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# MEDIATION IN THE ADMINISTRATIVE PROCESS: THEORETICAL AND LEGAL ASPECT
# МЕДІАЦІЯ В АДМІНІСТРАТИВНОМУ ПРОЦЕСІ: ТЕОРЕТИКО-ПРАВОВИЙ АСПЕКТ

***Summary.*** *Introduction. The need to adapt national legislation to European standards, to find optimal alternative ways and methods of resolving both public and private law disputes, to reform the system of protecting the rights, freedoms or interests of citizens and legal entities actualizes the necessity for effective implementation of the institution of mediation – an alternative method of conflict resolution with the participation of a neutral intermediary (mediator), which, in turn, necessitates a comprehensive study of theoretical and legal issues of integrating this institution into the legal space of Ukraine, in particular the features of its formation and use at the current stage, as well as clarifying further prospects for improving current procedural legislation in order to ensure the possibility of exercising the right to alternative dispute resolution.*

*Purpose. The purpose of the article is to investigate the features, essence, legal principles and prospects of using mediation in the administrative process of Ukraine, based on an analysis of the theory of administrative procedural law and national legislation.*

*Materials and methods. The materials of the study are the legislative regulation of relations in the field of mediation, the work of Ukrainian and foreign scientists, experts on the issues of implementing and conducting mediation as a form (method) of resolving a legal dispute, including administrative legal. In the process of conducting the study, a set of general and special methods of scientific knowledge was used: dialectical, complex, structural-functional, theoretical generalization and grouping, analysis and synthesis, logical generalization of results.*

*Results. In the scientific article, based on the analysis of regulatory legal acts that moderate social relations related to mediation in order to prevent the emergence of conflicts (disputes), including public law ones, it is determined that it is the specificity of the latter that determines the features of mediation in the administrative process, the components of which are proceedings in the field of management, proceedings in administrative litigation, administrative tort proceedings.*

*Analysis and consideration of the opinions of the scientific community, Ukrainian and international experts on the essence of mediation as a form (method) of resolving an administrative legal dispute, its advantages, as well as factors that complicate the process of introducing the institution of mediation into the national system of protection of individual rights and freedoms allowed us to identify the main areas of effective development of the latter, namely: 1) improving the legal regulation of the effective functioning of the institution of mediation; 2) using a comprehensive approach to eliminating factors that complicate the process of conducting mediation in Ukraine; 3) conducting a large-scale campaign to popularize mediation procedures to ensure awareness*

*of legal entities, including administrative entities, about alternative methods of conflict resolution; 4) increasing the level of legal culture of the population.*

*Further research in this area. In further scientific research, the mediation experience of foreign countries will be analyzed in order to find optimal ways to improve the system of out-of-court dispute resolution in Ukraine.*

***Key words:*** *mediation, administrative process, administrative litigation, public law dispute, administrative law dispute, conflict, alternative dispute resolution, legislation.*

***Анотація.*** *Вступ. Необхідність адаптації національного законодавства до європейських стандартів, пошуку оптимальних альтернативних способів і методів вирішення як публічно-правових так і приватно-правових спорів, реформування системи захисту прав, свобод чи інтересів громадян та юридичних осіб актуалізує потребу ефективного впровадження інституту медіації – альтернативного способу врегулювання конфліктів за участі нейтрального посередника (медіатора), що, в свою чергу, обумовлює необхідність комплексного дослідження теоретико-правових питань інтеграції в правовий простір України цього інституту, зокрема особливостей його формування та використання на сучасному етапі, а також з'ясування подальших перспектив удосконалення чинного процесуального законодавства з метою забезпечення можливості реалізації права на альтернативне вирішення спорів.*

*Мета. Мета статті полягає в тому, щоб на основі аналізу теорії адміністративного процесуального права, національного законодавства дослідити особливості, сутність, правові засади та перспективи застосування медіації в адміністративному процесі України.*

*Матеріали і методи. Матеріалами дослідження є законодавче регулювання відносин у сфері застосування медіації, праці українських та*

*зарубіжних учених, експертів з проблематики впровадження та проведення медіації як форми (способу) вирішення правового спору, у тому числі адміністративно-правового. У процесі проведення дослідження було використано сукупність загальних і спеціальних методів наукового пізнання: діалектичний, комплексний, структурно-функціональний, теоретичного узагальнення та групування, аналізу та синтезу, логічного узагальнення результатів.*

*Результати. У науковій статті на підставі аналізу нормативно-правових актів якими врегульовуються суспільні відносини, пов'язані з проведенням медіації з метою запобігання виникненню конфліктів (спорів), у тому числі, публічно-правових, визначено, що саме специфіка останніх обумовлює особливості проведення медіації в адміністративному процесі, складовими якого є провадження у сфері управління, провадження з адміністративного судочинства, адміністративно-деліктні провадження.*

*Аналіз та врахування думок наукової спільноти, українських та міжнародних експертів щодо сутності медіації як форми (способу) вирішення адміністративно-правового спору, її переваг, а також чинників, що ускладнюють процес упровадження інституту медіації в національну систему захисту прав і свобод особи дозволив виокремити основні напрями ефективного розвитку останнього, а саме: 1) удосконалення правового регулювання результативного функціонування інституту медіації; 2) використання комплексного підходу до усунення чинників, що ускладнюють процес проведення медіації в Україні; 3) проведення широкомасштабної компанії з популяризації процедур медіації задля забезпечення обізнаності суб'єктів правовідносин, у тому числі адміністративних щодо альтернативних способів вирішення конфліктів; 4) підвищення рівня правової культуру населення.*

*Перспективи. У подальших наукових дослідженнях буде*

*проаналізований досвід медіації зарубіжних країн задля пошуку оптимальних шляхів удосконалення системи позасудового вирішення спорів в Україні.*

***Ключові слова:*** *медіація, адміністративний процес, адміністративне судочинство, публічно-правовий спір, адміністративно-правовий спір, конфлікт, альтернативне вирішення спорів, законодавство.*

**Statement of the problem.** The need to adapt national legislation to European standards, to find optimal alternative ways and methods of resolving both public and private law disputes, to reform the system of protecting the rights, freedoms or interests of citizens and legal entities actualizes the necessity for effective implementation of the institution of mediation – an alternative method of conflict resolution with the participation of a neutral intermediary (mediator), which, in turn, necessitates a comprehensive study of theoretical and legal issues of integrating this institution into the legal space of Ukraine, in particular the features of its formation and use at the current stage, as well as clarifying further prospects for improving current procedural legislation in order to ensure the possibility of exercising the right to alternative dispute resolution.

**Analysis of recent researches and publications.** Theoretical and practical problems of the development of existing alternative methods of resolving legal conflicts, including administrative-legal ones, have been the subject of research by Ukrainian and foreign scientists and practitioners. In particular, K. Rostovskaya and N. Grishina consider the features of the application of the mediation procedure in administrative proceedings, highlight the features of an administrative-legal dispute [1]. The team of authors has prepared a textbook edited by N. Krestovska and L. Romanadze, which is devoted to the theoretical and practical problems of mediation [2]. Ukrainian scientists R. Mironyuk and D. Holoborodko have analyzed scientific opinion on the essence of mediation as a form (method) of resolving an administrative-legal dispute, identified the legislative principles of implementing the mediation

procedure for resolving such disputes in a pre-judiciary order, and clarified foreign experience in applying the mediation form of resolving administrative legal disputes [3]. The prospects for the development of mediation in the administrative process of Ukraine and its impact on expert judicial activity are the subject of a study by D. Davydenko [4]. T. Shynkar thorough work is devoted to the theoretical and practical problems of the application of mediation in administrative proceedings [5]. Legal and theoretical aspects of mediation in administrative proceedings of Ukraine are studied by N. Shelever [6]. A group of foreign and Ukrainian experts carried out a Gap Analysis of the introduction of the institution of mediation in Ukraine [7], an analysis, state and prospects for the development of mediation in administrative legal disputes (A. Sergeeva, O. Gorodnychy, A. Ryshchenko [8]). At the same time, the issue of the features of mediation in the administrative process of Ukraine as a type of alternative methods of resolving public legal disputes requires improvement and additional research.

**The purpose of the article** is to investigate the features, essence, legal principles and prospects of using mediation in the administrative process of Ukraine, based on an analysis of the theory of procedural administrative law and national legislation.

**Materials and methods.** The materials of the study are the legislative regulation of relations in the field of mediation, the work of Ukrainian and foreign scientists, experts on the issues of implementing and conducting mediation as a form (method) of resolving a legal dispute, including administrative legal. In the process of conducting the study, a set of general and special methods of scientific knowledge was used: dialectical, complex, structural-functional, theoretical generalization and grouping, analysis and synthesis, logical generalization of results.

**Presentation of the main material of the research.** In the Law of Ukraine «On Mediation», in particular in Art. 1, mediation is defined as «<…>

an extrajudicial voluntary, confidential, structured procedure, during which the parties, with the help of a mediator (mediators), try to prevent the emergence or resolve a conflict (dispute) through negotiations» [9]. This regulatory legal act moderates «public relations related to mediation in order to prevent the emergence of conflicts (disputes) in the future or to resolve any conflicts (disputes), including <…>, administrative ones, as well as in cases of administrative offenses and in criminal proceedings with the aim of reconciling the victim with the suspect (accused)» [9]. In addition, the Code of Administrative Procedure of Ukraine (Part 5 of Article 47, Part 3 of Article 58, Paragraph 2 of Part 1 of Article 66, Part 6 of Article 122, Paragraph 2 of Part 2 of Article 180, Paragraph 5 of Part 6 of Article 181, Paragraph 4 of Part 1 of Article 236) also regulates the issue of using mediation during the consideration and resolution of public law disputes submitted to the administrative court for resolution [10].

It should be noted that the features of mediation in the administrative process, the components of which are proceedings in the field of management, proceedings in administrative regulation, administrative tort proceedings [11, c. 116, 119], are due to the specifics of the legal conflict (dispute), namely – public legal.

The legislative definition of a public law dispute is given in Art. 4 of the Code of Administrative Procedure of Ukraine [10]. As K. Rostovskaya and N. Grishina rightly point out, «<…> administrative jurisdiction does not include disputes on public law relations where there is no subject endowed with public authority powers, or it does not perform its administrative functions» [1, c. 185]. Scientists distinguish the following features of an administrative law dispute: the mandatory subject which is a public authority or an official; the legal position of both parties is characterized by legal equality before the law and the court and equality of procedural jurisdiction; the essence of an administrative legal dispute is the differences between the subjects of administrative law, which indicate the

dissimilarity of their legal positions in the disputed legal relationship that binds them; the subject of the differences is subjective public rights, the legality of administrative acts that relate to the implementation of public authority activities; administrative disputes can also arise only regarding the legality of regulatory acts, be initiated by direct refutation and resolved by recognizing the regulatory act as invalid, that is, regardless of the subjective rights of any interested persons; an essential feature of an administrative dispute is the presence of a certain procedure for its application and resolution [1, c. 185; 2, c. 362-363].

Having analyzed the scientific opinion on the essence of mediation as a form (method) of resolving an administrative legal dispute, R. Myronyuk and D. Holoborodko come to the conclusion that in the scientific circles of researchers of the conciliation (mediation) procedure there is no unity of scientific positions concerning the place of mediation in the system of methods of resolving administrative legal disputes: some consider mediation to be an exclusive procedure for pre-court settlement of administrative legal disputes, others allow the possibility of conducting mediation in the process of judicial consideration of the case; others propose the introduction of mediation as a mandatory pre-court procedure for resolving certain categories of administrative-legal disputes, and the fourth generally exclude the possibility of resolving public-legal disputes by means of a mediation procedure [3, c. 225].

So, what are the advantages of using mediation compared to other methods of resolving public legal disputes, including administrative legal ones?

Thus, the authors of the textbook created within the framework of the Ukrainian Mediation Academy project note that the main arguments in favour of the use of mediation in administrative legal relations are thoroughly set out in Recommendation (2001) 9 of the Committee of Ministers of the Council of Europe to member states on alternatives to judicial review of disputes between administrative bodies and individual parties of September 5, 2001. It notes that

«judicial procedures are not always the most suitable in practice for the settlement of administrative disputes; that the widespread use of alternative means of administrative dispute settlement will make it possible to approach the solution of these problems and bring administrative bodies closer to the public; that the main advantages of alternative means of administrative dispute resolution may be, depending on the case, simpler and more flexible procedures, allowing for faster and cheaper resolution of the dispute, amicable settlement, dispute resolution with the participation of experts, resolution of disputes on the basis of justice, and not only in accordance with strict legal norms, and wider margins of discretion» [2, c. 360].

Investigating the main directions of development of the mediation procedure in Ukraine in accordance with the current legislation and its prospects in the administrative process, D. Davydenko comes to the conclusion that such an alternative method of conflict resolution as mediation has a significant number of advantages, namely: it allows to increase the satisfaction rate of participants (thereby reducing the number of appeals in the courts), to achieve balanced solutions in the negotiation process, to reduce the cost of the conflict, to shorten the time for considering the case [4, c. 255].

Finding out the features of the application of the mediation procedure in administrative proceedings, K. Rostovskaya and N. Grishina highlight the following advantages of the mediation procedure in administrative legal disputes: a fairly high degree of effectiveness; saving money on the part of both the state and private individuals; saving time - speed; confidentiality; relieving administrative courts; implementation of the principle of the service concept of the state, the principle of the rule of law and good governance [1, c. 182, 187].

According to some scholars, the advantages of mediation as a method of dispute resolution include: 1) control that the parties have over both the direct mediation procedure and its results; 2) direct participation of the parties in negotiations; voluntariness of the procedure; speed of mediation, its efficiency

and cost-effectiveness, simplicity and flexibility; 3) fairness, since the mediator guarantees that the already non-existent unequal relations between the parties cannot affect the course of negotiations and their result; 4) confidentiality; 5) ensuring effective interaction between the parties; assistance in maintaining, improving or restoring relations between the parties; taking into account the long-term and important interests of the parties at each stage of the mediation procedure to resolve the dispute with an emphasis on the present and future, rather than the past; 6) mutual benefit of the mediation result; creative approach to resolving the dispute (T. Shynkar, N. Shelever [5, c. 15; 6, c. 243]).

It should be noted that despite all the advantages of such an alternative method of dispute resolution as mediation, the process of its effective application and implementation in the national system of protection of individual rights and freedoms is complicated by a number of factors. First of all, these are: the lack of proper legal regulation of the institution of mediation in Ukraine, as well as the use of a comprehensive approach to making changes to national legislation; lack of awareness of subjects of legal relations, including administrative ones, about alternative methods of conflict resolution; lack of confidence among the parties in the effectiveness and feasibility of mediation; fragmentary level of awareness of the population about the existence of mediation as an alternative method of dispute resolution, about the essence of the procedure, basic principles of mediation and the role of the mediator; lack of high-quality information state policy on the social promotion of the institution of mediation [7, c. 47]; low legal culture of the population, without raising which it is impossible to carry out a reform regarding the introduction of a particular legal institution; established position of society that going to court is the only way to resolve a dispute; lack of legal basis and financial support, because any reforms require significant costs, etc. [12, c. 61].

The following is emphasized in the expert community: procedural legislation in the field of administrative disputes is favourable for the use of

mediation; the main problem lies in the political will and legislative capabilities of the subjects of power; local governments may be most interested in resolving disputes out of court, including through mediation, and have the necessary powers; mediation will not be able to become widespread without a large-scale campaign to popularize the alternative dispute resolution procedures (A. Sergeeva, O. Gorodnychy, A. Ryshchenko [8, c. 27]).

**Conclusions of this research and prospects for further research in this area.** Thus, taking into account the opinions of the scientific community, Ukrainian and international experts on the essence of mediation as a form (method) of resolving an administrative legal dispute, its advantages and factors that complicate the process of introducing the institution of mediation into the national system of protecting individual rights and freedoms allows us to identify the main areas of effective development of the latter, namely: 1) improving the legal regulation of the effective functioning of the institution of mediation; 2) using a comprehensive approach to eliminating factors that complicate the process of introducing and conducting mediation in Ukraine; 3) conducting a large-scale campaign to popularize mediation procedures in order to ensure awareness of subjects of legal relations, including administrative ones, about alternative methods of resolving conflicts; 4) increasing the level of legal culture of the population.

In further scientific research, the mediation experience of foreign countries will be analyzed in order to find optimal ways to improve the system of out-of-court dispute resolution in Ukraine.

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