SETTLEMENT OF ADMINISTRATIVE DISPUTES WITH THE PARTICIPATION OF A JUDGE: FOREIGN EXPERIENCE AND IMPLEMENTATION IN UKRAINE

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ABSTRACT

The authors investigated the issue of the peculiarities of the settlement of administrative disputes with the participation of a judge. The essence of the settlement of administrative disputes with the participation of a judge is revealed, in particular, through the features that allow distinguishing such a procedure among other ways of settling legal disputes. The peculiarities of legal regulation of the use of mediation, including judicial one, in foreign countries are established. It is established that among the countries in which this institute already functions today and has positive indicators, we can name France, Poland, and the USA. In Germany and Italy, on the other hand, the use of mediation in resolving legal disputes, including administrative disputes, is not seen as a court procedure but is the prerogative of the private service sector. The content of the current Ukrainian administrative procedural legislation, which regulates the settlement of administrative disputes with the participation of a judge, namely the grounds for such a court procedure, the procedure for its appointment, forms and procedures, is highlighted. According to the results of the research, the problematic aspects of the functioning of the institute of the settlement of administrative disputes with the participation of a judge in Ukraine are grouped according to the relevant criteria (legislative, organizational, informational), and possible ways to solve them are identified.

Keywords: Administrative Dispute, Court, Court Proceedings, Administrative Proceedings, Judicial Mediation.

INTRODUCTION

In democratic states governed by the rule of law around the world, judicial protection is one of the main forms of protection of human and civil rights and freedoms, through which disputes and conflicts between the parties are resolved, with the main goal of establishing truth and achieving justice. As a result of the reform of procedural legislation in Ukraine in 2017, the possibilities for resolving legal disputes were expanded by introducing new procedural and procedural instruments, one of which was the settlement of administrative disputes with the participation of a judge. This provides an opportunity for the parties to the case of administrative offenses to resolve the legal dispute more quickly. In addition, the functioning of such a

conciliation institution helps to relieve administrative courts and also contributes to the procedural economy as reasonable mitigation of procedural formalities and speeding up the process, which is reflected in the reduction of the cost of legal aid, etc. Settlement of administrative disputes with the participation of a judge is a judicial procedure that is important for the fair, timely consideration and proper resolution of administrative cases in order to protect the rights, freedoms, and interests of the individual in the field of public relations.

Ukrainian procedural legislation underwent important changes at the end of 2017, among which the introduction of a new procedure-settlement of a dispute with the participation of a judge - became innovative. The need to introduce a new procedural institution in administrative proceedings in Ukraine-dispute resolution with the participation of a judge as an alternative way of resolving administrative disputes was caused by a number of factors. Among them, in particular, are the caseloads of courts in dealing with cases of administrative offenses, the complexity of resolving legal disputes in the administrative process, and so on. Given that the institution of dispute resolution with the participation of a judge in administrative cases in Ukraine is relatively young, it is important to study foreign experience in applying such procedures for settling administrative disputes, as well as to determine the features of legal regulation under Ukrainian law and identify specific problems.

LITERATURE REVIEW

In the context of the research topic, it is important to establish the essence of the settlement of administrative disputes with the participation of a judge. In particular, Muza (2020) notes that the settlement of a dispute involving a judge is a new institution of administrative litigation and a way of alternatively resolving public-law conflicts. The legislator provides the judge with a mediator in resolving the dispute but not within the framework of the court proceedings, as the actions of the judge and the participants in the court proceedings are not recorded. Horetskyi (2019) points out that the institution of administrative dispute resolution with the participation of a judge is a relatively independent set of legal norms separated within the framework of administrative procedural law, which regulates a specific group of public relations arising in connection with the dispute settlement procedure with a judge. This set of legal norms falls under the concept of intersectoral institution, given the common legal nature of conciliation of the parties, the identity of the tasks before the court, the means to achieve them, the procedure for implementation and homogeneity of the content of legal norms (Genys & Krikštolaitis, 2020).

Biluha (2015) defines the settlement of an administrative dispute involving a judge as a procedure that is based on mediation but is carried out officially by a person-a representative of the state judiciary. The researcher also identifies features that distinguish such a procedure among other ways of resolving legal disputes, namely:

1. Voluntariness;
2. Involvement of a mediating judge (mediator) in its holding;
3. Implementation in order to reconcile interests through finding a mutually acceptable solution;
4. Speed;
5. Flexibility and lack of detailed regulation;
6. Efficiency;
7. Confidentiality;

8. The possibility of involving representatives;
9. The absence of additional preferences for the party to the dispute-an individual.

However, there are other approaches to the relationship between the settlement of administrative disputes involving a judge and mediation. In the study of the peculiarities of dispute resolution with the participation of a judge, the scientific position of Bondarenko-Zelinska (2018) is quite interesting. The author emphasizes the characteristic difference between pre-trial settlement of a dispute involving a judge and mediation: if the mediation procedure, like the mediator, is determined by the parties, the pre-trial settlement of disputes with a judge is subject to procedural form and is conducted by a qualified lawyer.

METHODOLOGY

The methodological basis of the study of the institute of settlement of administrative disputes with the participation of a judge is a set of scientific methods, including dialectical, comparative law, formal law, and system-structural methods. Using the dialectical method, the essence of the settlement of administrative disputes with the participation of a judge is revealed, in particular, through the features that allow distinguishing such a procedure from other ways of settling legal disputes. The comparative legal method was used to establish the features of the legal regulation of the use of mediation, including judicial, in foreign countries (for example, France, Poland, USA, Germany and Italy). Using the formal-legal method, the content of the current Ukrainian administrative procedural legislation, which regulates the settlement of administrative disputes with the participation of a judge, namely the grounds for such court proceedings, the procedure for its appointment, forms and procedures, is highlighted. According to the results of the research, the system-structural method allowed to group the problematic aspects of the functioning of the institute of administrative dispute settlement with the participation of a judge in Ukraine according to the relevant criteria, as well as possible ways to solve them.

FINDINGS AND DISCUSSIONS

The practice of using mediation procedures in resolving legal disputes, including administrative ones, is widespread in many countries around the world. At the same time, it is important to study the question of how such a procedure is used in individual states: whether it is used as a court procedure or conducted by intermediaries (mediators) as representatives of the private sector.

In France, the legal regulation of the use of mediation in administrative proceedings is carried out in accordance with the Code of Administrative Procedure (Code de justice administrative). In cases where the judge considers that the administrative dispute before him (her) can be resolved by conciliation and consensus, he (she) may at any time propose a settlement of the dispute through mediation. In this case, mediation is conducted by a mediator, who informs the judge whether the parties have reached an agreement or not (Code of Justice Administrative, 1996).

Mediation in administrative proceedings is widely used in Poland. The basic principles for the use of judicial mediation in resolving administrative cases are set out in Section 5a of the Code of Administrative Procedure (Code of Administrative Procedure, 1960). According to the

Code, judicial mediation is voluntary and may be conducted during the proceedings, if the nature of the case allows. The purpose of mediation is to clarify and take into account the factual and legal circumstances of the case and the agreement on its settlement within the current legislation, including by making a decision or concluding an amicable agreement. Participants in mediation may be: (1) the body, which conducts the proceedings and the party or parties in the process, or (2) the parties in the process. If the case is referred for resolution through mediation, the period of suspension of consideration is not more than two months. A mediator can be an individual who has full legal capacity and enjoys full public rights, in particular, a mediator who is included in the list of permanent mediators or in the list of institutions and persons authorized to conduct mediation proceedings conducted by the president of the regional court or in the list maintained by a non-governmental organization or university whose information was reported to the chairman of the regional court (Code of Administrative Procedure, 1960).

In the United States, at the beginning of the introduction, the institution of mediation was classified exclusively as private (voluntary), when the parties are free to choose a mediator and determine the rules of the process itself. Later, a kind of mediation as an institution of public procedural law emerged: in order to reduce the caseloads of common law courts, mediation in some cases is now a prerequisite for court proceedings, and the procedure for its conduct is formalized. Thus, a distinction was made between extrajudicial and pre-trial mediation (Dzhyha, 2020).

In contrast to the countries mentioned above, judicial mediation is not used in Germany. However, this was not always the case. Prior to the adoption of the Mediationsgesetz (MediationsG), there were certain experimental schemes on the basis of German courts that were considered as models of judicial mediation because judges acted as mediators. However, Article 9 of the Act provided that after 1 August 2013, mediation including in the administrative jurisdiction, is attributed purely to the private sector, and the mediator is a person who is not empowered to make decisions in the case (Mediation Act, 2012). Similarly, in Italy, mediation is the prerogative of the private service sector. In particular, according to the Legislative Decree on Mediation aimed at reconciliation of civil and commercial disputes, 2010, the mediator is a person or persons who, individually or collectively, mediate without, in any case, the authority to make a decision, which is obligatory for service recipients (Legislative Decree, 2010). In Italy, mediation systems are not created directly in court. Thus, the Italian judicial system relies on a court-related model of mediation, where the dispute is referred to a private mediator.

Introduced changes that came into force at the end of 2017 in the Ukrainian procedural legislation, including administrative procedural, one of the novelties was to establish the basic principles for the settlement of administrative disputes with the participation of a judge. The normative legal document, the provisions of which regulate the procedure for settling administrative disputes with the participation of a judge, is the Code of Administrative Procedure of Ukraine (CAPU). The legal basis for the settlement of an administrative dispute with the participation of a judge is contained in Chapter 4, Section 2 of the CAPU. Determining the grounds for the settlement of an administrative dispute with the participation of a judge, the legislator enshrined the cases in which the application of such a procedure is not allowed, namely: (1) in administrative cases defined by Chapter 11 of Section II of the CAPU (complex, urgent, standard and exemplary administrative cases), except for the cases specified in Article 267 (compulsory alienation of land, other real estate located on it, for reasons of public necessity), and typical cases; (2) in the case of the intervention of a third party who declares

independent claims on the subject matter of the dispute (Legislation, 2005). The procedure for appointing a dispute settlement with the participation of a judge provides for the court to issue a relevant ruling on such a procedure. It is important to take into account that in case the parties do not reach a peaceful settlement of the dispute as a result of the settlement of the dispute, re-settlement of the dispute with the participation of a judge is not allowed. The dispute settlement procedure with the participation of a judge is carried out within a reasonable time but the maximum deadline is set-no more than thirty days from the date of the decision to hold it. As for the form of settlement of administrative disputes with the participation of a judge, such a procedure can take place both through joint (with the participation of all parties, their representatives and the judge) and closed (at the initiative of the judge with each party separately) meetings, including in video conference mode. The main powers of a judge during joint meetings are: clarification of the grounds and subject of the claim, the grounds for objections; explanation to the parties of the subject of evidence in the category of the dispute under consideration; inviting the parties to submit proposals on ways of peaceful settlement of the dispute; implementation of other actions aimed at the peaceful settlement of the dispute by the parties. It should also be noted that during the settlement of the dispute there are relevant restrictions, as evidenced by the provisions of Article 186 of the CAPU. Among them are the following: the judge has no right to provide legal advice and recommendations to the parties, to assess the evidence in the case; the minutes of the meeting are not kept and are not recorded by technical means; it is forbidden to use portable audio devices, as well as to carry out photo and filming, video and audio recording, etc. (Code of Administrative Procedure of Ukraine, 2005). The list of grounds, on which the settlement of an administrative dispute with the participation of a judge is terminated, is defined in Article 188 of the CAPU and is comprehensive. The grounds for termination of this court procedure include:

1. Submission by the party of an application for termination of settlement of the dispute with the participation of a judge;
2. Expiration of the term for settling the dispute with the participation of a judge;
3. At the initiative of the judge in case of delay of the dispute settlement procedure by any of the parties;
4. Achievement by the parties of conciliation and appeal to the court with a statement of conciliation or the plaintiff's appeal to the court with a statement to leave the statement of claim without consideration or in case of rejection of the claim or recognition of the claim by the defendant (Legislation, 2005).

Legislative enshrinement of the basic principles for the settlement of administrative disputes with the participation of a judge, in particular, the grounds for conducting, order of appointment, forms and procedures for conducting should further promote the active use of this judicial procedure. The main purpose of resolving administrative disputes with the participation of a judge is to protect the rights, freedoms, and interests of the individual in the field of public relations, which is an important indicator of protection of every citizen and civil society in general, and therefore state security in general (Reznik et al., 2020).

RECOMMENDATIONS

The introduction of a procedure for resolving administrative disputes with the participation of a judge in Ukraine has the potential to become an effective tool for resolving them, reducing the burden on judges in administrative cases, which will help achieve the main

task - a comprehensive, complete, and objective resolution. However, in order to achieve this and taking into account the fact that the investigated procedure is just beginning to be used in administrative proceedings, there are many problematic issues regarding the effectiveness of its implementation. We believe that the current problematic aspects of the functioning of the institution of administrative dispute resolution with the participation of a judge in Ukraine can be grouped according to the following criteria: (1) legislative-time limits established by law, the period for the application of this procedure should not exceed thirty days (a rather short period for such a procedure, for example in Poland it is two months); impossibility of conducting the procedure of settlement of an administrative dispute with the participation of a judge in the courts of appeal and cassation, etc; (2) organizational-many judges lack the special knowledge and skills of a "*mediator judge*" and, as a result, lack experience in this area; (3) informational-the lack of educational programs aimed at informing about ways to resolve disputes on the basis of conciliation, and as a consequence, ignorance of citizens about the model of behaviour in the peaceful settlement of disputes, etc. The solution of these urgent problems is possible by creating an appropriate and effective legislative foundation, special training of judges to acquire skills in resolving administrative disputes with their participation, introduction of educational programs in educational institutions aimed at informing the public about the possibility of conciliation.

CONCLUSION

The study of foreign experience in the use of mediation in resolving legal disputes allows stating that the practice of resolving legal disputes with the participation of a judge as a mediator in foreign countries is in the active stage of implementation. Among the countries in which this institution already operates today and has positive indicators are France, Poland, and the United States. In Germany and Italy, on the other hand, the use of mediation in resolving legal disputes, including administrative disputes, is not seen as a court procedure but is the prerogative of the private service sector. In Ukraine, important steps have already been taken to introduce the institution of administrative dispute resolution with the participation of a judge. In particular, this is evidenced by the innovations in administrative procedural legislation that took place at the end of 2017, according to which rules on the basic principles of settlement of administrative disputes with the participation of a judge have been introduced to the CAPU. At the same time, it should be noted that today the institution of dispute resolution with the participation of a judge in Ukraine in administrative proceedings is ineffective and almost not used.

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