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Principles of mediation as an alternative way to protect human and citizen rights

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Nadiya Bortnyk *
Olha Tylchyk **
Galina Lukyanova ***
Olha Skochylias-Pavliv ****
Olesia Remeniak *****

Abstract

The purpose of the investigation is to analyze the principles of mediation as an alternative way of protecting human and civil rights specified in Ukraine's draft law "On Mediation", to reveal their relationship and interdependence. During the investigation, it was recognized that mediation should be understood as negotiations organized in a special manner with the participation of a neutral mediator who assists the parties in developing a mutually beneficial solution. This approach can be considered one of the most effective ways to restore violated subjective human rights. The methodology includes a comprehensive analysis and generalization of the available scientific and theoretical material, as well as the formulation of relevant conclusions. During the research, the methods of scientific cognition were also used: terminological, logical-semantic, functional, system-structural, logical-normative. During the research, it was concluded that the formation of legislation on mediation should be based on the principles of mediation determined on the basis of the theoretical and

* *Nadiia Bortnyk,* Professor, Doctor of Science in Law, *Head of the Department of Administrative and Information Law* of the Educational-Scientific Institute of Law and Psychology, Lviv Polytechnic National University, Ukraine. ORCID ID: https://orcid.org/0000-0003-1794-2793. Email: bnp1969n@gmail.com

** *Olha Tylchyk,* Professor, Doctor of Science in Law, *Department of Administrative Law and Process and Customs Security*, University of State Fiscal Service of Ukraine, Ukraine. ORCID: https://orcid.org/0000-0002-7604-7660 Email: o.v.tilchik@ukr.net

*** *Halyna Lukianova*, Assistant Professor, Candidate of Science in Law, *Associate Professor at the Department of Administrative and Information Law* of the Educational-Scientific Institute of Law, Psychology and Innovative Education, Lviv Polytechnic National University, Ukraine. ORCID ID: https://orcid.org/0000-0003-1109-9299. Email: lukianova@ukr.net

**** *Olha Skochylias-Pavliv*, Assistant Professor, Candidate of Science in Law, *Associate Professor at the Department of Administrative and Information Law* of the Educational-Scientific Institute of Law, Psychology and Innovative Education, Lviv Polytechnic National University, Ukraine. ORCID ID: https://orcid.org/0000-0001-6737-7628. Email: olypav2019@gmail.com

***** *Olesia Remeniak*. Candidate of Science in Law, *Senior Lecturer at the Department of History of Ukraine, Economic Theory and Law* of the National Forestry University of Ukraine. ORCID ID: https://orcid.org/0000-0002-5175-1280. Email: oremenyak@ukr.net

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methodological analysis of the principles contained in the legislation in force in the developed world and the principles of law, as well as defined by the Constitution of Ukraine.

Keywords: mediation process; dispute; negotiations; principles of mediation; mediator.

Principios de la mediación como forma alternativa de proteger los derechos humanos y ciudadanos

Resumen

El propósito de la investigación es analizar los principios de la mediación como una forma alternativa de proteger los derechos humanos y civiles especificados en el proyecto de ley de Ucrania «Sobre la mediación», para revelar su relación e interdependencia. En el transcurso de la investigación, se reconoció que la mediación debe entenderse como negociaciones organizadas de manera especial con la participación de un mediador neutral que asiste a las partes en el desarrollo de una solución de beneficio mutuo. Este enfoque puede considerarse una de las formas más efectivas de restaurar los derechos humanos subjetivos violados. La metodología incluye un análisis integral y generalización del material científico y teórico disponible, así como la formulación de conclusiones relevantes. Durante la investigación se utilizaron también los métodos de cognición científica: terminológico, lógico-semántico, funcional, sistema-estructural, lógico-normativo. En el transcurso de la investigación, se estableció como conclusión que la formación de la legislación en materia de mediación debe basarse en los principios de mediación determinados en base al análisis teórico y metodológico de los principios contenidos en la legislación vigente en el mundo desarrollado y los principios del derecho, así como lo definido por la Constitución de Ucrania.

Palabras clave: proceso de mediación; disputa; negociaciones; principios de mediación; mediador.

Introduction

The main ways to protect violated rights, freedoms and legitimate interests are litigation and other jurisdictional mechanisms for resolving legal disputes. Due to the rapid development and formation of civil society, these methods are not always effective enough. Reconciliation, as a way of resolving the conflict, plays a significant social role, which is to

restore and preserve social harmony and to ensure a sense of stability and confidence of the participants in public relations in the existing legal order. Reconciliation in law is seen as a complex legal institution that combines different procedures provided by law, as a special way to influence public relations.

Mediation is a new promising way to resolve disputes in both the public and private spheres. In Ukraine, at the level of legislative initiatives, the foundations have been formed for the introduction of mediation and mediation procedures, but these legislative novelties require the formation of a clear theoretical basis.

The need to introduce the institution of mediation in the domestic legal system is extremely high, which is based on the positive results of the practice of applying the institution of reconciliation in many countries, and this shows its effectiveness. In addition, this is in line with Ukraine's general position on the harmonization of national legislation with EU legislation.

Analysis of the content of international legal acts on mediation, in particular in terms of their definitions of "mediation" and mechanisms to stimulate the integration of mediation into national legislation, shows the importance of mediation at the international level as a tool with significant potential to reduce conflict and labor burdening the courts, reducing the duration, reducing financial costs and facilitating dispute resolution and conflict resolution procedures in various areas of public relations (civil, commercial, criminal and administrative proceedings, international relations, family and labor jurisdictional and non-jurisdictional disputes).

1. Literature review

I. Yasynovsky (2014) devoted his research to the historical aspect of the development of the institution of mediation and modern trends in its development. Problems of theory and practice are considered by N. Mazaraki, who notes that in contrast to litigation, which is strictly regulated, formalized, and focused on the essence of the claim, mediation allows a flexible approach to dispute resolution, taking into account all aspects of the dispute, regardless of their legal or legal significance. The main task of judicial settlement of disputes for the parties is to resolve the dispute in their favor, and for judges – to make such a decision. At the same time, in the process of mediation the parties face the task of finding a mutually acceptable (compromise) solution to the dispute between them, based on the principles of voluntary participation and equality of the parties, and the role of mediator – competently and professionally assist parties in finding such a solution (Mazaraki, 2016).

Considering the issue of mediation through the prism of European experience and Ukrainian realities, N. Bezkhlibna notes that for Ukraine the issue of the need to implement the law "On Mediation" has long been controversial among the mediation community. On the one hand, this is due to the fact that mediation is a way of resolving disputes, the application of which in the private sphere does not require the mandatory existence of a certain legal framework. This process is voluntary for the parties and flexible. As a rule, it is carried out on a contractual basis and may well "fit" into the plane of the existing regulation of civil and commercial relations (Bezkhlibna, 2019).

2. Results and discussion

Instead, it should be noted that mediation mechanisms cannot replace an effective, fair and accessible judicial system, and therefore mediation is complementary to existing dispute resolution and conflict resolution mechanisms.

However, the general international trend is that the scope of guarantees and the variety of mediation mechanisms are expanding and have the preconditions for a significant increase in the future, giving significant impetus to the development of national legislation on mediation.

Ukraine's integration into the European social and legal space necessitates rethinking a number of key concepts and principles underlying the theoretical modeling and practical implementation of legal regulation and necessitates improving the system for resolving disputes arising in various spheres of human life (Yesimov, 2020). The urgency of peaceful settlement of legal disputes is due to the consideration by the Verkhovna Rada of Ukraine of the draft law "On Mediation", which aims to promote the development of business partnerships and harmonization of social relations (Draft Law of Ukraine "On Mediation", 2020).

The essence of mediation is manifested in a combination of two opposite elements – the autonomy of the parties and guarantees to develop a common position and achieve a mutually beneficial result. Any legal system can be viable if it is built and operates on the basis of certain consistent principles (Tylchyk and Leschynsky, 2021).

Under the principles of law should be understood as the original, cross-cutting ideas, general requirements that express the main and decisive in the legal framework of society. The principle is an ideological category, because the principles of mediation enshrine people's attitude to this institution as a social value. In the scientific literature to the deontological, legal principles of mediation, construction and implementation of meditative mechanisms for dispute resolution and conflict resolution include:

– legal principles: the principle of freedom and informed voluntariness of the parties and mediators; equality of the parties in the mediation process; independence of the parties in the mediation process; non-competitiveness; simplicity and speed of the mediation procedure, flexibility and informality; limited powers of the mediator (the mediator does not have the authority to impose a dispute resolution on the parties); confidentiality (confidentiality and professional secrecy of data obtained during the mediation procedure, unless the parties have agreed otherwise than the information that must be disclosed in accordance with applicable law or for the purpose of enforcing a mediation agreement, the information the disclosure of which required in the interests of public order); prohibition of harm (this principle requires mediators to avoid the procedure so that the conflict is exacerbated or its participants will be harmed); special attention to the interests of children, the disabled, the elderly, dependents (this principle determines the duty of the mediator to make sure that the proposed option for resolving the dispute will not harm third parties who may be children); professional multidisciplinary nature of the mediator (he must have a certain set of professional competencies in law, psychology, conflict, economics, etc.); the presence of the expressed consent of the parties to the presence of third parties, as a condition of such presence:
– communicative and psychological principles that have legal significance: the integrity of the parties to the conflict and the mediator; impartiality and neutrality of the mediator; personal nature of the mediation procedure (personal presence of the parties and the mediator) and direct interaction of the parties; ethics of behavior and the desire for psychological comfort during mediation procedures (the desire for mutual trust, the refusal of mutual invectives, resentment).

The draft law "On Mediation" contains the principles of voluntariness, equality of arms, neutrality and impartiality, confidentiality. Experts in the field of mediation suggest the possibility of continuing the discussion on the qualitative and quantitative composition of those principles that are not reflected in Art. 3 of the draft law "On Mediation" and are derived from the general content of the legislation (dispositiveness, mutual respect of the parties, neutrality of the mediator, transparency of the procedure and others).

It is important to note that there is no legislative definition of the principles of mediation. In order to study the problem of the principles of conciliation with the mediator, it is important to reveal the essence of the concept of "principles of mediation".

The principles of mediation are understood as the initial, fundamental principles, ideas, moral and ethical norms, and procedural bases of optimal interaction of the parties to the mediation process, general requirements of the conciliation procedure, observance and application of which guarantees conflict resolution to build further legal relations. This optimality should be determined in relation to the state between the ideal legal principle and the prevailing reality (Kovalev *et al.,* 2017).

The main ideas that underlie mediation activities and express its essence are normatively defined in Art. 3 of the draft law "On Mediation". This norm includes an exhaustive list of guidelines, which are the basis for the implementation of mediation activities in the national legal reality and are considered as the starting point of legal regulation of the institution of mediation. The legislator has defined seven normatively defined principles: voluntariness, confidentiality, independence and neutrality of the mediator, impartiality of the mediator, self-determination, and equality of rights of the parties to mediation.

The content of the principle of voluntariness is as follows: the freedom to enter the mediation procedure is due to the fact that the parties jointly decide to conduct a mediation procedure, the coercion of which is unacceptable, even if there is a mediation clause in the contract.

According to the draft law on mediation, agreements on the application and conduct of conciliation with the mediator and the direct conduct of such proceedings do not preclude recourse to a court or arbitral tribunal, unless otherwise provided by law. Freedom to withdraw from the mediation procedure – either party may refuse to continue the procedure without explaining the reasons for such refusal. It is inadmissible to force a mediation procedure or to conduct it without one party. Freedom to determine the terms of the mediation agreement – the parties determine the terms of the agreement, make proposals, and reject the proposals of the opposite party. The mediation agreement includes only those conditions that were the result of mutual free agreement of the parties.

According to the draft law on "Mediation", the mediation agreement is subject to implementation on the basis of the principles of voluntariness and good faith of the parties, ie the principle of voluntariness must be observed at the stage of implementation of the mediation agreement. However, there is a problem of non-performance of the agreement. The content of the principle of confidentiality is disclosed in Article 5 of the draft law "On Mediation". During the mediation procedure, it is necessary to maintain the confidentiality of information related to the specified procedure, except as provided by law, unless otherwise agreed by the parties. The mediator has no right to disclose information that became available to him during the conciliation procedure. A mediator may be liable for the disclosure of information, as defined by the statute or regulations on the association of mediators of which he is a member (Tylchyk and Tylchyk, 2021).

None of the participants in the procedure, regardless of whether the court or arbitration proceedings are related to the subject matter of the dispute, has the right to refer to information: about the readiness of the parties to participate in such proceedings; the positions, opinions or decisions expressed by one of the parties regarding the possibility of settling the dispute; about confessions made in the process of mediation; on the readiness of the parties to accept the mediator's proposal and settle the dispute (Tylchyk and Tylchyk, 2021).

It is inadmissible to demand from the mediator and from the organization carrying out the mediation procedure information relevant to the case, except as provided by law, and cases unless otherwise agreed by the parties. The mediator may disclose to the other party information relating to the mediation procedure only with the consent of the party who provided this information.

Confidentiality of mediation does not coincide with the concept of "trade secret" defined in Article 505 of the Civil Code of Ukraine (Civil Code of Ukraine, 2003). A trade secret is a mode of information that allows the owner of the information, under existing or possible circumstances, to increase revenue, avoid unjustified expenses, maintain market position, or obtain other commercial benefits.

The introduction of a trade secret regime requires organizational conditions, in particular the issuance of an order determining the composition of information relating to such a secret. To establish the confidentiality of mediation information, such actions are not required, it must be carried out in accordance with the direct instructions contained in the normative act on mediation. The principle of cooperation and equality of the parties is that the very request for mediation procedures, further steps and the overall result are due to the willingness of the parties to cooperate. Neither mediation nor individual agreements within mediation are possible without recognizing the parties as equal in their capabilities.

The principle of equality is one of the foundations of mediation and includes two components: cooperation between the parties and equality. The principle of cooperation reflects the private components of the institution of mediation. In essence, the principle has common features with the principle of solidarity of interests and business cooperation. According to T. Podkovenko and N. Figun, the principle of cooperation between the parties follows from the essence of conciliation proceedings (Podkovenko and Figun, 2017). The whole mediation procedure should be based on mutual agreements, concessions, and an atmosphere of trust and mutual respect should be maintained during the procedure. The principle of cooperation provides a rule according to which the parties, in seeking options for resolving the dispute, assist each other in order to achieve the end result. In the mediation procedure, the participants

jointly develop solutions to the existing problem, while in the course of an adversarial trial they substantiate and prove the claims and objections. The principle of equality of arms means a rule in which both parties have equal opportunities to perform all procedural actions. This principle, similar to the principle of procedural equality of the parties in civil proceedings, is a private manifestation of the constitutional principle of equality before the law and the court. However, in the conciliation procedure, the principle of equality of arms is considered a prerequisite for cooperation, as it has no significant independent significance (Ivanovich *et al.*, 2019).

The effect of this principle is that during the mediation procedure both parties equally choose a mediator and determine the terms of the conciliation procedure, express positions, ask questions, determine topics for negotiations, participate in the drafting of the agreement, have an equal right to an individual interview mediator.

The consolidation of this principle is implemented in the draft law "On Mediation", according to which during the conciliation procedure the mediator has no right to put one of the parties in a preferential position and diminish the rights and legitimate interests of one of the parties. The mediator guarantees equal opportunities to the parties involved in the process. The principle of impartiality of the mediator is that during the dispute settlement procedure, the mediator has no right to show personal interest, cannot be associated with either party. The mediator is obliged to immediately inform the parties about the existence of circumstances that may affect independence and impartiality.

According to S. Yosypenko, the main thing in the mediation process is the impartiality of the mediator, which allows the participants to work in an atmosphere of cooperation and ensures equal rights to participate in negotiations (Yosypenko, 2015). It should be noted that the guarantee of impartiality of the mediator provided by Art. 7 of the draft Law "On Mediation" stipulates that the mediator has no right to make proposals for the settlement of the dispute unless the parties have agreed otherwise.

In the event that a mediator, using a variety of mediation techniques, cannot communicate to the parties an acceptable way to resolve the conflict, the mediator's activities have no value or meaning.

The purpose of this provision in the draft law is to consolidate the essential feature of mediation that distinguishes this method of dispute resolution from all others. Only the parties themselves can make a decision that is in the best interests of the true interests and which they will then be willing to implement voluntarily, without external coercion. In this case, the actions of the mediator, his understanding of the conflict within the legal field and the transfer of this to the parties should contribute to the formation of the latter's responsibility for the mediation decisions (Leheza *et al.*, 2018).

The principle of mediator independence is closely related to the principle of impartiality. This principle is similar to the principle of impartiality, which until recently was associated mainly with the administration of justice. This principle is enshrined in the Constitution, judges are independent and subject only to the Constitution and the law (Constitution of Ukraine, 1996). However, the draft law "On Mediation" defines the principle of independence differently: like judges, a mediator, conducting the conciliation procedure, should not be under the influence of citizens, officials, state, and other bodies that restrict or predetermine a particular its action; must be independent materially, administratively or otherwise from the parties to the dispute or other interested parties (Leheza *et al.,* 2020).

According to V. Skrypchenko, "independent" and "independent" have interrelated meaning (Skrypchenko, 2020). Therefore, V. Skrypchenko concludes that the legislator, noting in Article 126 of the Constitution of Ukraine the independence of judges and subordination to the Constitution and the law, means not only the fact that judges, administering justice, are guided by the Constitution and law, but also their independence.

V. Skrypchenko notes that according to the Constitution of Ukraine, the principle of independence has a downside: the subordination of judges only to the Constitution of Ukraine and the law, declared by the Constitution of Ukraine, actually results in their subordination (in the sense of duty) to almost all types of legal acts. which they are obliged to follow during the administration of justice (Skrypchenko, 2020).

Conclusion

The analysis of the normatively established principles of mediation shows that the imperative principles of the draft law "On Mediation" have formed the basis for the legal regulation of mediation activities. At the same time, the term "mediation" refers to specially organized negotiations with the participation of a neutral mediator, who assists the parties in developing a mutually beneficial solution. This approach is one of the effective ways to restore violated subjective rights.

The mediator is free from emotional assessments of the parties to the dispute, impartial and independent in their judgments. A mediator has the right to undertake to organize the mediation process if he is able to maintain neutrality and in a particular situation can maintain emotional alienation, which implements the principle of equality in the mediation procedure.

The principles of mediation are divided into legal and communicative-psychological, which have legal significance. The legal principles include

freedom and informed voluntariness of the parties and mediators; equality of arms; independence of the parties in the mediation process; non-competitiveness; the principle of simplicity and speed of the procedure, its flexibility and informality; limited powers of the mediator; the principle of confidentiality; prohibitions on harm; professional multidisciplinary nature of the mediator; the presence of the expressed consent of the parties to the presence of third parties during the procedure, as a condition of such presence.

The communicative and psychological principles that have legal significance include the principles of good faith of the parties to the conflict; impartiality and neutrality of the mediator; personal nature of the procedure and direct interaction of the parties; ethics of behavior and the desire for psychological comfort during mediation procedures. At the same time, the draft of the analyzed law defines the principles: voluntariness, confidentiality, independence and neutrality of the mediator, impartiality of the mediator, self-determination, and equality of rights of the parties to mediation.

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