DOI https://doi.org/10.36059/978-966-397-153-7/43-66

WAYS OF PUBLIC-LAW DISPUTE RESOLUTION

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INTRODUCTION

The updated Code of Administrative Proceedings of Ukraine has brought to the legal reality of the Ukrainian state changes that determine the development of justice in Ukraine in line with world trends. These changes also concern the implementation of mechanisms for the settlement of public-law disputes: through mediation and dispute settlement with the participation of an administrative court judge. For the countries of the Romance-Germanic legal family, the issue of alternative ways of resolving legal conflicts has become urgent due to the rethinking of the role of the modern state, its purpose, the nature of interaction with civil society and every citizen. For a "consensus society" dominated by the idea of tolerance, absolute recognition of other people rights and interests as one's own, compromise settlement becomes a priority form of conflict resolution. In addition, such a way to resolve conflicts most closely fits into the landmark movement to minimize the functions of the modern state, which declares the development of service relations between the government and the individual through enhanced private initiative, delegation of public functions or, at least, diversification of the subjects of their realization[1].

There is no doubt that litigation is the most effective way of protecting legal rights, but in some cases, adjudication does not yet mean a genuine resolution of the conflict and, on the contrary, it may provoke its escalation[2]. It was in the context of changing the ideology of the functioning of the modern state that a discussion was started on expanding the range of ways of alternative settlement of public-law disputes and the expediency of their support at the state level. Thus, Recommendation No. R (81) 7 identified ways of facilitating reconciliation and mediation as a way of facilitating access to justice[3]. Such procedures are complementary to traditional

[1] Дзевелюк М.В. Сервісна держава як функціональна модель сучасної держави. Актуальні проблеми держави і права. 2017. Вип. 78. Ст. 60-67, p. 67

[2] Подковенко Т.О. Медіація як один з альтернативних способів розв'язання юридичних конфліктів. Державо і право. Вип. 45. Ст. 31, p. 31.

[3] Рекомендация R(81)7 Комитета Министров государствам-членам относительно путей облегчения доступа к правосудию 14 мая 1981 г. Офіційний веб-портал Верховної Ради України. URL: https://zakon.rada.gov.ua/laws/show/994_133.

litigation, but can not substitute or made traditional litigation impossible (except in certain cases of arbitration) in any case. At the same time, these recommendations have become specific in Ukraine: mediation as the most widespread, world-wide-established, clear and established instrument is still outside the legal field; instead, in all procedural codes (except the Code of Criminal Proceedings of Ukraine, the Code on Administrative Offences of Ukraine), a dispute settlement procedure with the participation of a judge has been implemented[4]. That demonstrates reverse "centripetal" processes when the state, presented by a body such as a court, does not delegate its functions to it, but on the contrary – is given an additional function that is not inherent to it. This is justified by the fact that the settlement of a dispute involving a judge does not have any features in common with justice, except that this procedure is carried out by a judge.

1. Concepts and features of public litigation

Law is divided into public and private due to the fact that in every system of law there are norms, which should ensure general (public) interests, the interests of society, the state, and there are rules that protect the interests of individuals. Public law encompasses several spheres of public life, above all the construction of the state and the government, including public administration, that is, the expression of public interest as a total, general social interest in each sphere of public life. In other words, public law is associated with the realization of public authority (state power and local self-government) and is characterized by the influence of the imperative method of legal regulation, which is an original, constitutive feature of public law and determines the nature of public-legal relations[5]. Thus, public law is the set of legal institutions, rules and norms that underpins the functioning of a structured governmental and organizational system by which the purpose of securing public order and ultimately the realization and protection of human rights is achieved through the use of the imperative method[6].

Based on the rules of public law, there are many legal links between public authorities and local self-government, citizens, legal entities,

[4] Про внесення змін до Господарського процесуального кодексу України, Цивільного процесуального кодексу України, Кодексу адміністративного судочинства України та інших законодавчих актів: Закон України від 03.10.17 р. № 2147-VIII. Офіційний веб-портал Верховної Ради України. URL: https://zakon.rada.gov.ua/laws/show/2147-19.

[5] Харитонова О. І. Адміністративно-правові відносини (проблеми теорії): монографія. О.: Юридична література. 2004. 328 с., р. 119.

[6] Харитонов Є. О., Старцев О. В. Цивільне право України: підручник. вид. 2, перероб. і доп. К.: Істина, 2007. 816 с., р. 12.

etc., which are related to the exercise of public authority and the satisfaction and harmonization of public interests, that is, the needs of society or the needs of a particular territorial community provided by the law[7]. Such legal relationships are expressed in the establishment of legal personality, the legal status of these entities (which is associated with the emergence of common legal relations), and are prerequisites for establishing specific public relations, as a legal relationship between the entities of the legal sphere, which due to the presence of certain legal facts have reciprocally corresponding subjective rights and legal obligations. Considering the above, it is possible to distinguish a number of characteristic features of public-law disputes, which allow to distinguish them from private legal disputes (that arise from economic, civil, housing, land, family, labor relations, etc.)[8].

Firstly, it is the nature of particular legal relationships that arose the dispute. A dispute will be a public-law one if the disputed rights, freedoms, interests, duties, powers are realized in public-legal relationships. It is this criterion in jurisprudence that is essential to distinguish public-law disputes from disputes in private law. If the exercise of authority by a public authority occurs through specific legal relationships with other entities, in most cases such legal relationships will be just public law. However, in some cases, the exercise of public-authority functions may also occur through private-law relationships. This is due to the fact that there are no impenetrable borders between public and private law. They are interconnected. The above also applies to the field of public administration. The exercise of public authority, although is mediated primarily by the fields of public law, but analysis, for example, of the structure of public-administrative relations, allows to state that the sphere of public administrative relations is wider than the sphere of these relations governed by the rules of administrative law[9]. Management is in unity with the law as a whole, with the whole system of its branches[10]. Due to the extraordinarily broad scope of administrative relations, they are mediated by the norms of a number of branches of law, but administrative and constitutional law are

[7] Bryant G. Garth (1992) Power and Legal Artifice: The Federal Class Action Law & Society Review, 26 (2), pp. 237-272, DOI: 10.2307/3053898, p. 238.

[8] G. Richard Shell (1988) The role of public law in private dispute resolution: reflections on Shearson/American express, Inc. V. McMahon. American business law journal, 26 (3): 397-433, DOI: 10.1111/j.1744-1714.1988.tb01150.x, p. 399.

[9] Державне управління в Україні: навчальний посібник. За загальною редакцією В. Б. Авер'янова. К.: НАН України. Інститут держави і права ім. В.М. Корецького, 1999. P. 19.

[10] Алексеев С.С. Право и управление в социалистическом обществе (общетеоретические вопросы). Советское государство и право. 1973. № 6. P. 13.

of paramount importance. Therefore, legal acts of public authorities may also serve as the basis for the emergence of economic, civil, housing, land, family, labor relations (so in accordance with Part 4 of Article 11 of the Civil Code of Ukraine in cases established by acts of civil law, civil rights and obligations arise directly from acts of state authorities, authorities of the Autonomous Republic of Crimea or local self-government bodies). For example, for the exercise of their power functions, local governments may adopt acts on the transfer of communal property for rent, which are the basis for the conclusion of relevant contracts. If the dispute arises over such a contract and the question arises as to the lawfulness of the act of the local self-government body on the lease of the property, the dispute concerns private legal relations not related to the protection of rights, freedoms or interests in public-law relations, and is not public-law.

In order to determine the nature of particular legal relationships, and therefore the nature of legal dispute, it is necessary to take into account the following features of public-legal relations, which distinguish them from legal relations in private law[11]:

a) these relations are related to the exercise by the State or territorial communities of their public functions, in particular as regards the protection of the rights and freedoms of man and citizen;

b) public-law interest (the desire to provide benefits that are of social importance, i.e. benefits that are important not only to one individual but to a large number of people – the community, society) dominates in these relations;

c) they are governed by the rules of public law (above all, those enshrined in the acts of constitutional, criminal, administrative, financial legislation, etc.);

d) as a rule, a party to these relations is an entity that is endowed with public authority (to recognize a public-law relationship, it is required that the entity endowed with public authority exercises these powers in such relations; as a rule, it is a state body, local self-government body, their official or official person or other entity to which the respective powers of the state or local self-government are delegated).

The exercise of public-authority functions may affect the rights, freedoms, interests of individuals and legal entities even when the legal relationship between such persons and the relevant public authority is not related to the existence of specific legal relationships (for example, when seeking protection of legitimate interest protected by the law of interest),

[11] Кодекс адміністративного судочинства України: науково-практичний коментар / За заг. редакцією Р. О. Куйбіди (видання друге, доповнене). К.: Юстініан, 2009. 976 с., p. 38.

which, along with subjective rights and freedoms, acts as an independent object of judicial protection. Therefore, in the absence of specific legal relations between the parties to the dispute, it is necessary to determine other features of a public-law dispute, though predominantly covered by the foregoing features of public-law relations, but which have an independent significance for determining the nature of a legal dispute that arose in the absence of specific legal relations between its parties.

Secondly, public-law disputes arise in connection with the exercise of public authority, that is, certain public-power functions (which are manifested in the respective powers of public authorities). Public power is exercised, including through the implementation of public administration. This kind of public-authority activity applies to almost all spheres of society and is primarily related to the exercise of executive power and local self-government. In addition, public administration encompasses relationships that are formed within internal organizational activity within state bodies, local self-government bodies, etc. Considering the above, the vast majority of public law disputes arise in the field of public administration.

Thirdly, the subject of public-law dispute are the contradictions regarding the exercise of rights, freedoms, interests, powers in public-legal relations, as well as the exercise of public-power functions and related rights, freedoms, interests outside specific legal relations. At the same time, the exercise of public-power functions is connected with the committing or not performing (inactivity) of state bodies, local self-government, their officials or officials, other entities to which the powers are delegated. These specific actions are externally manifested in public administration tools. These include, first of all, the adoption of regulatory or individual legal acts, the conclusion of public-law contracts, the implementation of other actions that have legal consequences.

Fourthly, almost always one of the parties in public-law disputes is the subject, which is vested with public-authority powers, and precisely in connection with their implementation (some public-law disputes, which are an exception to cited, for example, in Article 275-277 of the Code of Administrative Proceedings of Ukraine). Such entity shall be a public authority, local self-government body, their official or official or other entity to which the respective powers of the state or local self-government have been delegated. This subject becomes a party to the dispute precisely in connection with the exercise of power, and not in connection with the realization, for example, of its civil personality.

Finally, fifthly, the resolution of public-law disputes requires special legal, including judicial, procedures that take into account the specifics of such disputes. This, in particular, stipulates the peculiarities of administrative justice (which is reflected in the principle of official clarification of all the circumstances of the case, the presumption of lawfulness of the claims of the plaintiff of a natural or legal person, etc.). In addition, participation in a public-law dispute of a state or local government body (their official or official), in conjunction with an imperative method of legal regulation, does not allow to speak about the widespread use and effectiveness of resolving public-law disputes in an informal way[12].

Thus, on the basis of all of the above, public-law dispute can be defined as embodied in legally significant actions of the parties of the contradiction regarding the exercise of rights, freedoms, interests, powers in public-legal relations, as well as in the exercise of public-power functions and related their rights, freedoms, interests beyond specific legal relationships. It should be borne in mind that, in the course of administrative justice, not all, but only certain, public-law disputes are dealt with. The following features have been used by the legislator to identify public-law disputes that are the subject of consideration in administrative proceedings, to distinguish them from public-law disputes, which are considered under the rules of other court procedures[13].

2. Settlement of public-law dispute in administrative proceedings

For the adjudication of public law disputes there is an institute of administrative justice. And administrative justice is a type of justice, the subject of which is public-law disputes, which is implemented in the form of administrative justice based on judicial specialization. Based on the above definition, we can define the following features of administrative justice that determine its essence:

– administrative justice is directed at consideration and settlement of public-law disputes concerning violation of rights, freedoms, interests of individuals and legal entities in the field of public administration (material aspect) ;

– administrative justice is carried out in a special statutory manner (procedural form) – in the form of administrative justice (administrative

[12] Крохина Ю. А. Юридический конфликт в финансовой сфере: причины, сущность и процедуры преодоления. Журнал российского права. 2003. № 9. Р. 72.

[13] Кодекс адміністративного судочинства України: науково-практичний коментар / За заг. редакцією Р. О. Куйбіди (видання друге, доповнене). К.: Юстініан, 2009. 976 с., р. 129.

process), which is adapted for effective consideration of public-law disputes and other cases in the public-legal sphere (procedural aspect);

– administrative justice is implemented on the basis of judicial specialization – specialized courts (organizational aspect).

Therefore, administrative law (the administrative process of settling public-law disputes) refers to the procedure established by law for the administrative courts to hear and resolve public-law disputes and certain other cases in cases provided for by law. The objective of administrative justice is the fair, impartial and timely resolution of disputes by the court in the field of public-legal relations in order to effectively protect the rights, freedoms and interests of individuals, rights and interests of legal entities from violations by the authorities.

From the analysis of the task of administrative justice, it becomes clear the importance of this institution for the development of a democratic, rule of law in general and the resolution of public-law disputes in particular. For the purpose of carrying out the task of administrative justice, administrative courts, when deciding on the protection of the rights, freedoms and interests of individuals and legal entities from violations by the authorities in making their decisions, committing actions or omissions, check whether they are (committed) (ch. 2 Article 2 of the Code of Administrative Proceedings of Ukraine):

1) on the basis, within the powers and in the manner defined by the Constitution and laws of Ukraine;

2) using the authority for the purpose for which the power was conferred;

3) justified, that is, taking into account all the circumstances that are relevant for the decision (action);

4) impartial (impartial);

5) in good faith, that is, with a sincere intention that the exercise of power and achievement of the set goals and fair results;

6) prudent, i.e. in accordance with common sense and generally accepted moral standards;

7) respecting the principle of equality before the law, preventing all forms of discrimination;

8) in proportion, in particular, with respect to the necessary balance between any adverse effects on the rights, freedoms and interests of the person and the purposes to which this decision is directed (action);

9) taking into account the right of a person to participate in the decision-making process;

10) in a timely manner, i.e. within a reasonable time.

Given the guaranteed part 2 of Art. 55 of the Constitution of Ukraine, everyone has the right to appeal in court the decisions, actions or omissions of state bodies, local self-government bodies, officials and officials, every natural or legal person has the right to apply to an administrative court if it considers that the decision, action or inaction of a subject power violations of their rights, freedoms or legitimate interests (provided that the settlement of a dispute is adhered to in court, if the obligation of pre-trial settlement is expressly established by law)[14].

In the cases provided for by law, not only individuals and legal entities but also the authorities may apply to the administrative court. Such cases involve the judicial authorization of certain decisions and the taking of certain actions, which are connected with the exercise by the authorities of those "interfering powers", which entail a significant restriction of the rights and legitimate interests of natural or legal persons (for example, establishing restrictions what about the exercise of the right to peaceful assembly, the forced dissolution of citizens' associations, the forced expulsion of foreigners and stateless persons outside Ukraine, etc.).

When settling a public-law dispute within the framework of administrative justice, certain methods of judicial protection (substantive legal measures of a coercive nature, applied by the court and by means of which an effective restoration of the violated rights, freedoms, interests of a person) are applied, namely:

recognition of a legal act or its separate provisions as illegal and invalid;

recognition as illegal and cancellation of an individual act or its separate provisions;

declaring the actions of the authority subject to unlawfulness and the obligation to refrain from taking certain actions

recognition of the inactivity of the subject of authority by unlawfulness and obligation to take certain actions;

establishing the presence or absence of competence (authority) of the subject of authority.

Simultaneously with the application of the aforementioned methods of judicial protection, an administrative court may decide on the compensation of damage caused by unlawful decisions, acts or omissions of the subject of power or other violation of the rights, freedoms and interests of subjects of public-legal relations, or claims for the claim of property withdrawn on the basis of the decision of the subject of power. Otherwise, such claims are

[14] Конституція України: прийнята на 5 сесії Верховної Ради України 28.06.1996 р. Офіційний веб-портал Верховної Ради України. URL: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80.

decided by the courts in civil or commercial proceedings. In addition, protection may be applied in a manner that is not expressly provided by law, but does not contradict it (Part 2, Article 5, Item 11, Part 2, Article 245 of the Code of Administrative Proceedings of Ukraine).

When applying to the administrative court of the authorities with a claim to a natural or legal person, the court, as already noted, exercises preliminary control over the lawfulness of the decision or action of the subject of power – the requirements of the subject of power are satisfied by the court, provided that they are not violate the rights, freedoms, interests of the individual. Therefore, the decision of the administrative court does not specify the methods of judicial protection of the rights, freedoms, interests of the person, but sanctions the adoption of certain decisions to commit certain actions of the subject of power.

3. Settlement of public-law dispute through mediation

The mediation of disputes is characterized by the fact that the search for a mutually agreed solution is not based on formal documents, but solely on the search for the balance of interests of the parties through a series of negotiations, opinions and proposals with the participation of an independent person (mediator), acting on the basis of independence and impartiality, contributes to the support and development between the parties of the culture of their relations, the achievement of positive results and mutual understanding in the dispute that has arisen between them.

The advantage of mediation over the adjudication of public-law disputes is that the judge has no capacity in the trial to apply the rules of dispute settlement, which are not provided for by specific rules of law, even if those rules are mutually beneficial for both parties, provided for by the Law; the judge is guided by the law and the available evidence in the relevant case when conducting the trial. The latter can only be interpreted as true and false and judged by them at their discretion. In mediation, either party may recognize that the other party's claims are to some extent justified and agree to a compromise solution[15].

The administrative procedural legislation of Ukraine does not disclose the content of the concepts of "reconciliation" and "amicable settlement", but the analysis of judicial practice and scientific heritage allows to distinguish the following features of mediation in resolving public law disputes.

[15] Kaija Sandra , Reingolds Valerijs (2014) The role of mediation in public and private law in the Republic of Latvia. International Multidisciplinary Scientific Conferences on Social Sciences and Arts (SGEM 2014), Albena. Political sciences, law, finance, economics and tourism, 1: 491-498, p. 497.

First of all, the content of this activity is administrative procedural action. This is mediated by the requirements for the special procedure for issuing the representative's powers. The parties have a procedural right to obtain the protection of the violated subjective right or interest of the plaintiff, protected by law, and the right to defend the defendant against the unjustified claims of the plaintiff through the settlement of the case in court. The settlement of the issue of automatic settlement of the amicable settlement in reaching a reconciliation between the parties does not have an unambiguous interpretation. Interesting in this regard is the opinion of O.G. Bortnik, according to which the disposal of substantive law in the act of reconciliation (peace agreement) is always present, than this action differs from the rejection of the claim[16]. However, there is another point of view: the settlement agreement deals with substantive rights, which is why the parties dispose of procedural rights. At the trial of the court are considered legal relationships, and can only be waived from the valid law[17].

In addition, it can be noted that the courts are guided by the fact that when reaching a reconciliation (concluding a settlement agreement), not only procedural but also substantive rights are disposed of, so a special clause in the representative's power of attorney is required to carry out administrative actions.

Another feature that characterizes the amicable settlement is that it is a procedural action aimed at resolving the dispute by the disputing parties themselves and not by the court[18]. The substantive legal conflict in the ordinary course of the process is resolved by the court, which assesses the legality and validity of the claimant's claims and the defendant's objections, reflects his findings in the court decision[19]. By reaching a reconciliation (by concluding a settlement), the parties to the dispute thus refuse the prospect of resolving their dispute by a court, which can give a single answer about the nature and content of the legal relationship (or the lack of legal relations at all) between them (provided that the decision will be legal and justified). The

[16] Бортнік О.Г. Мирова угода у цивільному судочинстві : дис. канд. юрид. наук : 12.00.03 / О.Г. Бортнік. Харківський національний ун-т внутрішніх справ. Х., 2007. 227 с., р. 118.

[17] Колясникова Ю.С. Примирительные процедуры в арбитражном процессе : автореф. дис. … канд. юрид. наук. : спец. 12.00.03 «Гражданское право и процесс; хозяйственное право» / Ю.С. Колясникова. Екатеринбург, 2009. 26 с., р. 11.

[18] Mimoso Maria Joao ; Anjos Maria do Rosario (2019) Administrative arbitration in public procurement: a look at Portuguese law , Juridical tribune-tribuna juridical, 9 (1): 196-205, p. 197.

[19] Sandra Kaija, Inga Kudeikina (2018) Legal Scope of the Mediation and Problem of Applicability, European Journal of Sustainable Development, 7 (4): 372-380, DOI: 10.14207/ ejsd.2018.v7n4p372, p. 379.

outcome of the dispute settlement by the parties themselves may not coincide with the court decision that the court would have passed had the parties not reached a reconciliation (conclusion of a settlement agreement). This conclusion is based on an analysis of the rules of the Code of Administrative Proceedings of Ukraine on the procedure for closing proceedings in connection with the parties reaching a conciliation (court approval of the terms of the settlement agreement).

To achieve the purpose of solution of the dispute, the parties agree on the terms of its solution. The terms on which the parties agree to build their relationship are recorded in the court record and signed by the parties or stated in the written statement of the court involved in the case, as indicated in the court record. The importance of clear conditions fixation of reconciliation (peace agreement) determines the special requirements for their procedural fixation. The procedural document that issues the conclusion of the case by reaching a reconciliation (concluding a settlement agreement) is a decision to close the proceedings in the administrative case. Achieving reconciliation (concluding by the parties to a settlement agreement) leads to the conclusion of the case without a court decision. However, the decision to close an administrative proceeding in connection with a reconciliation (concluding a settlement agreement) has the consequences of a court decision[20] if the parties refuse to comply with the terms of reconciliation.

It should be emphasized that conciliation (amicable settlement) is a product of the will of two or more persons (the main difference between them is the refusal of the claimant and the recognition of the defendant), which is a legal fact, which leads to the termination of proceedings only in the case of his court certification – the difference between the procedural institute of reconciliation (amicable settlement) from the so-called "extra-judicial amicable agreement", which is, in essence, a normal substantive legal agreement between the parties. Approval of the conciliation (amicable settlement) by the court also stipulates the possibility of compulsory fulfillment of the terms of this agreement in case of evasion of the parties from fulfillment of the obligations stipulated by it. It is important for mediation the absence of restrictions or conditions for its application to any public-law disputes, with the aim of experimental identification of the zone of possible reconciliation, complications in reaching a compromise, negative impact on the degree of conflict of

[20] Основи адміністративного судочинства та адміністративного права : навч. посіб. / за заг. ред. Р.О. Куйбіди, В.І. Шишкіна. К. : Старий світ, 2006. 256 с., р. 353.

relations in the field of public administration[21]. This approach will provide more accurate regulatory regulation of the most important elements of mediation in the future[22].

Consequently, three conditions are necessary for the effective functioning of mediation in disputes:

1) high professionalism of the mediator, which clearly distinguishes the violation of the right from the offense;

2) the existence of an effective, first and foremost, available mechanism for the judicial protection of the infringed law, which in no case should be replaced by a mediation procedure, for which the establishment of justice rather than the resolution of the conflict remains a priority;

3) a high level of legal culture of the population, which creates internal personal barriers to the realization of the temptation to abuse the opportunities provided by mediation procedures.

For an effective mediation of settlement of public law disputes, such a condition as the full perception of the subject of power as a full participant in the negotiation process with an individual is also important. Thus, the Recommendation of the Committee of Ministers of the Council of Europe Rec (2001) 9 emphasizes that the widespread use of alternative administrative dispute resolution tools will help to resolve these problems and bring administrative authorities closer to the public, and one of the advantages of alternative administrative dispute resolution broad boundaries of discretion in the activities of public administration[23].

At the same time, even at level of the Council of Europe, there is an understanding that the process of "dismantling" the settlement of public-law disputes has many obstacles, among which one of the most significant is that states have not realized the potential utility and effectiveness of alternative dispute resolution between administrative bodies and private ones and therefore do not take sufficient steps to explain to the administrative authorities the benefits of alternative models for resolving such disputes, which may lead to unconventional, effective and rational

[21] Richard C. Reuben (1997) Public Justice: Toward a State Action Theory of Alternative Dispute Resolution, California Law Review, 85 (3): 577-641, DOI: 10.2307/3481153, p. 577.

[22] Sandra Kaija, Inga Kudeikina (2018) Legal Scope of the Mediation and Problem of Applicability, European Journal of Sustainable Development, 7 (4): 372-380, DOI: 10.14207/ejsd.2018.v7n4p372, p. 379.

[23] Рекомендація Rec (2001) 9 Комітету Міністрів Ради Європи державам-членам щодо альтернатив судовому розгляду спорів між адміністративними органами й сторонами – приватними особами, ухвалена Комітетом Міністрів 5 вересня 2001 р. URL: https://vkksu.gov.ua/userfiles/doc/perelik-dokumentiv/EU_Standarts_book_web-1 .pdf.

settlement[24]. But in the current situation in Ukraine, it is almost impossible. The guidelines for better implementation of the Recommendation on Alternative Dispute Resolution between Administrative Authorities and Private Parties clearly identify the role of states: promoting the application of alternative dispute resolution methods with private parties to individual administrative acts, treaties and other controversial issues; encouraging the use of internal review, reconciliation, mediation and negotiated settlement as mandatory prerequisites for initiating court proceedings; encouraging administrative bodies to initiate alternative dispute resolution methods in all cases where such methods are not contrary to applicable law; the obligation on administrative authorities to consent to the use of alternative dispute resolution methods when required by a private party, except where such a procedure is contrary to the public interest or is abused by the private person[25].

None of these measures have been implemented in Ukraine for more than ten years. Even after the new version of the Code of Administrative Proceedings of Ukraine enters into force, the law does not provide for any case where an appeal to the administrative body with a complaint is a prerequisite for filing an administrative claim. Therefore, the authority in Ukraine has no incentive to apply alternative dispute resolution procedures, but has numerous reservations about this step in the form of potential allegations of dishonesty, unlawful interest, diminished performance plans, and so on. All of this, in aggregate, testifies to the significant defects in the basis for the effective functioning of any model of alternative dispute resolution in Ukraine. The only major step in fulfilling the recommendations on the implementation of European standards in the field of justice in Ukraine is the normative fixing of dispute settlement with the participation of the judge of the administrative court in the Code of Administrative Proceedings of Ukraine. Therefore, it is necessary to study it in more details for the perfection of regulations.

[24] Керівні принципи для кращого виконання наявної Рекомендації про альтернативні методи розв'язання спорів між адміністративними органами і приватними сторонами, затверджені Європейською комісією з питань ефективності правосуддя 7.12.2007 р., CEPEJ (2007) 15. URL: https://vkksu.gov.ua/userfiles/doc/perelikdokumentiv/EU_Standarts_book_web-1.pdf..

[25] Керівні принципи для кращого виконання наявної Рекомендації про альтернативні методи розв'язання спорів між адміністративними органами і приватними сторонами, затверджені Європейською комісією з питань ефективності правосуддя 7.12.2007 р., CEPEJ (2007) 15. URL: https://vkksu.gov.ua/userfiles/doc/perelikdokumentiv/EU_Standarts_book_web-1.pdf.

4. The settlement of a public-law dispute with the participation of an administrative court judge

The Institute for the Settlement of a Public-Law Dispute with the Participation of a Judge cannot be recognized as mediation in the classical understanding because, firstly, the mediator is an independent person, secondly, the mediation is extremely flexible and confidential, thirdly, mediation is separated from the judiciary and is its alternative.

The settlement of a dispute involving a judge can be considered as part of administrative proceedings – an optional step in the preparatory proceedings. At the same time, this approach has many objections:

the administrative procedure establishes the right to reconciliation, which is an integral part of the administrative court's activity, but the legislator regards the settlement of the dispute with the participation of a judge as a separate activity not related to reconciliation during the development of basic procedural relations, fixing the court's obligation to promote reconciliation;

the settlement of a dispute involving a judge is based on fundamentally different principles other than those enshrined in the Code of Administrative Proceedings of Ukraine (this is most evident from the principles of openness and openness of the trial and its full fixation by technical means, which directly contradicts the requirements of confidentiality in private meetings);

the judge remains unchanged for both the trial and the settlement of the dispute.

These controversies over the introduction of a dispute resolution institute with the participation of a judge are of increasing interest to scholars and practicing professionals. The vast majority of researches has been conducted on alternative ways of resolving civil disputes and the global experience of their application, conducted by Spector O. M.[26], pre-trial settlement of administrative and legal disputes (Beluga S. S.[27], Shinkar T. I.[28], Lyubchenko Ya. P.[29]). Therefore, the legitimate option of

[26] Спектор О.М. Альтернативні способи вирішення цивільно-правових спорів: світовий досвід та перспективи застосування у правовій системі України. Київ: Фенікс, 2013. 159 с.

[27] Білуга С.С. Досудове врегулювання адміністративно-правових спорів: автореф. дис. ... канд. юрид. наук: 12.00.07. Одеса, Національний університет, «Одеська юридична академія». 2015. 22 с. URL: http://dspace.onua.edu.ua/bitstream/handle/11300/1980/%D0%91%D1%96%D0%BB%D1%83%D0%B3%D0%B0%20%D0%A1.%20%D0%A1..pdf?sequence=1&isAllowed=y.

[28] Шинкар Т.І. Застосування медіації в адміністративному судочинстві: вітчизняний та зарубіжний досвід: автореф. дис. ... канд. юрид. наук: 12.00.07. Львів, Національний університет, «Львівська політехніка». 2017. 24 с. URL: http://lp.edu.ua/sites/default/files/dissertation/2018/8401/aref_shynkar_1.pdf

alternative conflict resolution, including in the public-legal sphere, is considered only in separate scientific articles. That is, the main focus in the study of the legal nature of the dispute settlement institute with the participation of the judge is to identify its common and distinctive features with mediation. The opposite vector of research is those that formulate the vision of the institute for the participation of a judge in resolving a public-law disputr through the procedural plane (M. M. Chabanenko, T. M. Lezhnev)[30].

Both areas appear to be important for developing a full-fledged system of alternative ways of resolving public conflicts in modern society and for selecting among the diversity of existing classical and integrated instruments in the world the one that would be most effective in Ukraine, which is the purpose of this study.

Settlement of a dispute involving a judge in the structure of the administrative process not only destroys established theoretical constructs (which, indeed, today are of rather conditional value), but also fails to fulfill its direct purpose. Recall that the intensification of the process of developing alternative litigation procedures is related to the attempt to unload the courts, as recorded in Recommendations Rec (2001) 9 of the Committee of Ministers of the Council of Europe to Member States on alternatives to litigation between administrative authorities and parties – private parties in 2001 "a large number of cases and… a steady increase in the number of cases may weaken the capacity of courts competent in administrative cases to hear cases within a reasonable time, within the meaning of Art. 6.1 of the European Convention on Human Rights"[31]. In contrast, the number of cases pending before a judge in no way decreases – the proceedings themselves are differentiated. Talking about simplifying the activity of a judge after implementing the procedure for settling a dispute involving a judge in the procedural codes is also unlikely, on the contrary, it is an additional burden on the judge. First, almost all judicial professionals have pointed out that mediation is a

[29] Любченко Я.П. Альтернативні способи вирішення правових спорів: теоретико-правовий аспект: автореф. дис. ... канд. юрид. наук: 12.00.01. Харків, Національний юридичний університет імені Ярослава Мудрого. 2018. 22 с. URL: http://nauka.nlu.edu.ua/download/diss/Lubchenko/d_Lubchenko.pdf.

[30] Чабаненко М.М., Лежнєва Т.М. Правова природа врегулювання спору за участю судді (в контексті структури цивілістичного процесу). Порівняльно-аналітичне право. 2018. № 2. С. 135-137. URL: http://pap.in.ua/2_2018/37.pdf.

[31] Рекомендація Rec (2001) 9 Комітету Міністрів Ради Європи державам-членам щодо альтернатив судовому розгляду спорів між адміністративними органами й сторонами – приватними особами, ухвалена Комітетом Міністрів 5 вересня 2001 р. URL: https://vkksu.gov.ua/userfiles/doc/perelik-dokumentiv/EU_Standarts_book_web-1 .pdf.

specific area of knowledge that requires special training, which, according to the current legislation, is obviously required by all judges in Ukraine[32]. Secondly, the ratio between the procedure for settling the dispute with the participation of a judge and the trial of the case (especially in the written procedure) through the categories "simpler – more complicated" is completely incorrect, since the former will require considerable efforts on the part of the judge, the number and duration of meetings is not regulated by law. Thirdly, in the judicial process where the rules of summary procedure are applicable, speed of decision-making of a final decision that is taken on the consequences of the dispute settlement procedure is almost the same. Nowadays the judicial process where the rules of summary procedure are applicable is the basic form of consideration and resolution of cases in administrative proceedings. Thus, under summary procedure, the case is heard within a maximum of 60 days from the date when the proceeding is started, while the term of the procedure with judge participation may take up to 120 days (60 days for the preparatory hearing + 30 extra days in case when it is necessary + 30 days for the dispute resolution procedure itself) in total. So, we can see that in court dispute settlement significantly loses before the mediation procedure.

The introduced dispute settlement procedure with a judge role in it could co-exist with classical mediation, especially regarding to public-law disputes, since mediation has additional complications and causes open opposition. The logic is simple: the more options to resolve a conflict, the better. But, in this case, there are some objections, although they are not so obvious. There is no doubt that a compromise settlement of disputes has real advantages and a humanistic implication, but it also has unattractive "reverse" as this method recognizes the assignment in one's rights as a norm. It leads to the opinion that in case of a conflict a loss of rights is inevitably, even if it is expressed in minor actions. Consequently, in the exaggerated form, the "consensus society" risks becoming a "right of the strong," which does not hesitate to state hypertrophied demands and obtain at least part of the expected advantage as a result of the conciliation procedure.

If in Ukraine there is co-existence of mediation and settlement of the dispute with the participation of a judge, a private person who is in conflict with the authority body will get additional psychological stress. Following the path of least resistance, the private person should turn to a mediator

[32] Конституція України: прийнята на 5 сесії Верховної Ради України 28.06.1996 р. Офіційний веб-портал Верховної Ради України. URL: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80.

whose task is to find a critical margin of assignment for the party. But when the private person is not satisfied, the only way is to take the case to a court, where the private person will settle the dispute with judge participation, that means another assignment for the private person. Provided that the above-stated procedure is unsuccessful, the "phantom of reconciliation" will not leave the private individual, because according to part 5, Art. 194 of the Code of Administrative Proceedings of Ukraine "when considering the merits of the case the court promotes a reconciliation of the parties"[33]. The hypertrophied view of the situation clearly demonstrates how the compliance of citizens is trained.

The analysis of critical remarks on the procedure of dispute resolution with the participation of a judge in the publications of Ukrainian scholars allows us to conclude that the majority of scholars see the following shortcomings and make the following suggestions:

1) the election of a proper judge to settle the dispute (many scholars are inclined to the need to empower individual judges, and not the entire judicial body of the court);

2) the absence of establishment of the main priorities of the dispute settlement procedure, consolidation of its principles;

3) gaps in the dispute's interrelation settlement procedure and the restarted court proceedings (possibility of applying procedural coercion measures, a violation of the settlement procedure as a basis for appealing a court decision, that was made based on its consequences, etc.).

We considered these observations to be relevant and useful for improving the existing dispute settlement procedure with the participation of an administrative court judge.

In addition, much attention should be paid to such problematic issues of the above-stated procedure as the use of procedural terminology in its regulatory framework and the power of a judge, such as to decide whether to apply the dispute settlement procedure. First of all, it should be noted that Part 4 of Art. 186 of the Code of Administrative Proceedings of Ukraine provides that clarification on the subject of evidence in the category of considered dispute to the parties shall be done by the judge[34]. The establishment of the subject is one of the key issues in proving justice. Traditionally, the subject of proof in a case refers to the circumstances that must be established by the court. In other words, when determining the

[33] Кодекс адміністративного судочинства: Закон України від 06.07.2005 р. № 2747-IV. Офіційний веб-портал Верховної Ради України. URL: https://zakon.rada.gov.ua/laws/show/2747-15.

[34] Ibid.

subject-matter in each specific case, it is necessary to find the answer to the question: what circumstances (or facts) should be established? At the same time, the establishment of the circumstances of law violation, which became the subject of bringing lawsuit to the court, and clarification of actual rights and obligations of the parties to the dispute – "kill" the very idea of settling the dispute, because it leads to the approval of one party in their rightness and destroy any grounds for concessions. The purpose of this procedure is not to "understand the matter of a case", but to find a solution acceptable for both parties, which, at the same time, will require certain concessions from each side, otherwise it loses any meaning. Therefore, the question arises: why during the dispute settlement procedure should a judge explain to the parties the subject of the evidence in their case? In order to reach a compromise, the judge should establish the person's requirements (according to the Code of Administrative Proceedings of Ukraine they are the grounds and subject of the claim and the grounds of objections), the system of alternative proposals from each party and form a zone of possible coordination of position[35]. Thus, the use of the term "evidence" in a dispute resolution procedure with judge participation is incorrect and may substantially distort the very idea of this procedure as an alternative to administrative justice.

Another important direction of improving the dispute settlement procedure with the participation of the administrative court judge is to define its boundaries and to understand the transformation of the role and status of the judge which is unchanged in the initial stages of judicial proceedings in the administrative court and in the dispute settlement procedure. The Code of Administrative Proceedings of Ukraine states that such "written" boundaries are resolutions on conducting the dispute settlement procedure and on termination of the dispute settlement procedure, in which the judge decides, respectively, on the suspension and resumption of judicial proceedings in the case. In this regard, there are comments about the "priorities" of these procedural documents. Settlement of a public dispute involving a judge is a derivative procedure that can exist only in the form of court proceedings. Therefore, the court proceeding itself is a "primary" procedure, which have to be reflected in the relevant court decisions. The primary issues that should be reflected in

[35] Білуга С.С. Досудове врегулювання адміністративно-правових спорів: автореф. дис. ... канд. юрид. наук: 12.00.07. Одеса, Національний університет, «Одеська юридична академія». 2015. 22 с. URL: http://dspace.onua.edu.ua/bitstream/handle/11300/1980/%D0%91%D1%96%D0%BB%D1%83%D0%B3%D0%B0%20%D0%A1.%20%D0%A1..pdf?sequence=1&isAllowed=y.

court decisions (court procedural documents) are the questions of termination and restarting court proceedings. Only when these questions are resolved it should be noted in the decision that the dispute settlement procedure with the participation of a judge should be applicable or terminated.

An analysis of the content of decisions on the appointment of a dispute settlement procedure with the participation of a judge shows that the judges are not fully aware of the transformation of their tasks and thus, their status. For example, many decisions address the form of meetings (not just the first ones)[36], although the form of the meeting according to the Code of Administrative Proceedings of Ukraine should be chosen by the judge as the person conducting the conciliation procedure. In addition, according to the injunction of the Codex of Administrative Proceedings of Ukraine, a closed meeting is initiated by a judge. It also raises objections. Since the judge's function in the dispute settlement procedure is to direct the parties to seek a compromise and if the parties wish to discuss the issue with the judge in the form of a closed meeting, it should not be prohibited.

The last comment on the context of the court decision is about the possibility to appeal it. In these decisions, the question of the dispute settlement procedure and the suspension of proceedings is not only interconnected, but also interdependent. There are no other grounds for the suspension of proceedings in these decisions.

At the same time, the possibility of appealing the court decision on the dispute settlement procedure is realised as follows: the court decision regarding the appointment of the dispute settlement procedure with the participation of the judge is not subjected to be appealed and comes into force from the moment of its announcement; a court decision regarding the suspension of the proceedings may be appealed[37]. To some extent, this can be explained by the prescription of Art. 294 of the Code of Administrative Proceedings of Ukraine, that states that the decision to terminate the proceedings is classified as an appeal, that is appealed separately from the court decision. Chapter 4 of the Code of Administrative Proceedings of Ukraine regulates the issues of dispute settlement with the participation of a judge, but it does not mention the possibility to appeal administrative court decision on its appointment. It only allows to appeal a court decision

[36] Єдиний державний реєстр судових рішень. Офіційний веб-портал «Судова влада». URL: http://reyestr.court.gov.ua/.

[37] Кодекс адміністративного судочинства: Закон України від 06.07.2005 р. № 2747-IV. Офіційний веб-портал Верховної Ради України. URL: https://zakon.rada.gov.ua/laws/show/2747-15.

on termination of despite resolution (in that case appeal is not allowed). It turns out that appealing the decision in the part of claim suspension indicates an automatic disagreement to settle a dispute with a judge participation. Therefore, it is inappropriate to distinguish between these two issues in the decisions on a dispute settlement procedure with the participation of a judge. Although according to Art. 184 of the Code of Administrative Proceedings of Ukraine, the settlement of a dispute with the participation of a judge is carried out with the consent of the parties, and also taking into account the need to popularize this procedure, the possibility of appeal on an appeal basis is impractical[38].

CONCLUSIONS

The study has found that a public-law dispute expresses a legal conflict that arises over performing public administration and the realization of public authority in which the subject of public administration is one of the parties to a public-law dispute. The dispute can be settled both in trial and at the pre-trial stage within the framework of administrative proceedings through mediation and with the participation of a judge of the administrative court. The administrative process of settling public-law disputes means the procedure established by law for the activities of administrative courts to hear and resolve public-law disputes and certain other claims in cases provided by law.

It was substantiated that a dispute settlement procedure with the participation of an administrative court judge may not be recognized as an optimal model of an alternative method of public-law dispute resolution, but it has the right to exist prior to the introduction of mediation. It is also a useful tool for the gradual expansion of the idea that the authority body is a party to a negotiating process. Legal regulation of the procedure for the settlement of disputes with the participation of an administrative court judge requires improvement. Some amendments should be made as to the refusal of using purely procedural terms. It should be supplemented with special terminology, which emphasizes the differences between this procedure and the activities of judges related to the administration of justice (preparing procedural documents related to the procedure for the settlement of disputes, involving the administrative court judge, the status and powers of the judge in this procedure).

[38] Кодекс адміністративного судочинства: Закон України від 06.07.2005 р. № 2747-IV. Офіційний веб-портал Верховної Ради України. URL: https://zakon.rada.gov.ua/laws/show/2747-15.

SUMMARY

The study is devoted to clarifying the legal nature of the mechanisms of the settlement of public law disputes, which are implemented within the framework of administrative justice, through mediation and with the participation of an administrative court judge. The author stated the low level of adaptation of the existing system of public-law dispute resolution in Ukraine to the real needs of the population. Formal setting of international practices of the application of mediation in the specified field does not approve them in the sphere of administrative justice, does not give signs of efficiency and admissibility. It is proved expedient to recognize the dispute settlement procedures involving administrative judges a variety of court mediation procedures and subsequently to separate them from administrative justice.

The purpose of the study is to identify ways to improve the efficiency of the resolution of public law disputes in Ukraine through the use of international experience in this process; to outline a unified concept of reforming the institutional and legal foundations of involving an administrative court judge as a mediator and offer specific recommendations for implementing changes to the legal reality of Ukraine. The main tasks that have determined the substantive components of the study are the following: establishing the nature and determinative features of public litigation, the separation of administrative justice as a way of solving it, identifying mediation as an alternative to judicial consideration of resolving public law disputes, comparing the model of settlement administrative proceedings, not only with traditional mediation, but with modernized understanding of the purpose of the state and justice as part of its key feature, efficiency at present.

In the current research we used both general philosophical and special methods of scientific knowledge such as systematic analysis method, dialectical method, formal-logical method and structural-functional method, as well as a number of empirical methods. The survey results are relevant to domestic legislators and entities engaged in protection of rights and freedoms of an individual and citizen in the field of public administration on the background of updating management trends of democratization of administrative processes in Ukraine.

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