ESTABLISHMENT OF THE INSTITUTE OF MEDIATION IN UKRAINE AT THE LEGISLATIVE LEVEL

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Abstract. The article analyzes the legal acts governing mediation in Ukraine. Attention is paid to the stages that the institute of mediation went through before it was established at the level of law. The main steps of making and developing of the Law of Ukraine on Mediation was studied, which includes the preconditions for its adoption, developed legislative initiatives, etc. The analysis of the adopted law, in particular its main provisions, has been carried out. The classification of legal acts regulating mediation in Ukraine, which includes three groups, was carried out. The first group includes sectoral legal acts, among which there are the laws of Ukraine and codes, such as the Criminal Code, and the Civil Code. The second one includes by-laws, most of which are strategies, plans, and concepts. And the third group includes judicial acts, for example, court decisions. The main legal documents regulating mediation in Ukraine were divided into these groups. The main provisions of these acts were studied. The article outlines the main terms related to mediation as a dispute resolution process, such as mediation, mediation agreement, etc. Attention was paid to the study of the activities of non-governmental and public organizations in the field of mediation development. It was determined that these non-governmental organizations play an important role in shaping the system of mediators by providing them with training and advanced training services. Another component of their activities is educational work, the purpose of which is to promote alternative procedures, explain their effectiveness and benefits, and increase public confidence in these methods.

Keywords: dispute resolution, intermediary organizations, judicial acts, legal acts, mediators, regulations.

INTRODUCTION

For many years, the main deterrent to the development of the institution of mediation remained the lack of legislation as a regulator of the mediation procedure. Although mediation is becoming increasingly popular for dispute resolution in Ukraine, the lack of regulation has not solved a number of problems, primarily related to building public confidence in alternative dispute resolution. The level of trust is influenced by the awareness
of citizens about out-of-court procedures, their features, and benefits. Mediation proved its effectiveness as a dispute resolution procedure in many foreign countries, especially in Europe. Since the signing of the “Association Agreement between Ukraine and the European Union”, the legal system has been constantly changing (Association Agreement with Ukraine, 2016). These transformations also apply to the development of alternative ways of resolving disputes. Simultaneously with the legislative activity, non-governmental and public organizations actively worked on the introduction of mediation in Ukraine. A significant event that reflected the result of the long work of state and public institutions was the adoption on November 16, 2021, of the “Law on Mediation” by the Ukrainian Parliament (Law of Ukraine on Mediation, 2021).

MATERIALS AND METHODS

The methodology of this work was formed based on the purpose, object, and subject of the study. The methodology includes a number of research methods and techniques. In order to achieve the goals of the study was used a group of general scientific methods, such as analysis, synthesis, induction, deduction, comparing, historical and logical methods. Using the method of analysis, the provisions of legal documents governing mediation in Ukraine were studied. The method of comparison was used to compare these acts, which were divided into three groups. Using synthesis, mediation was studied as an object in its entirety, in a single and interconnected part of its parts. The method of induction is based on a formal-logical inference, which was used to form a general conclusion by analyzing individual facts. The deduction was used to get particular results by comparing general facts. Historical and logical methods were used to clarify the stages of the legal establishment of mediation in Ukraine.

Formation of the institute of mediation in the social sphere

In the first years of independence in Ukraine, there was a crisis in social relations. A large number of conflicts in the field of labor arose in the Donetsk and Luhansk regions, which necessitated a rapid and effective settlement of labor relations. In 1994, at the initiative of the Donetsk Psychological Center, with the support of the American non-governmental organization Search for Common Ground, the Ukrainian Mediation Center (UCM) was established. UCM and a reputable American organization have jointly launched projects aimed at spreading mediation in Ukraine by opening regional centers. The largest group, among others, was the Odesa Regional Mediation Group (OOGM), established in December 1994, which at the time included 7 members. Among the achievements of OOGM, the most noteworthy is the creation of a precedent for the use of mediation in civil proceedings, conducting the first mediation in 1997 on the basis of the Odesa Regional and Central District Courts of Odesa.

The Ukrainian Center for Understanding began its work in 1994 as a representative office of Search for Common Ground in Ukraine. In 2002, the charity Ukrainian Center for Understanding (UCP) was registered. The UCP was restructured into the Institute for Peace and Understanding (Ukrainian Center for Understanding, 2022).

As a part of the project “Building a network of restorative justice centers in the community” in the period from September 2006 to February 2007 in ten regions of Ukraine, the Ukrainian Center for Understanding conducted an interim evaluation of the implementation
of restorative justice programs. During the reporting period, 41 restorative justice programs were conducted, including 39 – criminal mediation, 2 – family conferences (Horova, 2007).

In the spring of 2014, the Odesa Model of Dialogues was established as part of the OOGM’s peacekeeping activities. “The main idea of this model: dialogue, dialogue platform resolves conflict issues in several ways and systematically, in accordance with current challenges in the community. This model is important for understanding the complex work with the conflict at different stages, – says Inna Tereshchenko, head and co-founder of OOGM” (Tereshchenko, 2019). In the same year, at the initiative of OOGM, the National Association of Mediators of Ukraine (NAMU) was established.

In the period from 2014 to 2019, a number of public organizations were established to promote mediation in Ukraine, including the Lviv Mediation Center, the League of Mediators of Ukraine, and the Association of Family Mediators of Ukraine. The activities of these associations include information events, forums, seminars, and work on creating standards of professional mediation through the training of mediators, the formation of codes of conduct, and more.

Legislative processes of implementation of mediation into the Ukrainian legal system

The first step toward the normative regulation of mediation in Ukraine was the designing of the Draft Law on Mediation No 7481 of December 17, 2010. It consisted of five sections, containing 28 articles and final and transitional provisions, and established general provisions on mediation, its principles, procedure, and legal status of mediators, requirements for mediators, their rights, and responsibilities. This Draft set out the provisions for the establishment of associations of mediators, the introduction of a national register of mediators, and the approval of a unified training program for those wishing to obtain the profession of a mediator. On February 11, the Draft was revoked and withdrawn from consideration. From that moment until today, a number of Draft Laws on mediation have been proposed: No 8137 of February 21, 2011; No 10301 of April 5, 2012; No 2425a of June 26, 2013; No 2480 of March 27, 2015; No 3665 of December 17, 2015; No 10425 of July 5, 2019; No 3504 of May 19, 2020.

The Draft Law No 3504 of May 19, 2020, was finalized and adopted on November 16, 2021. The Law of Ukraine on Mediation No 1875-IX officially entered into force on December 15, 2021. This act is a legal basis for conducting mediation in Ukraine. According to the preamble of this Law, it regulates the main aspects of the mediation process, including the legal status of the mediator, his/her rights and responsibilities, the scope of powers (rights and obligations) of the parties to the dispute, etc. (Law of Ukraine on Mediation, 2021).

Undoubtedly, the introduction of the law on mediation was a prerequisite for dispute resolution through mediation in Ukraine on the legal level, but most scholars share the view that this act should be flexible. Too strict rules would be contrary to the nature of mediation, which, unlike a well-regulated trial, is adapting to the needs of the parties to the case.

Sectoral legal acts regulating mediation

Acts that constitute sectoral legislation do not directly regulate mediation but contain rules that provide for its practical application. Such acts include the laws of Ukraine and codes.

“The Criminal Code of Ukraine” contains rules that provide for reconciliation between the
parties to the conflict, which is close to mediation. Reconciliation of the parties in a criminal case can be used as an option for its settlement under several conditions. This is possible if the guilty person has committed a criminal offense for the first time or has committed a minor crime and repents. The guilty party must reimburse the victim for the damage caused by his/her actions (Criminal Code of Ukraine, art. 46, Section IX). It can be concluded that the condition for reconciliation between the parties to the conflict is the consent of the guilty party to reimburse the damage caused to the victim. In this case, the injured party’s interest in conciliation, which he/she seeks to satisfy, is to obtain compensation, and the interest of the guilty party is the release from criminal liability.

“The Criminal Procedure Code of Ukraine” regulates the procedural aspect of the conciliation between the victim and the guilty party in the criminal case. It contains detailed requirements for a conciliation agreement, in particular:

a) the initiator of the agreement may be the victim, suspect / accused, except for conciliation agreements in criminal proceedings for criminal offenses related to domestic violence, where only the injured party may be the initiator;

b) the agreement must contain an indication of the parties to the conflict, the legal qualification of the misdemeanor or crime, significant circumstances for the relevant criminal proceedings, terms of reimbursement, agreed punishment and consent of the parties to its appointment or to the appointment of punishment and release from probation, the consequences of concluding and approving the agreement, the consequences of non-performance of the agreement, the date of its conclusion and signatures of the parties, etc. (Criminal Procedure Code of Ukraine, 2012);

c) in case of concluding a conciliation agreement, its parties are limited in the right to appeal the verdict, and the injured party may not demand that the other party be held liable or change the compensation agreements set out in the agreement;

d) in case of intentional non-performance of the agreement by the guilty party, he/she may be prosecuted (Criminal Procedure Code of Ukraine, 2012).

“The Law of Ukraine on the Procedure for Resolving Collective Labor Disputes” of March 3, 1998, regulates the settling of collective labor disputes through conciliation (Law of Ukraine on the Procedure for Resolving Collective Labor Disputes, 1998). The law stipulates that such disputes are resolved by the conciliation commission, a body appointed to make a decision that can satisfy the parties to a collective labor dispute (conflict). This body consists of representatives of the parties. In the process of resolving the dispute, the conciliation commission may involve an independent mediator.

“The Law of Ukraine on Free Legal Aid” of June 2, 2011, defines mediation as an element of free legal aid provided by specialized centers. These centers assist people in obtaining information on out-of-court dispute resolution procedures (Law of Ukraine on Free Legal Aid, 2011).

Another example of a sectoral legal act is the “Law of Ukraine on Social Services”, adopted on January 17, 2019 (Law of Ukraine on Social Services, 2019). This act defines mediation as a basic social service.

**By-laws regulating mediation**

Most by-laws have a programmatic nature and recommendatory action on the need to use mediation to resolve various categories of disputes. Such acts are:
1. “Regulations on the National Mediation and Conciliation Service”, approved by the Decree of the President of Ukraine No 1258/98 of November 17, 1998, (Decree of the President of Ukraine No 1258/98, 1998). This act establishes and regulates the activities of the National Mediation and Conciliation Service. The main tasks of this service related to mediation include: conducting alternative procedures for the settlement of collective labor conflicts; forming lists of independent mediators; providing training and advanced training for independent mediators specializing in collective labor disputes.

2. “The Concept of improving the judiciary to establish a fair court in Ukraine in accordance with European standards”, approved by the Decree of the President of Ukraine No 361/2006 of May 10, 2006 (Decree of the President of Ukraine No 361/2006, 2006). This document emphasizes the need to develop mediation and other alternative dispute resolution procedures in order to relieve the courts of the number of cases. Attention is drawn to the fact that mediation requires scientific justification and practical implementation. The Concept states that people should be provided with easy and quick access to information about the advantages of these methods of protection of rights compared to the judicial mechanism, and it is desirable to use recourse to the courts as an exceptional way to resolve a legal dispute.

3. “The Concept of Juvenile Justice Development in Ukraine” was approved by the Decree of the President of Ukraine No 597/2011 of May 24, 2011 (Decree of the President of Ukraine No 597/2011, 2011). This legal document is one of those documents that consider mediation as a mechanism of restorative justice in criminal cases. The Concept emphasizes the need to introduce mediation as an effective way of voluntary reconciliation of the victim and the offender, the adoption of appropriate law, and informing the public about this procedure.

4. “The Strategy for the development of the justice system and constitutional justice for 2021-2023”, approved by the Decree of the President of Ukraine No 231/2021 of June 11, 2021 (Decree of the President of Ukraine No 231/2021, 2021). The Strategy emphasizes that the judicial system of Ukraine lacks effective mechanisms for alternative (extrajudicial) and pre-trial dispute resolution. In order to improve access to justice, a conditional list of areas and measures has been formed, in particular:

- establishment of mandatory pre-trial dispute resolution with the use of mediation and other practices for certain categories of cases determined by law;
- elaboration of the issue of introduction of the institute of justice of the peace;
- introduction of pre-trial procedures of administrative appeal in cases of administrative proceedings with the expansion of possibilities of application of pre-trial and out-of-court procedures of settlement of disputes;
- optimization of court costs and procedures for their administration in order to encourage the use of extrajudicial methods of dispute resolution;
- improving arbitration proceedings, including increasing the requirements for the founders of arbitration courts, strengthening the institutional capacity of arbitration self-government, expanding jurisdiction over arbitration institutions, such as arbitral tribunals, and extending guarantees of confidentiality to arbitrators;
- introduction and development of the institute of mediation;
- improving the alternative dispute resolution methods in which the role of a mediator is performed by the judge (in judicial mediation).

The content of mediation services consists of measures to assist in resolving disputes, negotiating, and identifying and assessing ways and conditions for getting to an agreement between parties to the case. Assistance in resolving conflicts includes an analysis of the life situation of the parties to the dispute, which includes identifying the main problems, causes of the conflict, awareness of the parties, and explaining the nature, possible consequences, and ways to resolve the dispute. Mediation services may be provided in the amount of 1 to 12 meetings lasting up to 3 hours each (Order of the Ministry of Social Policy of Ukraine No 892, paragraph 2 of Section IX).

The quality of mediation services is assessed on the basis of the following indicators:

1) addressability and individual approach that meets the needs of the parties to the dispute, who apply for such services;
2) effectiveness, which is affected by the level of satisfaction with the services provided;
3) timeliness, i.e. provision of services within the prescribed period;
4) accessibility and openness, as well as awareness;
5) respect for the dignity of the recipient of services;
6) professionalism of mediators.

The state standard establishes a categorical apparatus in the field of mediation, which includes the definition of such basic concepts as mediation, mediation agreement (conciliation agreement), consent to the use of mediation, social service provider (mediator):

Mediation is a method of resolving conflicts designed to bring conflicting parties together in order to reach an agreement in a structured process with the mediation of the mediator.

The provider of social mediation services is a mediator (social work specialist, social worker, and psychologist) who directly implements the activities that constitute the content of social services.

A mediation agreement is a written agreement on mediation (dispute resolution and/or elimination/compensation of damages) concluded between a mediator and the parties to the dispute who are recipients of social mediation services.

Consent to the use of mediation is a written consent (statement) of the parties to conduct negotiations to resolve the conflict using the services of a professional intermediary (mediator).

In order to receive mediation services, the recipient of the service must submit a written application to the entity providing such services. Such entities may be an enterprise, institution, establishment, organization, individual, individual entrepreneur.

According to the State Standard, the process of providing mediation services includes two stages that distinguish between the activities of an intermediary and a mediator:

The first stage is conducting mediation by an intermediary. After receiving information about the existing dispute, the intermediary establishes contact with the parties and arranges an individual meeting. The intermediary analyzes the situation, provides conditions for dialogue with the parties, and prepares for the meeting. He/she then identifies the causes
of the conflict, works out ways and conditions for resolving it. If necessary, the intermediary suggests that the parties to the dispute contact a mediator. At this stage, the intermediary determines the individual needs of the parties, enters into an agreement on mediation services, and draws up an individual plan.

The second stage is conducting mediation by a mediator. The role of the mediator is to help the parties build a dialogue, explain their vision of the conflict, identify ways to resolve it, analyze and, if necessary, adjust possible solutions, and agree to resolve the dispute and compensate for the damage caused. At this stage, a mediation agreement is concluded, if this was not done during the first stage.

In accordance with the provisions of the State Standard, mediation services are provided on a voluntary basis, availability, independence of the service provider, equality of service recipients, respect for their dignity, and confidentiality.

The State standard was taken as a basis in the Law on Mediation, especially its provisions concerning the requirements for the quality of mediation services.

**Judicial acts regulating mediation**

The judiciary can be an effective mechanism for promoting alternative settlements. For example, in 2003 the Ukrainian Center for Understanding, in cooperation with the Supreme Court of Ukraine, launched a program to introduce mediation in criminal cases in Kyiv. Within the framework of this program, partnerships with the judiciary were successfully established, mechanisms for cooperation with the courts were developed, 20 mediators were trained and practical experience in mediation was gained (Belinska, 2011). The following year, the Supreme Court issued two rulings emphasizing the need to develop the institution of conciliation in criminal matters:

“The Resolution of the Plenum of the Supreme Court of Ukraine On the Practice of Applying Legislation on Juvenile Delinquency by the Courts of Ukraine”, which provided that public organizations should be involved in the conciliation process: “Encourage courts to fully support the activities of those non-governmental organizations that aim to reconcile the juvenile offender with the victim before the trial – provide relevant information to such organizations, inform defendants and their legal representatives about the existence of such organizations in the district (city), to enable the victim and the accused to turn to these organizations to resolve the conflict and achieve reconciliation” (Resolution of the Plenum of the Supreme Court of Ukraine No 5, 2004).

“The Resolution of the Plenum of the Supreme Court of Ukraine On the practice of application by courts of legislation”, which provides for the rights of victims of crime (Resolution of the Plenum of the Supreme Court of Ukraine No 13, 2004). The Supreme Court recommended that the courts use conciliation procedures as widely as possible in criminal cases. The parties to the case may reconcile at any time both at the stage of preparation of the case for trial and during the court hearing, but until the end of the judicial investigation.

**CONCLUSIONS**

In Ukraine, mediation as a complex institute is currently being actively developed. This process is prompted by the adoption of specialized law. The Law of Ukraine on Mediation
has officially recognized mediation as a way of resolving disputes. This act will be amended in the future, as the practice of applying its provisions will show its gaps and shortcomings. In addition to the law, mediation as a procedure is regulated by a number of other legal documents of various levels. According to the legal framework of Ukraine, it can be concluded that, depending on the sphere of public relations, mediation may be used for resolving various types of cases, such as civil, family, commercial, medical, criminal, and other disputes.

Along with public authorities, non-governmental and public organizations play an active role in the development of mediation. The activities of these organizations are aimed at promoting mediation, conducting educational activities to familiarize citizens of Ukraine with alternative methods of conflict resolution. A considerable part of their activities is the training of mediators. These organizations offer various courses and certification programs, upon completion of which individuals are issued a certificate that allows them to provide mediation services. Such certificates are a confirmation of mastering the course program. One of the largest non-governmental organizations in Ukraine are the Ukrainian Academy of Mediation” (UAM) and the National Association of Mediators of Ukraine (NAMU). They dedicate their work to promote and introduce mediation in Ukraine. The UAM annually holds a Mediation and Law Forum, in which legal professionals have the opportunity to gain and develop their knowledge of mediation. One of the most significant achievements of this organization in mediation promotion was the publication in 2019 of the first Ukrainian textbook for lawyers “Mediation in the professional activity of a lawyer”. This textbook was developed as part of a UAM project, with the support of USAID and its New Justice Program.

REFERENCES


