

# Legal anomie in the sphere of alternative (out-of-court) dispute resolution

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**Abstract:** The study aims to identify the manifestations of legal anomie in the legal regulation of alternative conflict resolution in Russia's legal system and, based on the analysis of regulation in foreign countries, to offer possible ways to minimize anomie manifestations. Dialectical, formal-legal and comparative-legal methods were used in the research process. The article considers the legal regulation of mediation in Russia in a comparative-legal aspect with foreign countries and analyzes the current legislation and practice of its implementation. The study also revealed anomalous manifestations at the institutional and other levels of Russia's legal system. Declarative fixation of legal responsibility of mediators, as well as insufficiency of normative requirements to their professional level; absence of normative fixation of mandatory centralized bodies (associations) of mediators, which in turn generates insufficiency of corporate regulation of their activities. The study proposes to borrow foreign experience in the legal regulation of mediators' certification. The study also makes proposals to improve the current legislation.

**Keywords:** Legal anomie. Mediation. Alternative methods of dispute resolution. Conciliation procedures. Judicial conciliation.

**Summary:** **1** Introduction – **2** The concept of “legal anomie” – **3** Alternative resolution of legal disputes and legal anomie – **4** Conclusion – References

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## 1 Introduction

The development of social relations, including economic relations, inevitably leads to the complication of legal regulation, which consists of the adoption of new normative legal acts; the increase in the subjects of economic activity; the growth of various transactions. It is a deal of a certain law of “critical mass” of normative legal acts, and also of participants of public relations, the more they are, the more, respectively, increases the number of various disputes between them, as in many

cases public relations themselves conflicts and do not assume full coincidence of interests of the parties,<sup>1</sup> actually as most of the legal activity has initially conflicted character or there are conditions for the emergence and development of conflicts.<sup>2</sup> Accordingly, the workload of the judicial system is growing, which can no longer cope with the huge number of cases of civil and other characters and is unable to resolve them quickly and effectively, and the timeliness of justice is one of the guarantees of its fairness. Therefore, the state itself becomes interested in creating mechanisms of legal regulation, which would allow extrajudicial ways to resolve arising disputes, thereby contributing to the restoration of justice and social relations.

The institution of out-of-court dispute resolution is relatively new for the Russian legal system, largely borrowed from foreign legal systems. The very concept of “Alternative Dispute Resolution” is a generalization and includes various mechanisms by their legal character, namely, such as mediation, in some foreign countries – arbitration.<sup>3</sup> The manual of the International Institute for Conflict Prevention and Resolution (CPR) on mediation and Alternative Dispute Resolution in Europe notes: “the key can be considered the division of these processes into judicial, which results in a binding decision (for example, in the case of arbitration or expert opinion), and extrajudicial, which results in a non-binding decision (if it is, for example, an independent preliminary assessment or mediation)”.<sup>4</sup> In the Russian legal system, the mediation procedure is regulated by the Federal Law of the Russian Federation dated June 27, 2010, No. 193-Φ3 “On Alternative Dispute

<sup>1</sup> LIPINSKY, D., BOLGOVA, V., MUSATKINA, A., KHUDOYKINA, T. The notion of legal conflict, Conflict-Free Socio-Economic Systems: Perspectives and Contradictions (Bingley, West Yorkshire, 2019).

<sup>2</sup> LIPINSKY, D.A., MUSATKINA, A.A., BOLGOVA, V.V., KHUDOYKINA, T.V. Violation of Law As A Legal Conflict, Conflict-Free Socio-Economic Systems: Perspectives and Contradictions (Bingley, West Yorkshire, 2019).

<sup>3</sup> FERREIRA, D. B., GIOVANNINI, C., GROMOVA, E., SCHMIDT, G. R. Arbitration Chambers and trust in technology provider: Impacts of trust in technology intermediated dispute resolution proceedings”, *Technology in Society*, 68, 101872, 2022; FILIPCZYK, H. ADR in Tax Disputes in Poland – The State of Play and Perspectives. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, vol. 5, n. 10, 205, 2023; FERREIRA D.B., SEVERO L. Multiparty Mediation as Solution for Urban Conflicts: A Case Analysis from Brazil. *BRICS Law Journal*, 8(3), 5, 2021; FERREIRA, D.B., GROMOVA, E.A. Hyperrealistic Jurisprudence: The Digital Age and the (Un)Certainty of Judge Analytics. *Int J Semiot Law*, 36, 2261, 2023; GROMOVA, E.A., FERREIRA, D.B., BEGISHEV, I.R. ChatGPT and Other Intelligent Chatbots: Legal, Ethical and Dispute Resolution Concerns. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 05, n. 10, 153, jul./dez. 2023; GROMOVA E., IVANC T. Regulatory Sandboxes (Experimental Legal Regimes) for Digital Innovations in BRICS. *BRICS Law Journal*, 7(2), 10-36, 2020; HALOUSH, H.A. The Liberty of Participation in Online Alternative Dispute Resolution Schemes. *International Journal of Legal Information*, 36(1), 102, 2008; MAIA, A., FLÓRIO, R.A. Online Dispute Resolution (ODR) / Mediação de Conflitos On-line Rumo à Singularidade Tecnológica? *Revista Brasileira de Alternative Dispute Resolution – RBADR*, vol. 5, n. 10, 39, 2023; SOLHCHI, M. A., & BAGHBANNO, F. Artificial Intelligence and Its Role in the Development of the Future of Arbitration, *International Journal of Law in Changing World*, 2(2), 56, 2023.

<sup>4</sup> International Institute for Conflict Prevention and Resolution (CPR) Guidelines on Mediation and Alternative Dispute Resolution in Europe (New-York, 2015).

Resolution Procedure with the Participation of a Mediator (Mediation Procedure)”.<sup>5</sup> In view of the fact that in foreign countries the mediation procedure emerged much earlier than in Russia, there is a need to conduct research, which will be conducted on the basis of comparative-legal and formal-legal methods, as well as taking into account the achievements of such branches of scientific knowledge as general sociology and sociology of law.

The aim of the study is to identify the manifestations of legal anomie in the sphere of legal regulation of alternative conflict resolution in the legal system of Russia, as well as on the basis of the study of regulation in foreign countries to offer possible ways to minimize anomie manifestations. Methodology – dialectical, formal-legal and comparative-legal methods were used in the research process.

## 2 The concept of “legal anomie”

The concept of anomie was introduced into scientific circulation by the famous French sociologist E. Durkheim,<sup>6</sup> further developed in the works of R. Merton,<sup>7</sup> and since the second half of the XX century and up to the present time has become one of the central trends in sociology.

The concept of legal anomie, in contrast to Western legal thought for Russian legal science, is relatively new. In its most general form, anomie means “normlessness” or the absence of normativity itself. However, to say that anomie is “normlessness” inherently does not mean to reveal its legal characteristics.<sup>8</sup> Normlessness is only one of the manifestations of legal anomie, which consists of the absence of legal norms themselves in the presence of the necessity (need) of nominal legal regulation of social relations.

Manifestations of legal anomie are diverse, they may consist of the internal rejection of existing legal norms by a significant part of the population of the country; mass non-compliance with regulations; substitution of legal norms with rules and the use of so-called “situational law”, which is not really a right, and so on.

Another extreme of legal anomie is excessive regulation of social relations by the presence of requirements that are practically impossible to fulfill.<sup>9</sup> It is always noted that anomie processes intensify during various crises occurring in the state-organized society.

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<sup>5</sup> Collection of Legislation of the Russian Federation. 2010. No. 31. Art. 4162.

<sup>6</sup> DURKHEIM, E. Suicide. Sociological study. M., 1994. P. 234; DURKHEIM, E. On the separation of social labor. Method of research (M.: Nauka, 1990). P. 230.

<sup>7</sup> MERTON, R.K. Social theory and social structure (M.: AST, 2006). 873 p.

<sup>8</sup> MALKO, A.V. Legal life of society, anomie and problems of unity of legal space in modern Russia, State and law, 3, 5, 2023.

<sup>9</sup> LIPINSKIY, D.A., IVANOV, A.A. Review of the concepts of legal anomie in foreign and Russian sociological and legal thought, State and law, 11, 49, 2023.

Unlike Russian legal thought, foreign science has developed various concepts of legal anomie, which can be conditionally divided into several groups: legislative;<sup>10</sup> status;<sup>11</sup> state-legal;<sup>12</sup> cultural<sup>13</sup> and others. We are primarily interested in the concepts related to legislative, cultural and state-legal factors.

### 3 Alternative resolution of legal disputes and legal anomie

At first glance, there may be an impression that it has nothing to do with legal anomie in the sphere of alternative resolution of legal disputes, in our case – with mediation. However, it is not by chance that we have indicated that the mediation procedure is regulated by one normative legal act – the Federal Law “On Alternative Dispute Resolution Procedure with the Participation of a Mediator (Mediation Procedure)”. Is it possible to argue here about normlessness as one of the manifestations of legal anomie? On the one hand, there is a system of interrelated norms enshrined in the above-mentioned normative legal act. On the other hand, article 17 of this law, which states that “with the aim of developing and establishing standards and rules of professional activities of mediators, as well as the procedure for monitoring compliance with the requirements of these standards and rules of mediators who are engaged in professional activities, and (or) organizations engaged in activities to ensure the conduct of mediation procedures, may establish self-regulatory organizations of mediators”. Thus, the legislator assumed that in the course of time self-regulatory organizations, and possibly their associations, would emerge, which would adopt corporate normative legal acts mandatory for this sphere of activity, i.e., the state delegated its powers in this case. For example, such a normative act could become a “Code of Ethics for Mediators”, by analogy with the “Code of Ethics for Lawyers”, but alas, in the 13 years that have passed since the adoption of this normative legal act, this has not happened. It should be noted that there are separate codes of very limited scope by subject, for example, the “Code of Professional Ethics of Mediators of the Mediation Center of the Russian Union of Industrialists and Entrepreneurs” or the “Code of Mediators of Russia of the National Organization of Mediators”.

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<sup>10</sup> GOLDIN, A. Sobre los Derechos del Trabajo de América Latina: evolución y perspectivas, *Trabajo y Derecho*, 48, 12, 2019.

<sup>11</sup> ANDRADE SALAZAR, O.L., GALLEGOS, S.B., ROSILLO ABARCA, L.V. The incidence of legal certainty and collection analysis by means of third party intervention in ecuadorian legislation, *Universidad y Sociedad*, 14, 541, 2022.

<sup>12</sup> ALWAZNA, R. Y. Culture and law: The cultural impact on islamic legal statements and its implications for translation, *International Journal of Legal Discourse*, 2, 225, 2017.

<sup>13</sup> ANDRADE SALAZAR, O.L., GALLEGOS, S.B., ROSILLO ABARCA, L.V. The incidence of legal certainty and collection analysis by means of third party intervention in ecuadorian legislation, *Universidad y Sociedad*, 14, 541, 2022.

Despite the fact that the term “national organization of mediators” is used in the title, it cannot be called an all-Russian organization. In this sense, there should be a single local normative act for all mediation subjects. However, in order for it to be adopted, it is necessary to create the Chamber of Mediators of the Russian Federation and its branches functioning in the constituent entities of the Russian Federation, again by analogy with the Chamber of Advocates of the Russian Federation. However, the creation of such non-state bodies requires appropriate legal regulation and addition of new norms of organizational character to the Federal Law of the Russian Federation “On Alternative Dispute Resolution Procedure with the Participation of a Mediator (Mediation Procedure)”.

Logically, the question may arise as to why another body is needed, and whether it will not create bureaucracy and not contribute to the development of mediation. It seems to us that it should take on the role of a corporate standard-setter. So, if we turn to foreign experience of legal regulation of mediation, we can see that according to the International Institute for Conflict Prevention and Resolution they have developed regulations for mediation.<sup>14</sup> “Some other Administrative Dispute Resolution Centers have also issued a number of procedural rules that can be used both when the parties have agreed in advance in a dispute resolution clause and when they agree to a mediation procedure when a dispute already exists. For example, the Arbitration Chamber of Milan; the Center for Effective Dispute Resolution in London; the Center for Mediation and Arbitration in Paris”.<sup>15</sup> Foreign countries have developed mediation rules for specific sectors of the economy. Thus, in the sphere of commodities turns over, the use of arbitration rules of GAFTA (Grain and Feed Trade Association) is widespread. In the field of shipping and water rescue, there are several sets of rules. For example, the rules of the Society of Maritime Arbitrators. The CPR Group has also issued guidelines on the use of mediation in patent disputes, the Rules for Rapid Mediation and Arbitration, it has developed principles for mediation in disputes between insurers and policyholders, and so on. We do not seek to analyze and name all corporate regulations adopted in other countries, but our aim is to show the role of mediators’ associations in regulating their actions.

Thus, in this case we are faced with legal anomie, which is limited in character. It can be called the minimum manifestation of legal anomie in the considered sphere of legal regulation, which is local in character, because, in addition to

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<sup>14</sup> International Institute for Conflict Prevention and Resolution (CPR) Guidelines on Mediation and Alternative Dispute Resolution in Europe, <https://www.cpradr.org/RulesCaseServices/CPRRules/MediationProcedure>.

<sup>15</sup> International Institute for Conflict Prevention and Resolution (CPR) Guidelines on Mediation and Alternative Dispute Resolution in Europe, <https://www.cpradr.org/RulesCaseServices/CPRRules/MediationProcedure>.

local anomie, there may be more global anomie manifestations, which, as a rule, are associated with the change of socio-economic formation. For example, Russia experienced such anomie in 1917-1924, as well as in the 90s of the last century, which it successfully coped with, but anomie manifestations, which are alien to our society, legal culture, mentality remained at present.

Researchers who analyzed the experience of mediation in foreign countries point out that there are different approaches to its regulation, not in terms of its implementation, but in terms of organization and control. In particular, the UK is characterized by the presence of various bodies controlling the activities of mediators; in Germany, part of the mediation activities are carried out by notaries;<sup>16</sup> in Holland only control of mediation activities is regulated;<sup>17</sup> China in the field of labor relations is characterized by the presence of mediation as a mandatory stage of the process, which is aimed at reconciliation of the parties,<sup>18</sup> and in Italy mandatory pre-trial conflict resolution is provided for most cases.<sup>19</sup> At the same time, the popularity of mediation procedures in China is higher than in the USA.<sup>20</sup> Conventionally, the approaches to mediation regulation existing in different countries can be divided into two large groups. The first group includes countries with strict legal regulation of both mediators' activities and mediation procedures themselves. The countries in the second group are more characterized by regulation at the level of corporate acts. It is difficult to refer Russia to any of these groups, for reasons that will be discussed later.

If we compare Russia and China, where the legal regulation of mediation began at about the same time, we can note the undoubted popularity of pre-trial settlement in China, which has surpassed even the United States of America in the number of cases. Mediation is not popular in Russia, but it could significantly relieve the judicial system.

Over the last two years, Russia has become very skeptical of Western legal institutions and constructions that we are trying to implement in the Russian legal system. As A.V. Malko correctly notes, "A balanced approach is necessary, and it is inadmissible to criticize everything indiscriminately, only on the grounds that it is "Western" or foreign. In the conditions of globalization, the borrowing of legal

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<sup>16</sup> REUTOV, S.I. Mediation in modern legal practice: opportunities and prospects (Perm, 2015).

<sup>17</sup> ELISEEVA, T.S. Foreign experience of legal regulation of alternative dispute resolution procedure // *Legal World*. 2015. No. 6. Pp. 20-21.

<sup>18</sup> MARKOV, S.M. Chinese model of labor dispute mediation: a sociological perspective // *International scientific research journal*. 2015. Vol. 6. Pp. 40-47.

<sup>19</sup> GAYDAENKO, N.I. Mandatory mediation: the Italian experience. *Court of Private Arbitration*, 1 (79), 156, 2012.

<sup>20</sup> GUBAYDULLINA, E. KH. Foreign experience in the development of mediation as an out-of-court dispute resolution institution and its comparison with the experience of the Russian Federation. *Issues of economics and law*, 9, 21, 2023.

constructions and ideas, if it goes naturally and corresponds to the culture of the “host” country, is quite justified. If properly integrated, foreign institutions can be effective in the process of their implementation in practice. Besides, there are common, and to some extent universal, normative and value principles, on which the legal systems of many states are based. A different situation is observed if in the process of interaction there is a “blind” (mechanical) borrowing, in which legal constructions and ideas do not correspond to the nationally verified interests and legal culture of society as a whole, as well as the legal consciousness of the majority of its citizens”.<sup>21</sup>

Thus, when attempting to implement a foreign legal institution, first, it is necessary to assess its compliance with existing values, mentality, spiritual, cultural and other traditions. It seems that there are no norms in the mediation institute that do not correspond to our values. The reasons why citizens do not seek mediation services are most likely in the sphere of their legal consciousness and are closely related to legal infantilism and often legal ignorance.<sup>22</sup> Moreover, this problem cannot be solved overnight, as it requires appropriate legal propaganda and raising the level of legal culture of citizens.<sup>23</sup>

The question arises naturally as to which path Russia should follow in the future? In the direction of improving legal regulation by the state or self-regulation at the level of corporate normative legal acts. In self-regulation, taking into account the specifics of our mentality and the level of legal culture, there is a danger of turning the law into a “wrong”.<sup>24</sup> On the other hand, the state should not create only prohibitions with obligations in order to regulate the activities of mediators. It is also necessary to stimulate mediation, as well as to create the necessary socio-economic, organizational and other conditions for its implementation. The legal literature points to the need to create standards for the provision of qualified legal assistance in the Russian Federation,<sup>25</sup> it seems that part (section) of such standards should be the requirements for the provision of mediation services, because in essence it is also part of legal assistance.

It is believed that the Federal Law of the Russian Federation “On Alternative Dispute Resolution Procedure with the Participation of a Mediator (Mediation

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<sup>21</sup> MALKO, A.V., LIPINSKIY, D.A., MARKUNIN, R.S. Legal anomie in the legal system: theoretical and methodological foundations of research // Law enforcement. 2023. T. 7. No. 3. Pp. 5-14.

<sup>22</sup> MALKO, A.V., LIPINSKIY, D.A., ZRYACHKIN, A.N., MUSATKINA A.A. Psychological aspects of deformation of legal consciousness and legal responsibility, *Psychology and law*, 4, 153, 2022.

<sup>23</sup> MALKO, A.V., GURYEV, V.V., ZATONSKIY, V.A., KROTKOVA, N.V. Legal culture, legal policy and human rights (review of the materials of the scientific-practical conference), *State and law*, 2, 159, 2021.

<sup>24</sup> MALKO, A.V., TROFIMOV, V.V., ZATONSKIY, V.A. Once again about right and wrong, or why legal life is called legal life, *State and law*, 10, 55, 2020.

<sup>25</sup> MALKO, A.V., AFANASYEV, S.F., ERMAKOV, A.N. Standards for the provision of qualified legal assistance in the Russian Federation, *State and law*, 2, 166, 2019.



Procedure)” contains a number of significant gaps and shortcomings. Thus, Articles 15 and 16 of the said law establish requirements for mediators. In particular, it is stated that “persons who have reached the age of eighteen, have full legal capacity and have no criminal record may carry out mediation activities on a non-professional basis”. The following requirements are established for professional mediators: the age of 25 years; higher education and additional professional education in the application of mediation procedures. Retired judges constitute a separate category. There are no additional requirements for retired judges, which is quite reasonable and logical. The admission of persons without higher education as mediators, even if not on a professional basis, is immediately objectionable. Theoretically, a subject who has received only basic general education, which is compulsory in the Russian Federation, can act as a mediator. In this case, the quality of mediation is not asserted, but it is logical to assume that the parties who have chosen an alternative method of conflict resolution rely on the professionalism of the mediator. Perhaps, this is one of the reasons why citizens distrust the mediation procedure. In addition, the availability of higher non-legal education and additional education cannot be a guarantee of mediators’ professionalism. In this regard, we believe that it is necessary to introduce an educational qualification for both professional and non-professional mediators – higher legal education. If we turn to foreign experience of mediation regulation, Germany, Belgium, Austria provide various procedures for certification of mediators, after which they are allowed to operate independently.<sup>26</sup> At the same time, there are also standards of mediator training.

Another aspect that draws attention is the liability of mediators. In the previously mentioned law, Article 17 is devoted to it; however, it does not contain any specifics. In particular, it is stated that “mediators and organizations engaged in mediation activities shall be liable to the parties for damage caused to the parties as a result of such activities in accordance with the procedure established by civil legislation”. The civil legislation does not contain special norms, the subjects of which would be mediators. It remains only to refer to the general norms of the Civil Code of the Russian Federation (Articles 1064-1101), which do not take into account the peculiarities of mediators’ activities.

The legal responsibility of mediators can be viewed from another angle. With a certain degree of conventionality, it can be argued that the state has delegated to mediators a part of its powers to administer justice, as the mediator tries to resolve the dispute through reconciliation of the parties. In addition, administrative disputes can also be resolved through mediation in Russia, which brings mediation

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<sup>26</sup> DAVYDENKO, D.L. *Mediation procedures in the European legal tradition* (M.: Infotropik Media, 2013).



from the private to the public sphere. However, there are no rights without duties and no duties without responsibility, and there are no rights without responsibility for abuse of law. It can be assumed that the mediator will be bribed by one of the parties, but under the Criminal Code of the Russian Federation they are not a subject of bribery or commercial bribery. It is not excluded that the mediator will abuse their rights for one reason or another. Such actions are clearly socially dangerous, and civil liability measures alone are not sufficient to prevent possible offenses. It seems that depending on the consequences of abuse or bribery, administrative or criminal liability should be established for mediators. By analogy, as it is provided for abuse of authority by private notaries and auditors in Article 202 of the Criminal Code of the Russian Federation. In addition, the article of the Criminal Code of the Russian Federation on commercial bribery should be supplemented with a separate part, the subject of which would be the mediator.

Thus, such amendments to the current legislation can partially increase the level of citizens' trust in mediators. These gaps in the current legislation emphasize the presence of anomalous processes in the sphere of implementation of mediation procedures. In this case, anomie is manifested at the institutional level, i.e., in the absence of legal norms that are necessary to regulate social relations. Meanwhile, we are not in favor of the fact that the adoption of a new normative legal act or amendment of the existing one will overnight solve all the problems of legal regulation in the field of mediation. Legal anomie can manifest itself at several levels: institutional, enforcement and legal consciousness. Accordingly, a set of measures is necessary to minimize its manifestations. At the same time, one should not completely reject the Western experience of legal regulation of mediation only on the grounds that it is foreign.

## 4 Conclusion

In the sphere of mediation in the legal system of Russia there are anomalous processes, which are manifested at several levels: institutional; enforcement; subjective (in the sphere of legal consciousness). The institutional level is characterized by partial normlessness (insufficiency of legal regulation), which consists in gaps in the existing Federal Law of the Russian Federation "On Alternative Dispute Resolution Procedure with the Participation of Mediator (Mediation Procedure)", namely, declarative fixation of legal responsibility of mediators; insufficiency of normative requirements for their professional level; lack of normative fixation of mandatory centralized bodies (associations) of mediators, which, in particular, in the absence of a centralized mediator's association. In this connection, we believe that it is advisable to borrow Western experience of legal regulation both in terms of certification of mediators and the introduction of

a stricter educational qualification for mediation activities. The enforcement level is closely related to the subjective level and consists of insufficient enforcement, lack of a significant number of cases resolved with the help of mediators, which, in turn, is due to the lack of confidence of citizens and legal entities in the mediation institution as a whole. In order to level this process, it is necessary to take state measures to carry out legal propaganda, as well as to stimulate applications to mediators rather than to courts.

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Informação bibliográfica deste texto, conforme a NBR 6023:2018 da Associação Brasileira de Normas Técnicas (ABNT):

LIPINSKY, Dmitry; SAFIN, Zavdat. Legal anomie in the sphere of alternative (out-of-court) dispute resolution. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 06, n. 11, p. 113-123, jan./jun. 2024. DOI: 10.52028/rbadr.v6.i11.ART06.RU.

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