Вісник Національного університету "Львівська політехніка". Серія: "Юридичні науки"
№ 3 (35), 2022

УДК 342.9:347.965.42

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PRINCIPLES OF MEDIATION AS AN ALTERNATIVE METHOD TO ENSURE HUMAN AND CITIZEN'S RIGHTS

http://doi.org/10.23939/law2022.35.171

The article is devoted to the analysis of principles of mediation as an alternative method to ensure human and citizen's rights, enshrined in the Law of Ukraine "On mediation", their relationships and interdependence. The research methodology includes a complex analysis and consolidation of the available scientific and theoretical materials, as well as shaping the corresponding conclusions. In the process of the research conducting, the authors used methods of scientific cognition: terminological, logical and semantic, functional, system and structural, logical and normative. It is defined that mediation is specifically organized negotiations with involvement of an impartial intermediary, who facilitates the disputing parties in finding the optimal solution. Such approach can be viewed as one of the most effective techniques to restore the violated subjective rights. Principles of mediation are divided into two groups, namely legal, and communicative and psychological, which are of legal significance. The legal principles include freedoms and informed voluntariness of parties and mediators; equality of parties; self-determination of parties in the process of mediation; non-competition; principle of the simple and fast procedure, its flexibility and informality; limited authorities of the mediator; principle of confidentiality; do no harm principle; professional multi-competence of the mediator; informed consent of the parties on presence of a third party at the procedure as a condition of such presence. The communicative and psychological principles of legal significance include honesty of the conflict parties; impartiality and neutrality of the mediator; personal character of the procedure and direct interaction of the parties; behavioral ethics and endeavor to settle psychological comfort of the mediation procedure.

In the process of the research, it is determined that legislation on mediation should be based on the principles of mediation, approved basing on the theoretical and methodological analysis of the principles, defined in the current legislation of foreign countries and principles of right, declared in the Constitution of Ukraine. The research findings can be applied as a scientific base for improving the legislation on mediation, as well as in the lawmaking and law enforcement activities.

Key words: conflict, mediation, negotiations, principle of mediation, mediator, voluntariness, confidentiality, independence, neutrality.

Problem formulation. Nowadays, the main ways to restore violated rights, freedoms and legal interests is through court proceedings or other legal mechanisms of legal disputes resolving. Considering

the rapid development and progress of the civil society, the mentioned methods are not always effective. Reconciliation is the technique to resolve a conflict, which is of great social importance, and aims to restore and protect social harmony, to ensure stability and confidence of the social relationships participants in the current legality. In the law, reconciliation is viewed as a complex legal institute, which combines different, legally adopted procedures, as a specific manner to influence social relationships.

Analysis of the problem study. The issues of the nature of mediation, its specific features, principles, spheres of application were studied by many scientists, namely O. Belinska, N. Bondarenko-Zelinska, H. Yeriomenko, K. Kanisheva, L. Momot, Yu. Prytyka, D. Protsenko, Yu. Slipchenko, H. Ulianova and others.

The aim of the article is to study principles of mediation as an alternative technique to ensure human and citizen's rights.

Presenting main materials. The analysis of international legal acts on mediation, including those identifying the concept of "mediation" and mechanisms of promoting integration of mediation into the national legislation of countries, confirms significance of mediation at the international level, as a technique that has a sufficient potential to decrease the number of conflicts and to reduce the workload of the national juridical system, to shorten the period, to reduce costs, and to simplify the procedure of settling disputes and resolving conflicts in different spheres of social relations (civil, commercial, criminal and administrative proceedings, international relations, family and labor juridical conflicts).

Mechanisms of mediation should not be considered as a full-fledged alternative to court proceedings, and therefore, mediation can be used as an extrajudicial tool in addition to the acting judicial mechanisms of dispute settlement and conflict resolution.

However, the general international trend shows that the amount of guaranties and diversity of the mechanisms of mediation is being expanded and has prerequisites for a significant growth in the future, providing great stimuli for development of the national legislation on mediation.

Ukraine's integration into the European social and legal space requires reconsideration of the key concepts and principles, which create a base for theoretical modeling and practical exercising of the legal regulation, and needs updating of the system of resolving conflicts, which happen in different fields of human life [1, p. 41].

The relevance of amicable settling of legal disputes is declared by the Verkhovna Rada of Ukraine in the Law "On mediation", which aims to facilitate development of partnership business relationships and harmonization of social relations [2].

The core idea of mediation is revealed in combination of two opposite elements, i.e. independence of parties and guaranties of building a common position on the way to achieving an optimal result. In that case, any legal system is effective if it is built and performs basing on some non-contradictory principles.

Principles of law are the initial, essential ideas, general requirements, which manifest the main and crucial aspects in the legal fundamentals of social life. A principle is defined as an ideological category, because the principles of mediation declare human attitude to that institute as to a social value.

In the scientific literature, the deontological legal principles of mediation, development and implementation of the mediation mechanisms of resolving conflicts and settling disputes include:

– legal principles: the principle of freedom and informed voluntariness of parties and mediators; equality of parties in the process of mediation, self-determination of parties in the process of mediation; non-competition; a simple and fast procedure of mediation, flexibility and informality; limited authorities of the mediator (mediator is not authorized to impose any solution on the parties); confidentiality (confidentiality and professional secrecy about the data, obtained in the process of mediation, unless the parties have agreed otherwise, but for the information that should be open according to the current law or to fulfill the mediation agreement, as well as the information, which should be disclosed to ensure public

order); do no harm principle (that principle requires from mediators to avoid conducting the procedure in the manner that can aggravate and worsen the conflict, and its participants will get some harm; the interests of children, disables people, elderly, dependents are of particular concern, as the mediator should know the expected variant of the conflict resolution will do no harm to third parties, like children); professional multi-competence of the mediator (the mediator should be professionally competent in law, psychology, conflict management, economics); informed consent of the parties on presence of third parties as a condition of such presence;

– communicative and psychological principles, which are of legal significance, include honesty of the conflict parties and the mediator; impartiality and neutrality of the mediator; personal character of the mediation procedure (personal presence of the parties and the mediator) and direct interaction of the parties; behavioral ethics and psychological comfort during the mediation procedures (mutual trust, refusal of invectives, offences).

The Law "On Mediation" declares the principles of voluntariness, equality of the parties, neutrality and impartiality, confidentiality. Specialists in the field of mediation are concerned about the further discussion of the principles, which are not named in the Art. 3 of the Law "On Mediation", but are derived from the general content of legislation (mutual respect of the parties, impartiality of the mediator, transparency of the procedure, etc.).

It is worth noting that none principle of mediation is legally adopted. While studying the principles of conflict resolving with involvement of a mediator, it is important to define the essence of the concept of "principles of mediation".

Principles of mediation are defined as initial, basic fundamentals, ideas, moral and ethical norm, procedural foundations of an optimal interaction of the mediation process parties, general requirements to a conciliation procedure, which are followed and applied by the parties to ensure resolving the conflict and to develop the following legal relationships. The optimality should be determined with the respect to a perfect legal principle and the actual situation [3, p. 603].

The main ideas, which are fundamental for mediation activities and which reveal its essence, are legally approved in the Art. 3 of the Law "On Mediation". The mentioned norm includes a full list of key aspects for conducting mediation activities in the national legal reality and are viewed as primary principles of the legal regulation of the mediation institute.

There are seven legally identified principles, namely voluntariness, confidentiality, independence and neutrality of the mediator, impartiality of the mediator, self-determination and equal rights of the mediation parties.

The principle of voluntariness declares freedom of participation in the mediation procedure, when the parties decide on their wish to take part in the mediation procedure, no coercion is allowed, even when the mediation warning is prescribed in the agreement.

According to the Law "On Mediation", agreements on taking a conciliation procedure with participation of a mediator cannot prevent from claiming to a trial or an arbitration court, unless something different is declared in the Law. The freedom to leave the procedure means each of the parties can refuse to continue the procedure without any comment and explanation of such decision. Nobody can be forced to participate in the mediation procedure or to take it without another party. The freedom in setting conditions of the mediation agreement means the parties are free to define conditions of the agreement, make suggestions and refuse the opposite party's suggestions. The mediation agreements include only conditions of the mutual consent of both parties.

Referring to the Law "On Mediation", a mediation agreement is executed following the principles of voluntariness and honesty of the parties, i. e. the principle of voluntariness should be followed at the stage of the mediation agreement execution. However, it may finally result in failure of the agreement execution.

The essence of the principle of confidentiality is described in the Art. 5 of the Law "On Mediation". It says that mediation procedures should be necessarily conducted following the principle confidentiality of

the information, related to the mentioned procedure, but for the cases, approved by the legislation, unless some other conditions are discussed by the parties. The mediator is forbidden to disclose the information obtained during the conciliation procedure. Disclosure of information by the mediator will be punished according to the status or regulations of the association of mediators, he/she belongs to [4, p. 237].

No one of the procedure participants, regardless of his/her relation with the juridical proceedings on the dispute, is allowed to refer to the information about the parties' readiness to take part in the procedure; to the proposals, ideas or suggestions, announced by one of the parties on a possible resolving of the conflict; to the confessions, made in the process of mediation; to the parties' readiness to accept the mediator's proposal and settle the dispute.

It is forbidden to demand information from the mediator or the organization running the mediation procedure, unless it is the case declared in the laws or other conditions are discussed by the parties.

The mediator may disclose information on the mediation procedure to the opposite party on the agreement with another party.

Confidentiality of mediation does not coincide with the concept of "commercial secret", defined in the Article 505 of the Civil Code of Ukraine [5]. Commercial secret is all information, which the owner may use under available conditions to increase income, avoid unjustified costs, maintain market position or obtain other commercial benefits.

Introduction of the status of commercial secret requires some organizational conditions, including issuing an order, specifying the content of information that is of commercial secret. To set confidentiality of the mediation information, similar procedures are not needed since it is directly regulated by the act on mediation.

The principle of cooperation and equal rights of the parties means that the wish to take a mediation procedure, further steps and the general conclusion are determined by the parties' readiness to interact. No mediation, no separate agreements within the mediation process are possible without equal opportunities and rights of the parties.

The principle of equal rights is one of the fundamentals of mediation and includes two components: cooperation of the parties and equal rights. The principle of cooperation reflects the private constituents of the institute of mediation. By its nature, the principle has some common features with the principle of solidarity of interests and business cooperation.

According to T. Podkovenko, N. Fihun, the principle of parties' cooperation is determined by the essence of the conciliatory litigation [6, p. 39]. The whole procedure should be developed on mutual agreements, concession, the atmosphere of trust and mutual respect during the procedure.

The principle of cooperation suggests a rule which says that the parties, on the way of searching the variants of resolving the conflict, support one another to achieve final results. In the mediation procedure, participants together develop solutions of the actual problem, whereas in the process of competitive court proceedings, they substantiate and prove their requirements and objections.

The principle of equality of parties is considered as a rule, under which both parties have equal opportunities to perform all procedural actions. The principle is similar to the principle of procedural equality of the parties in civil proceedings, private manifestation of the constitutional principle of equality before the law and the courts. However, in the conciliation, the principle of equal rights of parties is considered as a prerequisite for cooperation because of its poor individual significance.

The effect of the mentioned principle is revealed in the equal rights of parties to choose mediators, to define conditions for conducting the conciliation procedure, to announce their positions, to ask questions, to set topics for negotiations, to participate in making an agreement, to take an individual talk with the mediator.

The principle is approved in the Law "On Mediation" declaring that during the mediation procedure the mediator is forbidden to give preference to any of the parties or diminish the rights

and legitimate interests of another party. The mediator guarantees equal rights and opportunities for the parties, involved in the process.

The principle of mediator's impartiality means that under the procedure of settling disputes, the mediator should not show his/her personal interest, shouldn't have any relations with the parties. The mediator should immediately inform the parties about the circumstances, which may influence his/her independence and impartiality.

S. Yosypenko says that mediator's impartiality is the main aspect in the mediation process as it provides for the procedure participants work in the atmosphere of cooperation and secures equal rights in negotiating [7, p. 132]. It is worth noting that the guaranty of the mediator impartiality is declared in the Art. 7 of the Law "On Mediation", and says the mediator should not make suggestions on the conflict resolving unless the parties have agreed otherwise.

In case the mediator has applied various mediation techniques but is unable to bring the parties to an acceptable outcome of the conflict resolving, the mediator's participation is useless and senseless.

The principle should be introduced into the Law to fix the essential feature of mediation that distinguishes this method of dispute resolution from all others. Only the parties can come to a solution, which will maximum meet their actual interests and which they will be ready to exercise voluntarily, under no external coercion.

In that case, the mediator's activities, his/her comprehension of the conflict within the legal framework should contribute to formation of the parties' responsibility for making mediation decisions.

The principle of the mediator's independence is closely related with the principle of impartiality. That principle, similarly to the principle of impartiality, has been associated only with the justice until recent days. That principle is enshrined in the Constitution so the judges are independent and only conform to the Constitution and the law [8].

Nevertheless, in the Law "On Mediation", the principle of independence is defined differently. It says that similar to judges, mediators, conducting the mediation procedure, should not be under the impact of citizens, authorities, governmental or other bodies, which restrict or predetermine their actions; the mediator should be independent from the disputants or other interested people in terms of financial, administrative or other impacts.

V. Skrypchenko considers that "independent" and "self-determined" are related concepts [9, p. 177]. Therefore, V. Skrypchenko concludes that in the Article 126 of the Constitution of Ukraine, the legislator mentions about independence of judges and their conformation to the Constitution and the Law, but actually means that judges refer to the Constitution and the Law and are self-determined in their activities.

V. Skrypchenko also notes that according to the Constitution of Ukraine, the principle of independence has its reverse: judges' conformation to the Constitution of Ukraine and the Law, declared in the Constitution of Ukraine, is actually determined by their subordination (namely – the duty to follow the law) to almost all kinds of legal acts, by which they are guided in the administration of justice.

The mediator is free from emotional remarks of the disputants, impartial and independent in his/her judgements. The mediator has the right to make commitments to arrange the mediation process in case he/she is able to stay impartial and emotionally neutral in specific situations that secure implementation of the principle of equality in mediation.

Conclusions. The analysis of the legally regulated principles of mediation confirms that the imperatives of the Law "On Mediation" have shaped the base for legal regulation of the mediation activities. Mediation is defined as specifically organized negotiations with involvement of a neutral intermediary, who facilitates the disputants find the optimal solution. Such approach is one of the most effective techniques to restore the violated personal rights.

Principles of mediation are divided into two groups, namely legal, and communicative and psychological, which are of legal significance. The legal principles include freedoms and informed

voluntariness of parties and mediators; equality of parties; self-determination of parties in the process of mediation; non-competition; principle of the simple and fast procedure, its flexibility and informality; limited authorities of the mediator; principle of confidentiality; do no harm principle; professional multi-competence of the mediator; informed consent of the parties on presence of a third party at the procedure as a condition of such presence.

The communicative and psychological principles of legal significance include honesty of the conflict parties; impartiality and neutrality of the mediator; personal character of the procedure and direct interaction of the parties; behavioral ethics and endeavor to settle psychological comfort of the mediation procedure. However, the Law "On Mediation" declares the principles of voluntariness, confidentiality, independence and neutrality of the mediator, impartiality of the mediator, self-determination and equal rights of the mediation parties.

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Дата надходження: 16.06.2022 р.

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ПРИНЦИПИ МЕДІАЦІЇ ЯК АЛЬТЕРНАТИВНОГО СПОСОБУ ЗАХИСТУ ПРАВ ЛЮДИНИ І ГРОМАДЯНИНА

Проаналізовано принципи медіації як альтернативного способу захисту прав людини і громадянина, вказані у Законі України "Про медіацію", розкрито їх взаємозв'язок й взаємообумовленість. Методика дослідження включає комплексний аналіз та узагальнення наявного науково-теоретичного матеріалу та формулювання відповідних висновків. Під час дослідження

використовувались методи наукового пізнання: термінологічний, логіко-семантичний, функціональний, системно-структурний, логіко-нормативний. У процесі дослідження визнано, що медіації трактуються як організовані особливим чином переговори за участю нейтрального посередника, який сприяє сторонам у виробленні взаємовигідного рішення. Такий підхід можна вважати одним із найбільш ефективних способів відновлення порушених суб'єктивних прав. Принципи медіації поділяються на правові та комунікативно-психологічні, які мають правове значення. Розкрито принципи: добровільності, конфіденційності, незалежності та нейтральності медіатора, неупередженості медіатора, самовизначення та рівності прав сторін медіації. В процесі дослідження встановлено, що формування законодавства щодо медіації повинно ґрунтуватися на принципах медіації, визначених на підставі теоретико-методологічного аналізі принципів визначених у чинному законодавстві зарубіжних країн та принципах права визначених Конституцією України. Прикладне значення дослідження визначається тим, що наукові результати створюють наукову основу для вдосконалення законодавства про медіацію, що може бути використано у правотворчій та правозастосовній діяльності.

Ключові слова: спір, медіація, переговори, принципи медіації, медіатор, добровільність, конфіденційність, незалежність, нейтральність.