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Compliance with the principle of the rule of law in Ukraine when applying mediation

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Ihor Bylytsia *
Oleksii Svyda **
Olha Yukhymiuk ***
Inna Kovalchuk ****
Tatiana Bylytsia *****

Abstract

The article is devoted to the study of mediation as one of the ways of implementing the concept of restorative justice. It is determined a change of view on justice and consideration of the possibilities of the mediation method in the resolution of legal conflicts. In order to achieve this objective, a philosophical and scientific methodology was implemented. It emphasizes the importance of mediation, which consists in the effective resolution of the legal conflict of the parties, determines the need to study the prospects of further improvement of the specified procedure in Ukraine, taking into account the leading world practices. On the basis of the analysis of the provisions of the current legislation, it has been shown the expediency of making appropriate changes in the Law of Ukraine «On Mediation». It is concluded that for the development of mediation as a form of protection of the rights and legitimate interests of a person, it is necessary to make certain changes in the wording of the Law of Ukraine «On Mediation», in particular, to define normatively the provisions concerning the conformity of the mediation procedure with the principle of the rule of law.

* PhD., Associate professor, Associate professor of the Department of Theory and History of State and Law, Faculty of Law, Lesya Ukrainka Volyn National University, Lutsk, Ukraine. ORCID ID: https://orcid.org/0000-0001-6971-777X. Email: ihor.bylytsia@vnu.edu.ua

** PhD., Associate professor, Associate professor of the Department of Organization of Judicial, Law Enforcement Agencies and the Bar, Faculty of Advocacy and Anti-Corruption Activity, National University «Odesa Law Academy». Odesa, Ukraine, ORCID ID: https://orcid.org/0000-0002-5805-3557. Email: svida-alexey@ukr.net

*** PhD., Associate professor, Associate professor of the Department of Theory and History of State and Law, Faculty of Law, Lesya Ukrainka Volyn National University, Lutsk, Ukraine. ORCID ID: https://orcid.org/0000-0002-3803-4746. Email: iukchymiuk.olga@vnu.edu.ua

**** PhD., Associate professor, Associate professor of the Department of Organization of Judicial, Law Enforcement Agencies and the Bar, Faculty of Advocacy and Anti-Corruption Activity National University «Odesa Law Academy», attorney. Odesa, Ukraine. ORCID ID: https://orcid.org/0000-0002-4286-8110. Email: iskoval2512@gmail.com

***** Lawyer, Lutsk, Ukraine. ORCID ID: https://orcid.org/0009-0005-6146-6204. Email: tanya.bylytsia@gmail.com

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Cumplimiento del principio del estado de derecho en Ucrania al aplicar la mediación

Resumen

El artículo está dedicado al estudio de la mediación como una de las formas de implementar el concepto de justicia restaurativa. Se determina un cambio de visión sobre la justicia y la consideración de las posibilidades del método de mediación en la resolución de conflictos jurídicos. Para el logro de este objetivo se implementó una metodología filosófica y científica. Se enfatiza la importancia de la mediación, que consiste en la resolución efectiva del conflicto legal de las partes, se determina la necesidad de estudiar las perspectivas de una mayor mejora del procedimiento especificado en Ucrania, teniendo en cuenta las principales prácticas mundiales. Sobre la base del análisis de las disposiciones de la legislación actual, se ha demostrado la conveniencia de realizar los cambios apropiados en la Ley de Ucrania «Sobre la mediación». Se concluye que, para el desarrollo de la mediación como forma de protección de los derechos e intereses legítimos de una persona, es necesario introducir ciertos cambios en la redacción de la Ley de Ucrania «Sobre Mediación», en particular definir normativamente las disposiciones relativas a la conformidad del procedimiento de mediación con el principio del Estado de Derecho.

Palabras clave: mediación; forma de protección de derechos; justicia restaurativa; solución de controversias; acuerdo y mediador.

Introduction

Currently, in Ukraine, in addition to the judicial form of protection, an alternative settlement of disputes in the mediation process is provided. Thus, the Law of Ukraine «On Mediation» defines the legal principles and procedure for conducting mediation as an out-of-court procedure for conflict (dispute) settlement, the principles of mediation, the status of a mediator, requirements for his training and other issues related to this procedure (ON MEDIATION: THE LAW OF UKRAINE, 2021). The introduction of the mediation institute in Ukraine meaningfully connects the modern development of the legal system of Ukraine with the European

legal systems, values and priorities of the development of the modern civilized world.

However, it should be noted that the Constitution of Ukraine (Articles 55, 124) primarily provides for judicial protection of the rights and legitimate interests of individuals and legal entities (CONSTITUTION OF UKRAINE, 1996), without paying enough attention to alternative methods of dispute resolution, which by their nature are most appropriate archetype of the Ukrainian nation and is one of the forms and methods of protecting the rights and legitimate interests of an individual.

The principle of adversarial litigation at the stage of dispute settlement with the participation of a judge is replaced by cooperation, which gives the parties the opportunity to find a mutually acceptable solution. Dispute resolution through mediation is characterized as a «win-win situation» when both parties benefit (Volkovytska, 2018). Therefore, the importance of resolving the parties' disputes using the mediation procedure in protecting the rights, freedoms and legitimate interests of a person is obvious.

This form makes it possible to ensure high-quality, timely resolution of disputes with the lowest costs and confidentiality. At the same time, the experience of foreign countries with developed systems of alternative dispute resolution shows that the effectiveness of the application of such practice is effective only under the condition of adequate normative regulation and high legal culture of society, readiness of citizens for dialogue both among themselves and with the state.

Within the scope of our research, we consider it necessary to find out the following: whether such a method of resolving legal disputes as mediation, defined at the legislative level in Ukraine, corresponds to the principle of the rule of law; whether such disputes should be resolved solely on the basis of the rules of law; whether parties can resolve disputes based on their own understanding of what is right and fair, etc.

1. Methodology of the study

Methodology is a possible component of any scientific and cognitive activity (Klymchuk & Trekke, 2018, p. 95). Research methods are chosen based on the goals and tasks set in the article, taking into account its object and subject. The methodological basis of research is a system of principles, techniques and approaches, based on philosophical, general scientific and special scientific methods, which are means of scientific research to obtain objective and reliable results.

The principle of dialectical denial made it possible to critically take into account the previous experience of the introduction and functioning

of mediation in the national legal system. Comparative and comparative legal methods were used in the analysis of domestic and foreign legislation, scientific research on the implementation of mediation activities, as well as certain aspects of the organization and functioning of the specified interdisciplinary institute.

The combination of methods of analysis and synthesis led to a two-faceted study of the problems of compliance with the principle of the rule of law in Ukraine when using mediation. On the one hand, factual material was used, the generalization and synthesis of which made it possible to formulate new theoretical propositions and conclusions. On the other hand, approaches to this problem developed by domestic and foreign science were carefully analyzed. Methods of abstraction, generalization, functional, legal-technical, specifically legal, induction and deduction, systemic, formal-logical and other methods were implemented during the analysis of legislation and the practice of its application in mediation.

The methods of generalization, grouping, modeling, and forecasting are used in the preparation of conclusions for a scientific article. The use of all methods in a relationship ensured the complexity and comprehensiveness of the study of problematic issues of the application of mediation in Ukraine.

2. Analysis of recent research

Although the study of the genesis of the concept of the rule of law is not a direct task of this study, we note that our further conclusions and statements will be based on conceptual works on this issue, and therefore are important in the context of achieving the goal of scientific publication. It should also be noted that the problems of legal regulation as well as the peculiarities of the introduction of mediation procedures in Ukraine are the subject of research by representatives of various scientific schools and branches of law.

At the same time, we note a certain lack of scientific works regarding the modern legislative regulation of mediation, as well as the compliance with the principle of the supremacy of the law of application of this institution in conditions of martial law. In addition, the accumulated theoretical and practical experience of the formation of the institution of mediation in the judiciary in Ukraine demonstrates certain contradictions in the legal regulation of relations arising in the national legal system. We identified separate theoretical and applied problems: from the lack of sufficient theoretical foundations for the legal support of mediation in the judicial system of Ukraine to the lack of systematicity and insufficient efficiency of the relevant practices.

3. Results and discussion

The main driving force behind the development of alternative methods of resolving criminal disputes is the insufficient efficiency of the judicial system during the consideration of certain categories of cases, which may consist in the overloading of courts, the duration of court proceedings, unqualified consideration of cases, as well as other shortcomings inherent in the judicial system of a particular state (Volkotrub, 2015). Mediation is one of the most common forms of restorative justice implementation, which should be understood as any process that allows persons who have been harmed by criminal offenses and persons who are responsible for this harm, in the case of their voluntary consent, to actively participate in resolution of issues arising in connection with the commission of a criminal offense with the help of an impartial third party (mediator) (RECOMMENDATION CM/ REC (2018, 8).

One of the key issues regarding the introduction of the institution of mediation remains the provision of a fair resolution of a legal dispute based on the rule of law. Establishing the rule of law in society and ensuring everyone's right to a fair trial are the primary tasks of the modern state. The essence of the rule of law is that human rights and fundamental freedoms are the values that shape the content and direction of state activity. The state must create conditions for the proper implementation of the rule of law in all social relations. The Constitution of Ukraine declares the principle of the rule of law to be one of the fundamental principles of the constitutional system of the state. The principle of the rule of law is paramount and decisive for a state governed by the rule of law, because law is a manifestation of the highest justice and its dominance in society consists in the priority of human rights and freedoms (Mazaraki, 2017).

The interpretation of the Constitutional Court of Ukraine appears to be a balanced position that embodies a comprehensive approach to the definition of the concept of "rule of law": "rule of law is the rule of law in society. The rule of law requires the state to implement it in law-making and law-enforcement activities, in particular in laws, the content of which should be imbued primarily with the ideas of social justice, freedom, equality, etc." (Decision of the Constitutional Court of Ukraine in No. 15- RP /2004).

It must be stated that the rule of law is not properly ensured in Ukraine, which is manifested in the inefficiency of state power, a significant level of corruption, the lack of access to justice, an impartial and fair trial, violations of the basic rights and freedoms of a person and a citizen. Further development of justice in Ukraine should be aimed at establishing the rule of law by ensuring: access to justice; fair judicial procedure; independence, impartiality and professionalism of judges; legal certainty, uniformity of court practice and openness of court decisions; effectiveness of legal protection.

Adherence to and implementation of the above ideas allows us to assert the existence of certain advantages of alternative dispute resolution methods compared to court proceedings, namely: 1) improved access to justice in a state that supports alternative dispute resolution; 2) the speed of the resolution of the dispute, because the parties do not have to wait for the time allotted for the consideration of the case, the probability of artificially delaying the resolution of the dispute by one of the parties is minimized; 3) the selection by the parties of the procedure and the mediator (mediator, expert, arbitrator, etc.), which is of particular importance in disputes, the resolution of which requires special knowledge; 4) confidentiality, which is practically impossible at court hearings and when the court demands documents, etc.; 5) the finality of the decision, because the parties are unlikely to appeal the decision that they reached independently and voluntarily; 6) an opportunity for both parties to emerge victorious from the dispute in the absence of the defeated by adopting a mutually acceptable decision; 7) preservation of commercial and personal relations, which is complicated if the party is dissatisfied, but has to comply with the court decision (Mazaraki, 2017, p. 12).

Mediation (from the Latin mediation – mediation): private and confidential use of mediators to resolve a conflict situation. In law, mediation is a method of dispute resolution with the involvement of a mediator (mediator), who helps to analyze the conflict situation so that the interested parties can independently choose a solution that would satisfy the interests and needs of all conflict participants. Unlike a formal court process, during mediation, the parties reach an agreement independently (Kartashov, 2019, p. 12).

Regardless of the difference in approaches to defining the concept of mediation, all of them are permeated by its main characteristic features: mediation is a special type of negotiation; mandatory participation of a mediator; the mediator is not a representative of any of the parties; the mediator assists the parties in conducting negotiations and reaching a mutually acceptable solution; the mediator does not examine the evidence and does not establish the facts; the mediator does not force the parties to make a certain decision and does not provide advice on possible decision options; the mediator does not make a binding decision for the parties; the active role of the parties themselves in negotiations regarding the independent search for possible solutions (Bilyk et al., 2019, p. 32-33; Nestor, 2018).

Mediation parties have the right: by mutual agreement, to choose a mediator (mediators) and/or an entity that ensures mediation; determine the terms of the mediation agreement; by mutual agreement, involve other participants in the mediation; refuse the services of a mediator(s) and choose another mediator(s); refuse to participate in mediation at any time; in case

of non-performance or improper performance of the agreement based on the results of mediation, apply to the court, arbitration court, international commercial arbitration in accordance with the procedure established by law; involve an expert, translator and other persons determined by agreement of the mediation parties (ON MEDIATION: LAW OF UKRAINE, 2021).

The implementation of justice in Ukraine under martial law is complicated by a number of systemic problems, some of which have intensified, while others have arisen directly as a result of armed aggression. Mediation, as a non-jurisdictional method of dispute resolution, is free from these problems and allows the parties to choose the most effective and acceptable option for resolving the dispute. As D. Piddubny rightly points out, a broad interpretation of the right to access to justice and consolidation of the legal institution of mediation allows, on the one hand, to relieve the judicial system, and on the other hand, based on the interests of the parties, within a reasonable period of time to resolve the dispute and implement an agreement based on the results of the procedure, as a result of which a the goal of justice (Piddubny, 2022).

So, as a legal phenomenon, mediation in Ukraine is just emerging, and already at this stage it is necessary to clearly define its types, which will allow to achieve legal support for their effectiveness. It is about pre-trial and post-trial mediation. The main characteristic of private mediation is that this dispute resolution procedure is initiated by the parties themselves. That is, the parties participate in mediation on the basis of an agreement concluded by them. Judicial mediation, unlike the previous one, is always connected with the trial of the case, as well as with the court as an institution» (Polishchuk, 2016).

In our opinion, the procedural aspects of these types of mediation should have normatively defined differences. This is due, in particular, to the fact that the parties can reconcile, including through mediation, at any stage of the court process. If pre-trial mediation is implemented, the parties conclude an agreement based on the results of the mediation, the content of which is determined by Art. 21 of the Law of Ukraine «On Mediation». The results of pre-trial mediation are drawn up in the form of an «agreement based on the results of mediation», and the results of court mediation can be drawn up at the choice of the parties in the form of either an «agreement based on the results of mediation» of mediation (Article 1) (ON MEDIATION: LAW OF UKRAINE, 2021), or a settlement agreement.

It is legally defined that a mediator «can provide mediation services on a paid or free basis, for hire, through an entity that provides mediation, through an association of mediators or individually» (Part 2 of Article 11) (ON MEDIATION: LAW OF UKRAINE, 2021). The legislation also stipulates that each registered mediator must provide one free mediation service per year. Such services are also provided to people with insufficient

financial means, while mediators work as volunteers in social service centers for families, children and youth. As an incentive, a reduction in court fees for mediators has been introduced in this case. At the same time, in the case of paid mediation, it is suggested to explain to potential clients the financial advantage of such a service, since it involves a shorter time for resolving the case, control and certain influence on the part of the participants of the extrajudicial process, the absence of remuneration for lawyers, the filing of appeals and cassation complaints, etc. (Maan *et al.,* 2020).

The following measures are recommended to solve the identified problems of mediation in Ukraine: 1) identification of tools to encourage the parties to settle legal disputes through mediation; 2) mandatory informing of the parties about the peaceful resolution of the dispute, in particular, directly by judges at any stage of the court proceedings – from preliminary to final – with the establishment of a break for the parties to contact a mediator; 3) definition of categories of civil disputes where mediation is a priority method of resolution; 4) monitoring the effectiveness of mediation in family, land, inheritance, labor, and intellectual property matters (Maan et al., 2020, p. 18).

It is worth paying attention to the requirements for a mediator as a mediator in the resolution of legal disputes (conflicts). According to the Law of Ukraine «On Mediation» «a mediator is a specially trained neutral, independent, impartial natural person who conducts mediation and does not have the right to combine his role with the functions of other mediation participants, to provide recommendations to the parties regarding the decision in this case, to make decisions, to be a representative or defender of any party at the pre-trial stage, in court, arbitration or arbitration proceedings in a case where he is a mediator; has the right to protection against interference by public authorities, enterprises, organizations regardless of the forms of ownership and subordination, public associations, individuals; to provide the parties with consultations and recommendations regarding the procedure for carrying out the mediation procedure (Article 7) (ON MEDIATION: LAW OF UKRAINE, 2021).

From the analysis of the relevant legislation, it can be seen that such an important requirement as the competence of the mediator has been overlooked. The law does not set requirements for the mediator's level of education. It is only mandatory that «the basic training of mediators is carried out according to a program with a volume (duration) of at least 90 hours of training, including at least 45 hours of practical training» (ON MEDIATION: LAW OF UKRAINE, 2021). According to the correct remark of some scientists, this approach is wrong and needs to be revised. First of all, it should be assumed that the mediator, who undertakes to carry out the mediation procedure - reconciliation of the parties, must be competent in solving similar cases. After all, one of the basic requirements

for a mediator is his ability to competently resolve a dispute (conflict), and an indication of the profession of a mediator indicates that such a person has a certain educational level of training (for example, junior bachelor, bachelor, master). Also, mentioning the profession gives reason to say that the mediator must have professional competence in one or another field of economic activity in order to competently consider the case of the parties (Kostyuchenko et al., 2022, p. 52).

To confirm that the mediator's competence is a necessary requirement for him, we cite the provisions of Art. 3 of Directive 2008/52/EC of the European Parliament and of the Council of 21.05.2008 on certain aspects of mediation in civil and commercial cases, which defines that «mediator» means any third person who is asked to mediate effectively, impartially and competently manner, regardless of the name or profession of that third party in the Member State concerned and the manner in which that third party was appointed or requested to mediate (DIRECTIVE 2008/52/EC).

The listed problems do not exhaust the list of debatable issues of mediation. In particular, among the problems, scientists also mention the issues of remuneration of the mediator, the enforcement of the final agreement, the low budget of the procedure, and the selection of mediators (Kantor, 2019). In general, it is worth agreeing that the further improvement of the mechanisms for the use of mediation in Ukraine, as an institution of alternative ways of resolving legal disputes, will contribute to improving citizens' access to justice and reducing the burden on the courts, and therefore, will help to reduce the terms of consideration of cases and the percentage of contested decisions, reduce court costs, improve the quality of court decisions and to achieve reconciliation between the parties (Volkovytska, 2018).

Conclusions

Based on the results of the conducted research, we come to the following conclusions.

Alternative methods of resolving disputes within the scope of judicial proceedings expand the limits of the rule of law, because state coercion cannot be comprehensive, and compliance with the ideals and principles of the rule of law must be based on people's everyday actions and the procedure for resolving their disputes. Mediation, as one of the forms of restorative justice, is a new and progressive approach to the state's response to criminal manifestations in society and conflict resolution in legal disputes. The specified method of resolving disputes, reducing the burden on the state judicial system, is able, based on the fundamental principles of law, to effectively perform the functions of justice in disputes that must be

resolved exclusively in court, and is able to improve the state of ensuring the right to a fair trial.

For the development of mediation as a form of protection of the rights and legitimate interests of a person, it is necessary to make certain changes to the wording of the Law of Ukraine «On Mediation», in particular: normatively define provisions regarding the compliance of the mediation procedure with the principle of the rule of law; to detail the reconciliation procedure of the parties, as the main goal of resolving the conflict between them on mutually acceptable terms; determine the possibility of carrying out mediation purely by mediators who have a higher legal education and establish a competency-based approach to the training of mediators in the relevant categories of cases.

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