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PECULIARITIES OF THE INSTITUTION OF MEDIATION IN THE ADMINISTRATIVE PROCEEDINGS IN UKRAINE

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The purpose *of the article is to study the peculiarities of the institution of mediation in the administrative proceedings in Ukraine, as well as the problems of using mediation procedures to resolve administrative and legal disputes.* ***Methods:*** *the methodological basis of the study were general scientific and specifically legal methods of cognition, in particular the system-structural method and the method of generalization, which made it possible to analyze scientific approaches and doctrinal positions of understanding the essence of the concept of mediation, as well as to clarify the peculiarities of the institution of mediation in the administrative process. With the help of the dialectical method of scientific knowledge, as well as the methods of analysis, synthesis, and abstraction, the content and purpose of the studied concept is determined, and its main tasks and functions are distinguished.* ***Results:*** *as a result of scientific research, the authors concluded that mediation serves as a progressive tool in the Ukrainian judicial reform, which can significantly contribute to the formation of a democratic legal state that is a guarantor of the constitutional and fundamental rights of an individual, ensuring justice in all situations and legal disputes. The institution of mediation in administrative proceedings has its own particular features: - mediation, as an extrajudicial procedural structured process, carried out with the aim of reaching an agreement between the parties to an administrative dispute with the help of a third party, can be considered in procedural and substantive aspects; - mediation in administrative proceedings performs organizational, informational, controlling, educational, law enforcement, regulatory dynamic, preventive and reparative functions, which ensure the settlement of an administrative and legal dispute between the parties in the conciliation procedure by finding a constructive solution necessary to achieve reconciliation; - taking into account world experience, it is expedient to distinguish two main models of mediation in administrative proceedings namely private and integrated.* ***Discussion:*** *the prospects for the development of the institution of mediation in administrative proceedings are the introduction of judicial and court-related mediation. In order to introduce mediation into the administrative process of Ukraine, it is necessary to: - make amendments to the Law of Ukraine "On Mediation" regarding the detailed regulation of the mediation procedure directly during the resolution of disputes involving power entities. The need for such a procedure arises from the essence of power-management relations, the regulation of which should be carried out at the legislative level; - define the procedure for conducting mediation, payment for mediation services, or conditions for conducting mediation free of charge in instructions (regulations) on the organization of claim and lawsuit work, self-representation, and representation of the interests of power entities in courts.*

Key words: *administrative proceedings; mediation; mediator; mediation procedure; administrative and legal dispute.*

Problem statement and its relevance. A necessary component of modern legal systems, which attests to the development of democratic institutions in the state, is the use of alternative procedures for resolving legal disputes. These procedures are generally recognized, enshrined in national legislation, and are the subject of modern scientific research. The relevant dispute resolution procedure is regulated by regulations in many foreign countries, including the USA, Australia, China, Great Britain, Germany, and other European countries. Nowadays, we can talk not only about the formed culture of mediation as a possible way of resolving legal disputes, implementing model projects in courts, conducting experiments on the introduction of non-jurisdictional procedures, but also about enshrining the institution of mediation in procedural codes [1; 2, p. 203-205].

The Committee of Ministers of the Council of Europe, which adopted a number of legal acts to ensure free access to justice, played a significant role in the implementation of alternative methods of resolving legal conflicts, including mediation as the most effective way of settling administrative and legal disputes. Thus, in Europe, the spread of mediation in the resolution of administrative and legal disputes/conflicts is associated with Recommendation (2001) 9 of the Committee of Ministers of the Council of Europe on alternatives to judicial review of disputes between administrative bodies and parties-persons dated September 5, 2001, which specifies that "wide use of alternative methods of administrative dispute settlement will provide an opportunity to approach the solution of these problems and bring administrative bodies closer to the public" [3].

In Ukraine, the concept of "mediation" as borrowing the experience of developed countries came into use more than thirty years ago, but it was the adoption of the Law of Ukraine "On Mediation" in 2021 that opened new horizons for the implementation of the mediation procedure in administrative proceedings. The introduction of relevant changes to the Code of Administrative Procedure of Ukraine (hereinafter referred to as the CAPU) after the adoption of this law is another evidence that the modern model of administrative procedure in Ukraine is subject to the intense influence of legal innovations, which are guidelines for the development of a legal democratic state and civil society.

Despite the formation of public requests for alternative ways of protecting violated rights, reforming the judicial system, as well as improving the process of settling legal conflicts, the issue of the possibility and expediency of introducing mediation procedures remains the subject of discussions among scientists and legal practitioners, in particular taking into account the peculiarities of the institution of mediation in administrative proceedings in Ukraine.

The purpose of the article is to study the peculiarities of the institution of mediation in the administrative proceedings of Ukraine, as well as the problems of using mediation procedures to resolve administrative and legal disputes.

Analysis of recent research and publications. The issue of mediation and methods of alternative dispute resolution, which were studied in various aspects, became the subject of scientific research by many domestic and foreign scientists, in particular A. Andreev, O. Horodnychyi, A. Kalish, S. Korinnyi, Yu. Melnychuk, F. Memel, M. Myroneko, A. Ryshchenko, A. Sergeeva, V. Teremetskyi, K. Tokareva, N. Shyshka, and others. However, in the context of the reform of administrative procedural law, this problem remains relevant in both theoretical and practical terms, since, despite the positive world experience and scientific justifications, the introduction of the mediation procedure in the administrative process of Ukraine requires additional argumentation.

Presentation of basic material of the research. One of the key aspects of the study of the specified research problem is the determination of the content of the term "mediation" itself.

In the international legal field, the term "mediation" is defined as any structured process, regardless of its name, in which two or more disputing parties resort to the assistance of a third party in order to reach an agreement to resolve their dispute, regardless of whether this process was initiated by the parties, proposed or appointed by the court, or provided for by the national legislation of the EU member state [4]. The structure of the mediation process refers to a normatively determined logical sequence of actions performed by the mediator and the parties. This is reflected in the current Law of Ukraine "On Mediation".

Thus, the Law of Ukraine "On Mediation" provided an official definition of mediation as an out-of-court voluntary, confidential, structured proce-

dure during which the parties, with the help of a mediator (mediators), try to prevent the occurrence or settle a conflict (dispute) through negotiations [5].

For a deeper understanding of the out-of-court mediation procedure in administrative proceedings, it is suggested to classify it into procedural and substantive aspects. Mediation is carried out precisely without the participation of a judge, that is, before going to court or during court proceedings – a procedural aspect, or the subject of mediation becomes the subject of a dispute – a substantive aspect.

The procedural aspect of the out-of-court mediation procedure is indicated by paragraph 1 of clause 2 of Article 3 of the Law of Ukraine "On Mediation", which stipulates the possibility of mediation to be conducted before applying to court, arbitration court, international commercial arbitration, or during a pre-trial investigation, court, tribunal, arbitration proceedings, or during the execution of a court, arbitration court, or international commercial arbitration decision [5].

Clause 2 of Article 31 of the Law of Ukraine "On Mediation" shows the peculiarities of the substantive aspect of mediation in the administrative proceedings. According to it, in an agreement based on the results of mediation, the parties to the mediation may go beyond the subject of the conflict (dispute) specified in the mediation agreement or beyond the subject of the claim (statement) if the mediation is conducted during the pre-trial investigation, court, tribunal, arbitration proceedings, or during the execution of a court, arbitration court, or international commercial arbitration decision [5].

In the scientific literature, mediation is mostly considered as an alternative form of dispute resolution, a certain structured negotiation process in which the parties voluntarily and independently intend to reach a peaceful settlement of their dispute with the help of a neutral and impartial party, namely a mediator. Since the understanding of mediation etymologically corresponds to the meaning of the Latin word "mediatio" – mediation, to moderate, conciliatory procedure [6, p. 298-299], then the basis of the meaning of the term "mediation" should be its formally defined and normatively established procedural form of mediation, and not the activities of the mediator, or the parties to the dispute, or their representatives. Paragraph 1 of Article 17 of the Law of Ukraine "On Mediation", which defines the procedure for conducting mediation, namely compliance with the requirements of the law, the mediation agreement, the rules of mediation, and the mediator's professional ethics [5], does not reveal the detailed procedure for conducting mediation.

The very problem of an unambiguous understanding of mediation, taking into account the wide range of its application and the variety of organizational forms, types, and models of the conciliation procedure with the participation of a mediator, should be directly connected with the legal model, which is reflected in the law or can become a means of constructing the law.

Elucidation of the meaning of the concept of "mediation" allows us to highlight the main task of this method of legal conflict resolution, which consists in facilitating the settlement of a legal dispute between the parties in the process of conciliation procedure by finding a constructive solution necessary to achieve reconciliation.

Speaking about the peculiarities of the institution of mediation, it is worth highlighting the functions of this legal phenomenon. In particular, according to A. Andreev, mediation in administrative proceedings performs the following functions: organizational, which ensures the very process of conducting mediation between the parties; informational, which is designed to help inform the parties to the dispute about their rights and obligations, the mediation procedure and other issues; controlling, which promotes compliance with the legislation during the mediation procedure, as well as ensuring the communication process between the parties; educational, which ensures the ability of the parties to an administrative dispute to learn the process of conducting negotiations; law enforcement, which consists in preventing the violation of legal norms, restoring the violated right and compensating costs by recognizing the illegality of the actions of one of the parties to the administrative mediation [7, p. 158]. Agreeing with the conclusions of S. Korinnyi, made in his thesis on the topic "Introduction of mediation into the administrative proceedings of Ukraine" [8, p. 121-125], it is worth noting that mediation in the administrative process, in addition to the above, performs a number of other functions, in particular, a regulatory dynamic function, because during the conciliation procedure, it exerts a legal influence on the parties to the admin-

istrative and legal dispute; a preventive function, contributing to the prevention of conflicts or their resolution in the early stages with minimal expenditure of time and money for the parties; reparative function, the essence of which is to restore and support business and personal relationships between the parties.

It should be noted that in the world practice of mediation, two main legal models in which mediation is implemented are clearly distinguished namely private and integrated. Private mediation (as a rule laid down in a special Law on Mediation) is an independent procedure for settling legal disputes that cannot be implemented in the activities of jurisdictional bodies. It is considered and regulated as a type of activity of professional mediators. In turn, integrated mediation is "incorporated" into the activities of jurisdictional bodies in the form of a procedure or mediation technology and is aimed at reconciliation between the parties within the framework of legal processes [8, p. 126-127]. The positive experience of countries that have implemented these mediation models allows us to conclude that only a comprehensive approach to the development of mediation, which includes the development of private and integrated models, will help mediation take a worthy place in the dispute settlement system. That is, in Ukraine, in parallel with the development of private mediation, it is necessary to implement an integrated model in the activity of jurisdictional bodies, which in no way should depend on private mediation.

However, one of the current problems in the implementation of mediation in administrative proceedings is that the adopted Law of Ukraine "On Mediation" defines the concept of mediation only in a narrow sense as an extrajudicial procedure that has no relevance to judicial mediation. Therefore, discussing the development of an integrated mediation model in Ukrainian judicial practice, including in the administrative field, is currently impossible.

At the same time, considering the research of national experts on the issue of mediation in administrative cases, it is worth noting that contemporary trends in enhancing the interaction between mediation and the judiciary contribute to the parallel development of various mediation models in most countries, such as external, judicial, and court-related models [9, p. 22].

The external mediation model is considered an independent way of alternative dispute resolution (conflict resolution) that is not brought to court. In the context of handling administrative disputes in this model, questions arise regarding the payment for the mediator's services. Since one of the parties is a power entity, funds for the payment of the mediator's services should be provided in the state or local budgets [9, p. 22]. Therefore, this mediation model cannot be considered acceptable for resolving administrative cases, as power entities cannot and are not inclined to allocate state funds for the services of private mediators.

Judicial mediation is integrated into the judicial proceedings, taking place after the commencement of proceedings in a case and is intended to resolve disputes that have already become the subject of judicial consideration. The practice of conducting judicial mediation procedures involving judge-mediators has gained wide acceptance in modern Germany, the Netherlands, Finland, and some states in the USA. The introduction of such a model occurred within court-initiated "pilot projects," where a group of judges was trained in mediation and served as judge-mediators, handling cases where parties expressed a desire to peacefully settle their disputes [9, p. 22-23]. This mediation model is particularly relevant for administrative disputes due to the specific composition of the legal relationships. The advantage of judicial mediation lies in the authority of the judge for individuals and government entities, disciplining the parties and facilitating the involvement of power entities in the mediation process.

The court-related model involves establishing the center of a mediation where court-accredited external mediators work, along with information receptions in the court. The main functions include administering the referral of cases for mediation procedures. This model follows the principle of "a house of justice with many doors," proposed by F. Sander, aiming to bring alternative dispute resolution methods closer to potential consumers – the disputing parties. According to the conclusion of the expert group, this mediation model in resolving administrative disputes is the most promising [9, p. 23]. Implementing this mediation model will allow conducting mediation within the courthouse, thereby increasing trust in the procedure, involving external experts (mediators), relieving the judicial

system from an excessive number of administrative cases under consideration, and ensuring proper guarantees for the participation of power entities.

Certainly, historically, in all mediation models aimed at achieving reconciliation between parties, the parties turn to a third party – a mediator or conciliation judge, who essentially perform the same function or provide the same service. However, the organizational principles for each of them differ because their legal status is determined by different approaches in the system of cultural and legal and legislative support for mediation procedures. Existing models find application in different countries; for example, in Germany, reconciliations take place based on an integrated model, and some countries do not exclude the possibility of reforms by transitioning from one model to another. In Ukraine, so far, only external (private) mediation has experienced active development. However, considering recent scientific works [2, p. 205-206], it is worth noting the possibility of officially establishing mediation both in the horizontal dimension – where mediation is applied between conflicting parties – and in the vertical dimension – where mediation occurs between parties and a government entity involved in the judicial process. Positive experience with implementing this approach is observed in Poland, where administrative mediation is enshrined in legislation. Mediation centers and organizations providing mediation services facilitate mediation procedures in cases related to administrative matters. In the context of administrative justice in Poland, mediation can be utilized in various cases involving property and legal issues [10, p. 134], significantly simplifying complex decision-making procedures in the judicial process.

The main purpose of administrative justice is to protect the rights, freedoms, and interests of individuals, as well as the rights and interests of legal entities, from violations by a power entity. This goal can be achieved through the search for reconciliation between conflicting parties in a case. In other words, mediation serves as a legal mechanism, alongside other legal mechanisms, aimed at achieving the primary objective of administrative justice in protecting the subjective public rights of individuals from violations by a power entity.

However, when considering the issue of administrative justice in the context of alternative dispute resolution, including mediation, it is worth noting that the sphere of administrative disputes is the most challenging for the application of the mediation procedure. This is due to characteristic features of such disputes, such as: - lack of corresponding authority of power entities, as governmental bodies operate in the public interest in their activities and do not have the freedom to make decisions; - inequality of the parties involved in the dispute, existing in a power-subordination relationship; - novelty of the mediation institution in administrative justice and in Ukrainian justice as a whole; - absence of legislative regulation and mechanisms for transferring cases to mediation; - existence of corruption risks through agreements between a public official and a private individual; - risks of accountability for power entities in the event of entering into a mediation agreement [9, p. 10].

It should be noted that in administrative justice, a power entity, according to Article 19 of the Constitution of Ukraine, must act only on the basis, within the limits, and in the manner provided by the Constitution and laws of Ukraine [11]. Conditions for reconciliation cannot contradict the law or exceed the competence of the power entity (Part 1 of Article 190 of the CAPU) [12]. This significantly complicates the participation of power entities in any consensual procedures, including mediation. For the successful implementation of mediation in administrative disputes, the respective power entity must have appropriate authority, and the dispute category must be suitable for mediation.

The peculiar aspect of conducting mediation in administrative justice lies in the requirement for a separate authorization from the representative of the power entity, approved by the leadership. For example, according to paragraph 2 of clause 3.2 of the Instructions on the organization of claim and lawsuit work, self-representation, representation of the interests of the Ministry of Defense of Ukraine, the Armed Forces of Ukraine in courts and other state bodies, execution of court decisions, approved by the Order of the Ministry of Defense of Ukraine dated December 30, 2016, No. 744, the decision regarding reconciliation and the conclusion of a settlement agreement is made by the head of the structural unit of the Ministry of Defense, the General Staff, the commander (chief) of the military unit (institution, organization) responsible for the budget program (subprogram), with the approval of the

heads of legal services [13]. Therefore, in administrative justice, permission for reconciliation and the conclusion of a settlement agreement is granted by the head of the structural unit of the Ministry of Defense, the General Staff, the commander (chief) of the military unit (institution, organization), in coordination with the leadership of legal services. This indicates that reconciliation of parties in the process of resolving an administrative case involves risks, and the procedure for obtaining approvals reduces the discretionary powers of the representative.

According to paragraph 3 of clause 6 of the Regulation on the procedure for conducting claim and lawsuit work in the State Judicial Administration of Ukraine and its territorial administrations, approved by the order of the State Judicial Administration of Ukraine dated August 9, 2021, No. 275, statements regarding the reduction of claims, withdrawal or refusal of a lawsuit and the subject of appeal, recognition of the lawsuit in whole or in part, conclusion of a settlement agreement are signed by the Chairman of the State Judicial Administration of Ukraine or the person performing his duties (head of the territorial administration of the State Judicial Administration of Ukraine) [14]. Thus, in this case, the procedure for reconciliation of parties in administrative justice can also be carried out only at the decision of the relevant head of the power entity.

However, according to paragraph 1 of Article 11 of the Law of Ukraine "On Mediation," a mediator may provide mediation services on a paid basis or free of charge, by employment, through a subject ensuring the conduct of mediation, through an association of mediators, or individually [5]. Therefore, it is advisable to include provisions in the instructions (regulations) on the organization of claim and lawsuit work, self-representation, representation of interests of power entities in administrative justice to determine the procedure for payment of mediation services or conditions for conducting mediation free of charge.

Conclusions. Mediation is a progressive instrument in the Ukrainian judicial and legal reform that can significantly contribute to the formation of a democratic state under the Rule of Law, serving as a guarantor of constitutional and fundamental rights of individuals, ensuring justice in various situations and legal disputes. The high qualification of mediators and the implementation of decisions accepted by the parties, proposed by the mediator, will positively influence the overall credibility of the mediation institution in the administrative justice system of Ukraine.

The institution of mediation in administrative justice has its specific features:

1) mediation, as an extrajudicial procedural structured process aimed at reaching an agreement between the parties to an administrative legal dispute with the assistance of a third party, can be considered in procedural and substantive aspects. Mediation is conducted without the involvement of a judge, specifically before resorting to the court or during the judicial proceedings – the procedural aspect. The substantive aspect of mediation lies in the subject of mediation, either within the scope of the dispute's subject matter or when the subject extends beyond the boundaries of the dispute's subject matter;

2) mediation in administrative justice performs, alongside organizational, informational, controlling, educational, and law enforcement functions, several additional functions: regulatory dynamic function, aimed at ensuring the reconciliation procedure; preventive function, which contributes to preventing conflicts or resolving them at early stages with minimal time and cost for the parties; reparative function, the essence of which is to restore and support business and personal relationships between the parties;

3) taking into account global experience, two main models of mediation in administrative justice are distinguished: private and integrated. Private mediation is an independent procedure for resolving legal disputes that cannot be implemented in the activities of jurisdictional authorities. Integrated mediation, on the other hand, takes place within the judicial proceedings, occurring after the commencement of the case and is intended to resolve disputes that have already become the subject of court proceedings;

4) regarding the prospects for the development of the mediation institution in administrative justice, the introduction of judicial and court-related mediation is proposed. Judicial mediation is integrated into judicial proceedings and is conducted by judges -mediators themselves. Court-related mediation involves the establishment of a court -related mediation center, where externally accredited court mediators work, along with information desks in

the court. Their primary functions include administering the referral of cases for mediation procedures;

5) to implement mediation in the administrative process of Ukraine, it is necessary to:

- make amendments to the Law of Ukraine "On Mediation" regarding the detailed regulation of the mediation procedure directly during the resolution of disputes involving power entities. The need for such a procedure arises from the essence of power-management relations, the regulation of which should be carried out at the legislative level;

- define the procedure for conducting mediation, payment for mediation services, or conditions for conducting mediation free of charge in instructions (regulations) on the organization of claim and lawsuit work, self-representation, and representation of the interests of power entities in courts.

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ОСОБЛИВОСТІ ІНСТИТУТУ МЕДІАЦІЇ В АДМІНІСТРАТИВНОМУ СУДОЧИНСТВІ В УКРАЇНІ

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Метою *статті є дослідження особливостей інституту медіації в адміністративному судочинстві України, а також проблем застосування процедур медіації для вирішення адміністративно-правових спорів.* ***Методологічною основою*** *дослідження стали загальнонаукові та спеціально-юридичні методи пізнання, зокрема системно-структурний метод та метод узагальнення, які дали змогу проаналізувати наукові підходи та доктринальні позиції щодо розуміння сутності поняття медіації, а також з'ясувати особливості інституту медіації в адміністративному процесі. За допомогою діалектичного методу наукового пізнання, а також методів аналізу, синтезу та абстрагування визначено зміст і призначення досліджуваного поняття, виокремлено його основні завдання та функції.* ***У результаті*** *наукового дослідження автори дійшли висновку, що медіація виступає прогресивним інструментом в українській судовій реформі, який може суттєво сприяти формуванню демократичної правової держави, яка є гарантом конституційних та основоположних прав особи, забезпечуючи правосуддя в будь-яких ситуаціях та правових спорах. Інститут медіації в адміністративному судочинстві має свої особливості: - медіація, як позасудовий процесуальний структурований процес, що здійснюється з метою досягнення згоди між сторонами адміністративного спору за допомогою третьої сторони, може розглядатися в процесуальному та матеріально-правовому аспектах; - медіація в адміністративному судочинстві виконує організаційну, інформаційну, контрольну, виховну, правоохоронну, регулятивно-динамічну, превентивну та репаративну функції, які забезпечують врегулювання адміністративно-правового спору між сторонами в процедурі примирення шляхом пошуку конструктивного рішення, необхідного для досягнення примирення; - враховуючи світовий досвід, доцільно виокремити дві основні моделі медіації в адміністративному судочинстві - приватну та інтегровану.* ***Обговорення:*** *перспективами розвитку інституту медіації в адміністративному судочинстві є запровадження судової та присудової медіації. Для впровадження медіації в адміністративний процес України необхідно - внести зміни до Закону України «Про медіацію» щодо детального врегулювання процедури медіації безпосередньо під час вирішення спорів за участю суб'єктів владних повноважень. Необхідність такої процедури випливає із суті владно-управлінських відносин, регулювання яких має здійснюватися на законодавчому рівні; - визначити порядок проведення медіації, оплату послуг медіації або умови проведення медіації безоплатно в інструкціях (положеннях) про організацію претензійно-позовної роботи, самопредставництва та представництва інтересів суб'єктів владних повноважень у судах.*

Ключові слова: *адміністративне судочинство; медіація; медіатор; процедура медіації; адміністративно-правовий спір.*

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