involves contractive (negotiative), mediatory-conciliate and arbitration procedure of solving conflict, as well as other related mixed forms⁶. The primary objective of ADR is to support (follow-up) the court as an institution that adjudicates disputes to improve the traditional justice system⁷. Compared to litigation, alternative procedures are more flexible, focused on decision-making subjectivity of the parties. It should be also emphasized the prospective orientation of the disputes. In many cases it is not only the question who was “to blame” in the past, but rather to ensure good

³ Ibidem, p. 230–321.

⁴ It is accepted here that that the concept of “conflict” means “the state of tension between two or more people or groups that have conflicting objectives”. See, E. Smoktunowicz (red.), *Wielka encyklopedia prawa*, Białystok – Warszawa 2000, p. 364. More on the phenomenon of social conflicts: S. Chępa, T. Witkowski, *Psychologia konfliktów. Praktyka radzenia sobie ze sporami*, Taszów 2004; R. Dahrendorf, *Nowoczesny konflikt społeczny. Esej o polityce wolności*, Warszawa 1993; Z. Pawlak, *O konfliktach*, Warszawa 1987; Z. Uniszewski, *Konflikty i negocjacje*, Warszawa 2000, p. 121, 126–139. In the literature, there is a separation between a conflict and a dispute. A dispute is regarded as one of the possible stages of a conflict, which is “socially revealed conflict of certain social actors (individuals, groups, or their organization). A. Korybski, *Alternatywne formy rozwiązywania sporów w USA. Studium teoretycznoprawne*, Lublin 1993, p. 26. The same is from the point of view of J. Kurczewski: “conflict may develop into dispute, if contrary claims of the parties and their incompatibility are communicated to the environment, even to one person” – see, J. Kurczewski, *Spór i jego rozwiązanie*, [in:] *Konflikt i przystosowanie*, „Prace Instytutu Profilaktyki Społecznej i Resocjalizacji Uniwersytetu Warszawskiego”, vol. IV, Warszawa 1979, p. 10–11. In the debate we have to deal with a specific decision-making process that is located in a normative context in which the parties pursue their own interests at the expense of the interests of the other parties. It is based on the axiological or legal justification of their demands. In the dispute, conflicting interests are transformed into parties’ claims.

⁵ A. Korybski, op. cit., p. 104.

⁶ For more see, R. Tokarczyk, *Alternatywne rozstrzygnięcie sporów w Stanach Zjednoczonych*, „Palestra” 9–10/1995; L. Morawski, *Proces sądowy a instytucje alternatywne*, „Państwo i Prawo” 1/1993, p. 12–24; R. Morek, *ADR w sprawach gospodarczych*, Warszawa 2004; A. Rau and others, *Processes of dispute resolution. The role of lawyers*, New York 2002.

⁷ In connection with that purpose there appeared some proposals of replacing the term “Alternative Dispute Resolution” with such terms as „Efficient Dispute Resolution” (EDR), „Complementary Dispute Resolution” (CDR), „Supplementary Dispute Resolution” (SDR). A. Korybski, op. cit., p. 87. The term of „Dispute Resolution” contains every forms and mechanisms of controlling the disputes (including litigation) – operating mostly in American reality, only in the case of failure the forms of dispute resolution based on negotiations. Ibidem, p. 10.

relations and cooperation in the future. This approach causes the fact that sometimes there is the situation that legal proceedings are abandoned. It allows considerably to shorten time and to reduce costs⁸.

An important premise for the development of ADR is to recognize that in democratic societies in the area of civil liberty there is a right to choose the institution that will settle the dispute. Monopolizing the functions of the courts appears to be justified only if there are substantial public reasons such as serious criminal matters. In free societies, citizens should have the right to a court, not the obligation of the state justice. Compulsion to judicial proceedings should be reduced to the situation when it is necessary⁹. In short, in a pluralistic society there is also demand of pluralism in the forms of justice¹⁰.

The outline of evolution of ADR (ADR in cultural and historical perspective)

A conflict is a common phenomenon in all cultures. In addition to resolving conflicts by force, there are also used non-violent means. This can be achieved in various ways. The dispute could be settled by a judgment announced by a ruler, a judge or an arbitrator. To end the conflict could also help the intervention of an independent person, endowed with confidence and authority. Therefore, some forms that are similar to the contemporary forms of mediation should not be treated as a new phenomenon¹¹. They are rooted in a lot of legal cultures and it can be considered that essentially they precede formal proceedings of the courts. Even in the primitive legal cultures some method based on conciliation may be found. There were also in almost every ancient country¹². For example, there was a demand in Sumerian state for prior to settlement of the dispute by the council to serve the functions of the court, the case was presented to a special person who was to assist the parties in reaching a solution to the dispute. Mediation has been practiced in Jewish, Christian, Hindu, Buddhist, Confucian, Islamic and Indian tribes cultures¹³.

Conciliatory methods have a long tradition in Asian countries based on Confucianism. There was considered that taking legal actions demonstrated the inability to pose peaceful relations with others, so it was a shameful last resort. Lack of confidence in the courts, the perception of them as a corrupted institution, biased, slow, devoid of moral authority, meant that in China until the early twentieth century, there

⁸ S. Włodyka, *Arbitraż gospodarczy*, Warszawa 1985, p. 13.

⁹ L. Morawski, *Główne problemy...*, p. 237–238.

¹⁰ L. Morawski, *Proces sądowy a instytucje alternatywne...*, p. 22.

¹¹ J.T. Barrett, J.P. Barrett, *History of Alternative Dispute Resolution*, San Francisco 2004, p. 1–18.

¹² See, J. Kurczewski, *Prawo prymitywne. Zjawiska prawne w zjawiskach przedpaństwowych*, Warszawa 1973, p. 8–13.

¹³ J.D. Rosenberg, *In Defense of Mediation*, "Arizona Law Review" 33(467)/1991, p. 471.

weren't any classic legal profession – a judge, a prosecutor, an advocate. These roles were fulfilled, if it came to a judicial resolution of the dispute, people enjoying the esteem sages¹⁴. They also functioned as intermediaries transferring information and offers to parties of the conflict and assisting in finding the optimal solution of the dispute. Similarly, conciliatory attitude is present in Japan, where only a small number of cases brought before the court. It is associated with the cultural emphasis on the search for understanding, balance and harmony in social relations and the avoidance of selfish individualism.

The art of mediation has developed well in areas dominated by Buddhism. In India Hindu villages used traditional justice system called panchaya. In this system, the bench of five elderly people served multiple functions, including mediation¹⁵. An important role in the practice of mediation played Buddhist monastic communities.

Unfortunately, there is no direct equivalent of mediation in Roman law. The institution of varied forms of mediation seems to be developed rather poorly. In connection with Roman law there are some traces and there could be found some references to the institution of “transactio”.

In the culture of Judaism the mediation functioned already in biblical times, and the key role there was played by rabbis. In the Christian tradition there are interpretations that recognize Christ as the chief mediator. As a consequence, peacekeeping duties in support of peace are assigned to the clerics¹⁶.

With the development of the modern Western world the evidences of mediation have gained more pragmatic than religious nature. They spread in the area of trade, in manufacturing, where the guild organizations served as forums for mediation and their members as mediators.

The determinants of the American system of civil law in the context of ADR

The modern ADR movement is rooted primarily in the common law legal culture that created for him more friendly ground than it was in the positive law systems. It is interesting to consider that the fastest and most efficient development of ADR took place in the case law countries: the United Kingdom, the United States, Canada, Australia and New Zealand. In this context, it is reasonable to ask whether, and what features of the common law system promote the usage of non-judicial forms of resolving conflicts. It should be noted here the nature of civil

¹⁴ R. Tokarczyk, *Współczesne kultury prawne*, Kraków 2000, p. 264.

¹⁵ C.W. Moore, *The Mediation Process. Practical Strategies for Resolving Conflict*, San Francisco 1996, p. 20.

¹⁶ Ibidem, p. 37. According to *Ewangelia według Św. Łukasza (2:5–6)*: “there is one God and one mediator between God and man and his name is Jesus Christ”. *Biblia Tysiąclecia. Pismo Św. Starego i Nowego Testamentu*. Poznań 2003.

procedure, the role of the judiciary, education and legal practice. The adoption of specific perceptions and actions in these areas is of course due to a number of elements of political, cultural and axiological preferences associated with the society. Typically, the concrete solutions relate to more general philosophical assumptions. For example, the reflection of John Locke influenced American Constitution, especially formulated on its basis the idea of inalienable rights. The author of *Two Treatises on Government* understood the society and the government as a result of the agreement, originally signed in the hypothetical state of nature, where all men were equal and free and their major motivation for the establishment of a political community was not anxious about his own life but more rational reasons justifying the need to protect the broad sense of ownership that were life, liberty, and property¹⁷. Thus, a key objective of the social contract was better and more effective protection for natural rights of an individual. This message is also expressed in the text of the Declaration of Independence of 4.07.1776. In the future the Declaration became the basis of the American Constitution. The declaration claimed that “all men are created equal; they are endowed by their Creator with certain unalienable rights and among these rights are life, liberty and the pursuit of happiness. To secure these rights there are appointed governments among Men, deriving their powers from the consent of the governed”¹⁸.

It is worth mentioning that especially today, in a lot of aspects the United States and most of Europe states refer to very similar traditions, for example in the case of the democratic system of government, free market economy, aiming to ensure a fair trial and due procedure, equal treatment of the parties, the right to defense, the right to be heard in the court. However, these general principles are implemented in different ways, due to the varied history of these countries, with the other structures of political and legal institutions. The set of conditions on the one hand affect the nature of the mentality of the society, and on the other this mentality shapes the institutional system axiology.

Alex de Tocqueville tried to depict fundamental characteristics of the American society. He emphasized that Americans value the individuality and autonomy of individuals very highly but it does not lead to closing within their own privacy. On the contrary, the scale of involvement of citizens in various forms of grassroots activity shows the need to search for new solutions and it is often associated with the need to develop the consensus between the public and private interests. Tocqueville says: “Regardless of age, position and mental level Americans are constantly associating. They have not only commercial and industrial companies, which include everyone, but also plenty of others: there are religious and moral associations, associations of serious and trivial character, associations dealing with the general and very specific things, large and small associations. Americans associate to organize

¹⁷ J. Locke, *Dwa traktaty o rządzie*, trans. Z. Rau, Warszawa 1992, p. 222.

¹⁸ *Deklaracji Niepodległości*, available at <www.republika.pl> (last visited: 20.06.2013).

games, to create seminars, to build inns, to build churches, to distribute books, to send missionaries to the antipodes. In this way it is assumed in American hospitals, prisons and schools. Americans also associate in order to proclaim a truth or by providing an example in the community to develop any feelings”¹⁹.

It is not surprising that in many situations where the system of state institutions proved to be inefficient, where there were some organizational gaps, there were some attempts to resolve that situation it. In these circumstances there was created the law with some differences from the continental system. It was connected with the understanding of the role of law in achieving democratic ideals. The law was conceived not as a rigid system of rules and regulations, which are usually the result of long-term, the process gradually entering into force. The law was expected to keep up with the changing reality. It was to respond to the dynamic needs and social values²⁰. Such understanding of the role of law caused the adoption of the system of case law. Moreover, from the beginning in the minds of Americans there was dominating the hostility towards all forms of authoritarianism, bureaucracy and hierarchy. It concerned also the codification projects that was based on the assumption that the power of the state is a centralized structure, and it has certain responsibilities to the citizens²¹.

In the common law system, unlike the continental system, the role of the courts in the interpretation and application of the law is understood differently. “The United States has a strong society, but a weak government”²². Political power is distributed and the federal government shares his power with the states, local governments, administrative agencies and courts²³. The courts are more flexible and creative than in the legal system of civil law. The U.S. justice system is open to new types of complaints and disputes and the impact of political and social movements. Lawyers often play an important role in the struggle for the defense of individual rights, against corruption and the institutional arbitrariness.

In comparison with the courts system of positive law, the role of the American judiciary is undoubtedly higher. While in the case of the first ones, the courts only interpret the law created by the legislative bodies, American courts combine the legislative and interpretative functions. In the first system there is only source of

¹⁹ A. de Tocqueville, *O demokracji w Ameryce*, trans. B. Janicka, M. Król, Kraków 1996, p. 116–117.

²⁰ R.A. Kagan, *Adversarial Legalism. The American Way of Law*, Cambridge 2001, p. 10.

²¹ M.R. Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process*, New Heaven 1986, p. 17. Despite some attempts to codify some fields of law in the United States in the XXth century (one of the example could be The Uniform Commercial Code – UCC), the situation can not be comparable to the European codes, from the objective and territorial scope, even if the majority of states accepted UCC, but in compliance with the case law, every state jurisdiction developed its own interpretation of the legal articles. See, R. Tokarczyk, *Prawo amerykańskie*, Warszawa 2009, p. 39–40.

²² S. Krasner, *Defending the National Interest: raw materials investments and U.S. foreign policy*, Princeton 1978, p. 61.

²³ R.A. Kagan, op. cit., p. 15.

rights created by the normative acts of the legislature, in the second there are mainly the precedent decisions of courts. So, the American judges create, amend, apply and interpret the law²⁴. About their higher capability in the case of creating law proves the fact that before mediation systems was introduced in the United States by state laws, the judges launched pilot mediation programs in some courts ms. In addition, in the U.S. system there is greater participation of citizens who have the ability to bring an action, which includes the part of the constitutional complaint. They may also become the members of the jury.

A clear feature of the specificity of American legal system is adversarial proceedings with the active role of the parties, which with the help of lawyers play a dominant role in the process. The lawyers are able, among others. To use cross-examination, a discovery procedure, to interview and to prepare witnesses for a trial, and they routinely engage the in activities designed to collect and to present evidence²⁵. In the American procedure there was adopted the model of not engaging the judge in the process. A judge is a neutral and passive, the parties do not expect him to ask questions of witnesses²⁶. He is responsible for gathering relevant evidence. His task is not to seek or discovering the truth, but the decision whether the parties adequately proved their position. In this perspective, the court is seen as a forum where parties can meet to exchange arguments to enforce claims to each other. The role that in the American process play parties with their representative lawyers requires from them to initiate negotiations and active co-operation, as this is the requirement of the process.

The features of the American legal system affect its strong settlement in specific social realities, opportunities for innovative decisions (precedents). However, this system also has certain unpredictability, lack of coherence (complexity), and high costs. The result may appear to be complicated, uncoordinated, unjust, unfair or creating inaccurate or unfair precedents. Not surprisingly, that American accustomed to the bottom-solving social problems sought cheaper and faster methods of dispute resolution, which created a very fertile ground for the development of mediation²⁷. Settlement of disputes by mediation fits well with the American legal culture, for which it is vital for individualism, autonomy of the parties to the dispute and the conviction that an individual is equipped with the best knowledge as to how to implement the own needs and interests.

It is also worth mentioning that some changes have occurred in the past twenty years in the United States. The system has evolved into a system, which is based on the agreement and cooperation of the parties. Some features of the civil procedure create favorable conditions for the tendencies of seeking compromise solutions.

²⁴ R. Tokarczyk, *Prawo amerykańskie...*, p. 32.

²⁵ *Ibidem*, p. 126.

²⁶ *Ibidem*, p. 123.

²⁷ R.A. Kagan, *op. cit.*, p. 10.

Then, the parties and their representatives have the time for interaction and conversation. Some factors as the introduction into education at the level of primary and secondary schools, and most of all the faculties of law the lectures on the theory and practice of mediation and negotiation have played also an important role in creating the attitudes of conciliation²⁸.

The development of the contemporary ADR in the United States

There are two key concepts concerning general reasons for the development of mediation in the United States. The first one connects that process with the judicial crisis that manifests itself for example in the increase of the number of cases, in the extending time of the proceedings, in dissatisfaction of the parties with the outcome of the trial and high costs and difficulties in the enforcement of implementation that are published in authoritative, decisive pursuance of the provisions. Under these conditions, the mediation was the result of practically oriented research in the field of cheaper and more effective conflict resolution. The second theory focuses on the more abstract criteria of the introduction of mediation. They are based on the assumption of the need of the implementation citizens' freedoms and rights to improve access to justice. So, it was necessary to create new forums where conflicts would have been solved. These forums would make it possible to go beyond the rigid rules of procedural and substantive law, which are sometimes a barrier in reaching satisfactory solutions²⁹. Among the other reasons for encouraging the development of mediation – the incensement of the public awareness of individual rights and human dignity, willingness to participate and to control procedures where decisions are made directly and they concern individuals - can be also underlined.

Taking into consideration a chronological perspective for the development of mediation in the United States, it should be noted that the earliest institutionalized mediation was conducted on workers' rights. In 1947, relaying on existing institutions at the Labor Department there was created the Federal Mediation and Conciliation Service (FMCS). It was assumed that agreements between workers and employers developed by conciliation will allow obtaining more efficient stabilization of the area of employment and production, particularly by reducing the harmful effects of strikes³⁰.

Crucial for the development of mediation was the second part of the twentieth century; especially the 60s and 70s, when basing on the Civil Rights Act of 1964 there were established two important institutions for the development of mediation.

²⁸ E. Gmurzyńska, *Mediacja w sprawach cywilnych w amerykańskim systemie prawnym. Zastosowanie w Europie i w Polsce*, Warszawa 2007, p. 243.

²⁹ *Ibidem*, p. 5–6.

³⁰ C.W. Moore, *op. cit.*, p. 23.

The first was the Community Relations Service (CRS) at the Department of Justice. Its task was to mediate in local communities in the conflict of discrimination on grounds of race or nationality. The second agenda was the Equal Employment Opportunity Commission (EEOC), which investigated discrimination in the workplace and created against this background that led to the dispute mediation. In parallel with the activities of the state administration in the field of anti-discrimination there were developed some programs to promote mediation in local communities. Since the early 60s, the federal government financed the activities of the so-called (NJC's) Neighborhood Justice Centers which were engaged in the conduct of free or low-cost mediation in small neighborhood conflicts and matters of a criminal nature with a low social harm act³¹. Subsequently, the range of cases settled by ADR increased with the issues related to the care of children and divorce cases.

An important step in the development of mediation it was a conference organized in connection with the crisis in the judiciary in 1976, where Professor Frank Sanders of Harvard University presented the concept *multidoor courthouse* justifying the introduction of the justice system, in addition to traditional litigation, new ways of solving disputes cases that were brought to courts. The further development of mediation took place in the 80s when the emergence of a large number of scientific publications³² and branch magazines³³ devoted to this subject can be noticed. The last period of the development of ADR in the United States occurred in the 90s, when the methods of mediation started to be regarded as relevant and they were becoming more common tools to resolve disputes. They were applied to almost all types of civil cases in courts of all instances, starting from lower state courts instances and ending with the federal courts of appeal. Mediation also developed outside the courts – in this period a number of private companies and public organizations that practiced this form of dispute resolution came into existence.

ADR in the United States is full variety of forms. They can be divided into basic (primary), which include negotiation, mediation (conciliation), arbitration³⁴ and non-basic (secondary, hybrid, mixed, combined). The last ones assume the hybrid nature, combining elements form the basic elements of judicial and administrative proceedings such as med-arb, arb-med, small claims courts (courts for minor

³¹ Ibidem, p. 25.

³² W. Ury and others, *Getting Disputes Resolved: Designing Systems to Cut the Cost of Conflict*, San Francisco 1988, p. 120; C.W. Moore, op. cit., p. 23; see also the literature cited in J.T. Barrett, J.P. Barrett, op. cit., p. 215.

³³ For example, "Journal of Dispute Resolution in Missouri/Columbia", "Negotiation Journal"; for more see, J.T. Barrett, J.P. Barrett, op. cit., p. 214.

³⁴ Basically, the basic forms have already established in the culture of statutory law and have been described in the literature, for example R. Świeżak, M. Tański, *Alternatywne metody rozwiązywania sporów. Przegląd zagadnień*, Warszawa 2003; A. Jakubiak-Mironczuk, *Alternatywne a sądowe rozstrzygnięcie sporów sądowych*, Warszawa 2008; A. Kalisz, A. Zienkiewicz, *Mediacja sądowa i pozasądowa. Zarys wykładu*, Warszawa 2009; R. Morek, *Mediacja i arbitraż. Komentarz*, Warszawa 2006; A. Zienkiewicz, *Studium mediacji. Od teorii ku praktyce*, Warszawa 2007.

civil cases), mini-trial, neutral fact-finding, confidential listening, early neutral evaluation, private judging, online dispute resolution (ODR), summary jury trial (accelerated process by jury), baseball arbitration – last offer arbitration, ombudsman³⁵.

Taking into account the multiplicity of criteria, in addition to basic and hybrid forms of ADR there can be also distinguished varied divisions of ADR: the forms associated with courts (court-annexed) and not associated with courts (out of court) forms; public and private forms; formal and informal forms; voluntary and non-voluntary forms; with binding character and non-binding character forms; forms that are distinguished because of the nature of the potential third person, for example: *mediator, arbiter, moderator, advisor, evaluator, confidential, listener, ombudsman, private judge*³⁶.

Conclusions

In every epochs and cultures in parallel with the occurrence of conflicts there have appeared varied ways of overcoming these difficulties. One of the remedies was mediation. The humanism of mediation is associated with respect for an individual who, as one of the parties of conflict, has the right to participate actively in finding a solution. So, a person is given the impact on these areas of life, which are traditionally decided by the others: judges or arbitrators. Mediation stands out from the other ways of mastering disputes because gives all parties the chance of discursive making decision and expressing the will of seeking creative solutions outside the adjudical legal system. One of the results of the mediation is the harmonization and stabilization of social relations by strengthening the culture of dialogue and setting disputes in a conciliatory manner that prevent their reviving in the future.

The genesis of the modern movement of ADR is associated with the United States, where it was the need to reform the judiciary. The changes had to rely on a more efficient resolution of disputes, but also they should have been adapted to the transformation of civilization in the sphere of justice which essence is expressed in the other understanding of the role of law. The law has not only the right to dictate programs, objectives and means of action but should also create an organizational framework, standards of competence and decision-making procedures that allow social subsystems to solve their problems in an independent way. Such an approach is also a response to the changing structure of modern societies where not only individuals but also groups are becoming more autonomous and reluctant to the

³⁵ Hybrid forms that exist in the United States are presented in: E. Gmurzyńska, *op. cit.*, p. 14–24; R. Tokarczyk, *Prawo...*, p. 331–335.

³⁶ A. Korybski, *op. cit.*, p. 108–135; R. Tokarczyk, *Prawo...*, p. 329; R. Morek, *ADR w sprawach gospodarczych*, Warszawa 2004, p. 75–101; A. Rau and others, *op. cit.*, p. 1–124.

imperious and authoritarian forms of social control. It should be underlined that the success of mediation in the United States became the inspiration for the introduction of mediation programs in the other countries, particularly in Europe.

Streszczenie

Tradycja ADR (Alternative Dispute Resolution) jako alternatywna forma wymiaru sprawiedliwości w amerykańskiej kulturze prawnej

Słowa kluczowe: konflikt, mediacja, alternatywne formy wymiaru sprawiedliwości, prawo precedensowe (*common law*).

Przybierające na sile procesy funkcjonalnego i społecznego różnicowania się systemów społecznych sprawiają, że słabnie znaczenie uniwersalizmu postępowania sądowego. Jednym z efektów pogłębiającej się złożoności i nieprzewidywalności zjawisk społecznych oraz zwiększającego się pluralizmu aksjologicznego jest „rozluźnienie” procedur, w ramach których rozwiązywane są spory i uzgadniane stanowiska, gdyż muszą one być bardziej otwarte i elastyczne, by sprostać dynamice i zróżnicowaniu przemian społecznych. Odpowiedzią na te wyzwania są zmiany zachodzące w języku, strukturach systemu prawa oraz procedurach jego stosowania. Jednym z przejawów tej ewolucji jest pojawienie się „alternatywnych form wymiaru sprawiedliwości”. Są one na ogół mniej sformalizowane, umożliwiają stronom większy wpływ na przebieg i wynik postępowania oraz w większym stopniu uwzględniają subiektywne interesy stron.

Termin „mediacja” nie posiada bezpośredniego odpowiednika w prawie rzymskim. Można jednak odnaleźć pewne powiązania z instytucją określaną mianem *transactio* (umowa stron).

Współcześnie podstawowym pojęciem z obszaru alternatywnych form wymiaru sprawiedliwości jest *Alternative Dispute Resolution* (dalej: ADR), obejmująca kontraktowy (negocjacyjny), mediacyjno-koncyliacyjny i arbitrażowy tryb rozwiązywania oraz rozstrzygania konfliktów, a także inne pokrewne formy mieszane. Podstawowym celem ADR jest wsparcie (uzupełnienie) sądu jako instytucji rozstrzygającej spory zmierzające do udoskonalenia tradycyjnego wymiaru sprawiedliwości. W porównaniu do postępowania sądowego procedury alternatywne są bardziej elastyczne, zorientowane na decyzyjną podmiotowość stron.