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MEDIATION AND COURT IN UKRAINE: PERSPECTIVES ON INTERACTION AND MUTUAL UNDERSTANDING

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Summary: 1. Introductory Remarks on Mediation Development in Ukraine. – 2. The Theory and Legal Regulation of Mediation. – 3. How Courts Interpret Mediation in the Ukrainian Case-law. – 4. Some Reflections and Final Remarks.

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MEDIATION AND COURT IN UKRAINE: PERSPECTIVES ON INTERACTION AND MUTUAL UNDERSTANDING

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Abstract In this note, the authors identify some problems concerning the introduction of mediation in Ukraine in terms of its use in the consideration and resolution of court cases. Despite the lack of clear legal regulation for mediation, courts in Ukraine still try to use this mechanism of pre-trial dispute resolution. Particular attention is paid to the law enforcement activities of courts in criminal and administrative cases, in which courts try to equate the conciliation procedure with the mediation procedure. These approaches clearly follow from the Resolutions and Recommendations of the Committee of Ministers of the Council of Europe and the settled case-law of the European Court of Human Rights (ECtHR) since, back in 1975, the ECtHR in its decision *Golder v. The United Kingdom* ruled that it is unlikely that the rule of law can be imagined without access to justice. However, the presumption that the courts are the main institution for resolving disputes continues to be undermined by the proliferation of alternative forms of dispute resolution, both agreement-based and judicial.

Keywords: mediation, access to justice, judicial mediation, case law, dispute resolution, Ukraine

1 INTRODUCTORY REMARKS ON MEDIATION DEVELOPMENT IN UKRAINE

One of the priority areas for justice reform in Ukraine is increasing the efficiency of the judiciary to ensure the right to judicial protection and equal access to justice for everyone.¹ According to the modern understanding of the international standard of access to justice,

1 Decree of the President of Ukraine of 11 June 2021 'On the Strategy for Reforming the Judiciary, Judicial System and Related Legal Institutions for 2015-2020' <<https://zakon.rada.gov.ua/laws/show/276/2015#Text>> accessed 19 June 2021; Decree of the President of Ukraine of 11 June 2021 'On the Strategy for the Development of the Justice System and Constitutional Judiciary for 2021-2023' <<https://zakon.rada.gov.ua/laws/show/231/2021#n10>> accessed 19 June 2021.

the state must guarantee access not only to the classic forms of the judiciary but also to alternative dispute resolution methods introduced at the national level.²

In this regard, alternative methods of civil law dispute resolution are becoming more relevant. On the one hand, this relieves the judicial system and increases its efficiency. On the other, it expands the protection of violated, unrecognised, and disputed rights and interests of persons to choose the most optimal way of considering the dispute, taking into account the nature and complexity of the latter, the peculiarities of parties involved in the dispute, the importance of the dispute for the person, etc.

In this context, mediation deserves special attention as a consensual (conciliatory) way of alternative resolution of civil disputes. In other countries, it has long been considered the traditional and most effective way to resolve conflicts, and recently, it has become increasingly popular in Ukraine.³

It should be noted that mediation, traditionally seen as an alternative to the formal administration of justice in state courts, is often used in court proceedings. In many countries today, various models of court-annexed mediation are successfully operating and developing, facilitating the direct integration of mediation procedures into the structure of civil proceedings.⁴

As a result of amendments to the Constitution of Ukraine,⁵ the provision on unlimited judicial jurisdiction was changed. From now on, in accordance with Art. 124 of the Constitution of Ukraine,⁶ the law may determine the mandatory pre-trial procedure for dispute resolution. In our opinion, mediation can become this kind of pre-trial procedure for settling disputes in some categories of cases, such as family and housing disputes, inheritance disputes, etc.

At the same time, the mediation procedure is not regulated by law in Ukraine,⁷ even though it has already been mentioned in several legislative acts⁸ and there are professional mediators operating in practice.⁹ In view of this, an important issue, in our opinion, is law enforcement practice, especially judicial practice, which illuminates the understanding of the essence of the mediation procedure as it has developed in society. This may be the basis for further development of the concept of court-annexed mediation in Ukraine.

2 V Komarov, T Tsvina, 'The Impact of the ECHR and the Case law of the ECtHR on Civil Procedure in Ukraine' 2021 1(9) *Access to Justice in Eastern Europe* 79-101. DOI: 10.33327/AJEE-18-4.1-a000047.

3 V Nekrošius, V Vėbraitė, Y Prytyka, I Izarova 'Legal, Social and Cultural Prerequisites for the Development of ADR Forms in Lithuania and Ukraine' (2020) 116 *Teise (Law)* 8-23. <https://doi.org/10.15388/Teise.2020.116.1>.

4 We can find examples in various jurisdictions, not only in leading states. In particular, see FK Shako, 'Mediation in the Courts' Embrace: Introduction of Court-Annexed Mediation into the Justice System in Kenya' (2017) 1 *TDM: Mediation & ADR*. General vision on relations of a mediator and a judge may be found here: PN Thompson, 'Good Faith Mediation in the Federal Courts' (2011) 26 (2) *Ohio St J on Dispute Resolution* 363. Recent studies related to Covid challenges also cover this topic. See T Sourdin, J Zeleznokow, 'Courts, Mediation and COVID-19' *Australian Business Law Review* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3595910> accessed 19 June 2021.

5 Law of Ukraine 'On Amendments to the Constitution of Ukraine (Concerning Justice)' of 2 June 2016 <<https://zakon.rada.gov.ua/laws/show/1401-19#Text>> accessed 19 June 2021.

6 Constitution of Ukraine <<https://zakon.rada.gov.ua/laws/show/254k/96-#Text>> accessed 19 June 2021.

7 For more the draft laws of Ukraine on mediation, see I Izarova, Yu Prytyka, S Kravtsov, 'Towards Effective Dispute Resolution: a Long Way of Mediation Development in Ukraine' (2020) 29 (1) *Asia Life Sciences* 389-399.

8 See Law of Ukraine 'On Social Services' <<https://zakon.rada.gov.ua/laws/show/2671-19#Text>> accessed 19 June 2021 and Law of Ukraine 'On Free Legal Aid' <<https://zakon.rada.gov.ua/laws/show/3460-17#Text>> accessed 19 June 2021.

9 'The National Association of Mediators claims 25 years of professional development in Ukraine' <<http://namu.com.ua/ua/>> accessed 19 June 2021.

2 THEORY AND LEGAL REGULATION OF MEDIATION

Mediation is one of a variety of alternative dispute resolution procedures.¹⁰ It is based on the voluntary participation of the parties, whereby a 'mediator' without auxiliary powers systematically facilitates communication between the parties to a conflict, enabling them to take responsibility for finding a solution to their conflict.¹¹

Mediation offers a flexible, self-determined approach that can address all aspects of a dispute, regardless of their legal significance. Against this background, mediation, unlike litigation, is described as an alternative dispute resolution (ADR).

Given the relationship between litigation and mediation, three types of mediation are singled out:

1. Private mediation, which is completely independent of judicial proceedings. It often takes place without any subsequent court proceeding.
2. Mediation initiated by the court, which then takes place without any further court involvement.
3. Judicial mediation, which is more closely linked to the court as an institution in terms of the place of dispute resolution and the specialisation of judges-mediators.¹²

Mediation is distinguished from other types of alternative dispute resolution, such as arbitration, ombudsman procedures, conciliation, and structured negotiations. The main reasons for distinguishing these procedures from mediation reflect its characteristics: its voluntary and flexible nature, the lack of adjudicatory competence of the mediator (mediator), and the self-determination of the parties. If, for example, arbitrators and ombudsmen have the competence to issue (at least partly) binding decisions, then in the mediation process, the parties, not the mediator, decide whether the dispute can be resolved. A conciliator has a greater influence on the outcome than the mediator, for example, by announcing a (optional) decision on conciliation.

The purpose of mediation is to allow the parties to find a solution to their conflict in a sustainable and self-determined manner. The procedure is constructive by its nature and provides a chance for personal development and social growth for the parties to the dispute. The principle of voluntariness and the development of a solution by the parties themselves raises the expectation of substantive justice in resolving the dispute. It is expected that the results will benefit both parties or, at least, avoid anyone being worse off after the mediation.¹³

Ukraine has proclaimed the European integration direction of its development, so the analysis of European approaches to the legal regulation of mediation deserves more attention.

10 This is a traditional view shared by majority of scholars. See L Boule, A Rycroft, 'Mediation: Principles, Process, Practice' (1998) 167 *JS Afr L*; J Nolan-Haley, 'Mediation: The "New Arbitration"' (2012) 61 *Harv Negot L Review*; E Silvestri, 'The Singapore Convention on Mediated Settlement Agreements: A New String to the Bow of International Mediation?' (2019) 3 (4) *Access to Justice in Eastern Europe* 5-11, V Terekhov, 'Online Mediation: a Game Changer or Much Ado About Nothing?' (2019) 3 (2) *Access to Justice in Eastern Europe* 33-50 and others.

11 Council of Europe, 'European Handbook for Mediation Lawmaking' (2019) 9 CEPEJ, 14 June 2019. <<https://rm.coe.int/cepej-2019-9-en-handbook/1680951928>> accessed 19 June 2021.

12 F Steffek, 'Mediation in the European Union: An Introduction' (2012) European Commission <<https://e-justice.europa.eu/fileDownload.do?id=b3e6a432-440d-4105-b9d5-29a8be95408f>> accessed 19 June 2021.

13 *ibid.*

The EU Directive,¹⁴ which has been in force since 2008, defines the use of mediation as ‘ensuring a balanced relationship between mediation and national justice’ (Article 1). The application of this Directive is limited to cross-border civil and commercial disputes, including under EU law and in family and labour disputes.

According to the EU data, all member states implemented its provisions in national law by 21 May 2011. Many states have further developed several mandatory rules, which were followed by all member states. As noted in the report, the national mediation laws adopted in the member states differ greatly in the use of different models, in the legal provisions, and, above all, in the final results in the number of mediations generated.¹⁵

Eight years after the adoption of the Directive and five years after its transposition into national law, the Committee on Legal Affairs of the European Parliament (JURI) has carried out an analysis to determine which national model of mediation, among many existing ones, works most effectively to achieve the real goal of the Directive – to increase the number of EU people and businesses using mediation.¹⁶ Therefore, the main problem in the development of mediation in the EU is to identify the main models of mediation used by member states in implementing the Mediation Directive.

As we have already mentioned, the mediation procedure is not regulated at the legislative level in Ukraine,¹⁷ despite being mentioned in some normative acts.

In particular, in accordance with Art. 70 of the Civil Procedure Code (CPC) of Ukraine,¹⁸ persons who are obliged by law to keep secret information entrusted to them in connection with the provision of professional legal assistance or mediation during the out-of-court settlement of a dispute may not be questioned about such information as witnesses.

In addition, according to Art. 1 of the Law of Ukraine ‘On Free Legal Aid’,¹⁹ legal services include: providing legal information, consultations, and explanations on legal issues; preparing applications, complaints, and procedural and other legal documents; representing the interests of a person in courts, other state bodies, local governments, and before other persons; ensuring the protection of a person from prosecution; assisting a person in ensuring a person’s access to secondary legal aid and mediation. It should also be noted that Art. 16 of the Law of Ukraine ‘On Social Services’²⁰ defines mediation as one of the basic social services.

At the same time, the legislation lacks a legal definition of mediation and its features. This, in turn, as will be seen from our study below, leads to a somewhat improper application of

14 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF>> accessed 19 June 2021.

15 Directorate-General for Justice (European Commission), ‘Study for an evaluation and implementation of Directive 2008/52/EC – the Mediation Directive’ (2016) <<https://op.europa.eu/en/publication-detail/-/publication/6c84b6a6-913e-4231-a677-55f8fa9cbb6>> accessed 19 June 2021.

16 Directorate-General for Internal Policies, ‘The Implementation of the Mediation Directive’ (2016) <https://www.europarl.europa.eu/RegData/etudes/IDAN/2016/571395/IPOL_IDA%282016%29571395_EN.pdf> accessed 19 June 2021.

17 In particular, it is worth noting the efforts of the legislator to regulate the mediation procedure at the legislative level. On 15 July 2020, the Verkhovna Rada adopted in the first reading the draft Law ‘On Mediation’ No 3504, introduced by the Cabinet of Ministers of Ukraine, according to which one of the legal grounds is the application of mediation in any conflicts (disputes) that arise, in particular, on civil, family, labour, economic, and administrative legal relations, as well as in criminal proceedings for the conclusion of conciliation agreements between the victim and the suspect or the accused and in other areas of public relations.

18 Civil Procedure Code of Ukraine <<http://zakon3.rada.gov.ua/laws/show/1618-15>> accessed 19 June 2021.

19 Law of Ukraine ‘On Free Legal Aid’ (n 8).

20 Law of Ukraine ‘On Social Services’ (n 8).

this concept in judicial practice. In our opinion, this significantly reduces the chances for the introduction and effective use of mediation in the future and should be considered very critically.

3 HOW COURTS INTERPRET MEDIATION IN THE UKRAINIAN CASE-LAW

In the case-law of Ukrainian courts, there are decisions in which courts apply the provisions on mediation. Such cases occur in civil and commercial proceedings, as well as in administrative and criminal proceedings.

During the analysis of judicial practice, a significant number of court decisions were found in which the courts mentioned mediation. At the same time, the content of the case and its application did not correspond to the generally accepted understanding.

In particular, when considering criminal cases, courts equate the mediation procedure with the conciliation procedure provided in Art. 46 of the Criminal Code of Ukraine (CrimPC).²¹ In its decision, the court,²² closing the proceedings, noted that Art. 46 of the Criminal Code of Ukraine enshrines the institution of mediation as an alternative way of resolving criminal disputes, which is based on mediation in the reconciliation of the parties, although, in fact, it goes about reconciliation with the victim (see below).

In accordance with this decision, the court notes that the release from criminal liability in connection with the reconciliation of the perpetrator with the victim allows: the victim to receive appropriate compensation more quickly for the damage caused to them; the person who committed the crime to be released from criminal liability; the state to save financial and other resources necessary for the investigation of these categories of cases.

The grounds for this type of exemption from criminal liability are the following: the person committed the crime for the first time; the act belongs to minor crimes (at the same time, it is not required that it falls within the category of so-called crimes of private prosecution); the person who committed the crime reconciled with the victim, and reimbursed the damage they caused or eliminated the damage.

Art. 46 of the CrimPC stipulates that a person who has committed a minor crime for the first time or a negligent crime of medium gravity shall be released from criminal liability if they have reconciled with the victim and reimbursed the damages.

Thus, in this case, the court, using the concept of mediation, equates it to the procedure of reconciliation between the victim and the accused, which creates a kind of illusory idea of mediation in criminal cases.

In another case, the court stated in its judgment²³ that

During the conciliation of the parties in criminal proceedings, each of the parties to the criminal law conflict pursues its own interests. For the victim, it is the restoration of violated rights by compensating for the damage caused by the crime, for the protection of which they are endowed with the relevant rights in criminal proceedings.

21 Criminal Code of Ukraine: Law of 5 April 2001 No 2341-III [2001] Vidomosti of the Verkhovna Rada of Ukraine (VVR) 25-26.

22 The decision of the Zolotonosha City District Court of Cherkasy region in the case No 695/2795/20 of 25 May 2021 <<https://reyestr.court.gov.ua/Review/97164760>> accessed 19 June 2021.

23 Decision of Vinnytsia City Court of Vinnytsia Region in case No 128/2072/19 of 5 March 2021 <<https://reyestr.court.gov.ua/Review/95349004>> accessed 19 June 2021.

For the accused (suspect), it is the avoidance of criminal liability or the imposition of a minimum sentence. The state, in turn, being the bearer of public interest, regulates public relations, which are the subject of criminal procedural law. And in resolving criminal conflicts, the ECtHR obliges national courts to strike a balance between private and public interests.

Thus, in passing judgment in this case, the court referred to the Framework Decision of the Council of the European Union 'On the Standing of Victims in Criminal Proceedings' of 15 March 2001 and directly focused both the prosecution and the victim's attention on the fact that it is mediation involving a competent person (mediator) who can help them reach a clear and fair agreement. After all, when concluding such an agreement, the parties, through compromise and mutually beneficial decisions, adapt the rule of law on conciliation in relation to a particular (their) case, which satisfies their interests and, as a result, public interests. Thus, in sentencing this case, the court, exercising its discretion, prioritised the application of the conciliation procedure with the help of a competent mediator.

Frequent cases of applying the definition of 'mediation' are reflected in the consideration of cases by courts to prosecute individuals for committing administrative offences. In particular, the court, in its decision²⁴ to release a person from administrative liability, focused attention on the fact that the possibility of releasing a person from administrative liability is an element of the implementation of such a legal and social institution in Ukraine as mediation, which at the time of the case had no clear legal regulation

However, based on the explanatory note to the draft Law of Ukraine 'On Mediation', mediation is one of the most popular forms of conflict resolution in developed countries. Mediation has received significant development in the European Union, Australia, the United States and is actively developing in the post-Soviet space.

Therefore, the application of conciliation measures in this case, as a consequence, will contribute to the development of civil society and the formation of a culture of peaceful civilized conflict resolution on the basis of mutual interests and consent.²⁵

Analysing this court decision, we can conclude that national courts, even in the absence of legal regulation of mediation in Ukraine, still focus on the possibility of its application, and, consequently, it becomes a ground for exemption from administrative liability.

In some cases, judges confuse mediation with the possibility of communicating with a litigant to obtain an illicit benefit. In particular, the commentary to the Code of Judicial Ethics²⁶ states that the analysis of the provisions of Art. 14 of the Code gives grounds to conclude that a judge should communicate with litigants only during the trial on the merits, ensuring equal treatment of all litigants as an independent arbitrator. The wording of the article allows simultaneous extra-procedural communication with all participants in the process. At the same time, out-of-trial communication with one participant in the absence of another may lead the absent participant to question the judge's impartiality.

As an example, we can cite the verdict of the Supreme Anti-Corruption Court, which stated that the accused (district court judge), who received an illegal benefit from a participant in the trial and did not plead guilty to his actions, claiming that the party to the case came to his office to discuss the possibility of applying the mediation procedure in a particular case, as he knew that they practiced mediation in court. According to the accused, out-

24 Resolution of the Bakhmatskiy District Court of the Chernihiv Region in case 728/313/18 of 7 March 2018 <<https://reyestr.court.gov.ua/Review/72634424>> accessed 19 June 2021.

25 *ibid.*

26 Commentary to the Code of Judicial Ethics <<http://rsu.gov.ua/uploads/article/komentar-kodeksusuddivskoietiki-edd47ed191.pdf>> accessed 19 June 2021.

of-court communication with one of the parties is the ground for disciplinary liability of the judge.²⁷

Special attention should be paid to the possibility of using mediation during the consideration of administrative cases by courts. As stated in Art. 2 of the Code of Administrative Procedure of Ukraine (CAP), the task of administrative proceedings is a fair, impartial, and timely resolution by the court of disputes in the field of public relations to effectively protect the rights, freedoms, and interests of individuals and the rights and interests of legal entities from the violations on the part of authorities. The specifics of parties to these cases determine the peculiarities of their consideration, as the participation of public law entities is mandatory. Despite such features, there are cases of application of mediation procedures in the law enforcement activities of courts.

Since 2011, mediation has been implemented in Ukraine within the framework of the Council of Europe's 'Transparency and Efficiency of the Judiciary' program. Four pilot courts – the Bila Tserkva City District Court of the Kyiv Region, the Vinnytsia District Administrative Court, the Donetsk Administrative Court of Appeal, and the Ivano-Frankivsk City Court – that had the opportunity to demonstrate the use of mediation in practice showed quite good results. Under the program, for the period from 5 July 2010 to 15 November 2010, 83 cases were referred to mediation, mediation took place in 50 cases, mediation ended successfully in 36 cases, and mediation agreements were concluded in 33 cases.²⁸ In all these cases, information meetings with the parties to the proceedings were held by the staff of these courts.

The experience of these courts should be taken into account, as it was in these courts that court-annexed mediation was introduced in Ukraine, and it was judges who conducted mediation procedures after which the parties came to a compromise solution to their disputes.

An example is the resolution of the court, according to which the proceedings on the claim of Military Unit A1231 to the Department of the State Executive Service of the Vinnytsia District Department of Justice to declare actions illegal and to oblige to act were suspended for the possibility of concluding an amicable agreement through mediation.²⁹ After the mediation, the guards were able to reach an agreement, and the dispute was closed. This example confirms the effectiveness of mediation in the consideration of cases in the courts of Ukraine, even if the participants in the case are subjects of public law.

In addition, the application of the mediation procedure is possible during the review of court decisions, which are considered under the rules of administrative jurisdiction, when the parties themselves decide on the possibility of resolving the dispute by referring the dispute to the mediator.

Thus, the Vinnytsia Administrative Court of Appeal, accepting the waiver of the appeal and closing the proceedings, in its decision of 20 February 2018 in case 130/2267/17, notes that the Vinnytsia Administrative Court of Appeal received a statement from the plaintiff's representative to refuse to consider appeals indicating that a mediation procedure (friendly dispute settlement) had been applied between the parties to the case and that, therefore, the subject matter of the claim between the parties was currently missing.³⁰

27 Judgment of the Supreme Anti-Corruption Court of Ukraine of 22 July 2020 <<https://reyestr.court.gov.ua/Review/90537916>> accessed 19 June 2021.

28 Ukrainian Center for Understanding, 'Analytical report on the introduction of court-annexed mediation in 4 pilot courts of Ukraine' (2010).

29 Judgment of the Vinnytsia District Administrative Court in case No 2a / 0270/4327/11 of 5 October 2011 <<https://reyestr.court.gov.ua/Review/48836081>> accessed 19 June 2021.

30 Decision of the Vinnytsia Administrative Court of Appeal in case No 130/2267/17 of 20 February 2018 <<https://reyestr.court.gov.ua/Review/72428337>> accessed 19 June 2021.

4 SOME REFLECTIONS AND FINAL REMARKS

In answering the question posed at the beginning of this study on how mediation is understood in law enforcement practice, especially judicial practice, it should be recognised that a single meaningful understanding of the essence of the mediation procedure in Ukrainian society has not developed. This may be the basis for further development of the concept of court-annexed mediation in Ukraine.

The analysis of judicial practice showed that despite some changes and development of mediation in Ukraine, the courts still do not fully understand the essence of this phenomenon, its importance, and its role in the rule of law and access to justice. We believe that the normative consolidation of the use of mediation (both judicial and extrajudicial) is an urgent issue not only in law enforcement practice but also in general doctrinal approaches to the definition of mediation as a separate type of alternative dispute resolution.

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