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MEDIATION AS A TOOL FOR CONFLICT RESOLUTION IN THE CONTEXT OF JUDICIAL SYSTEM CHALLENGES DURING WAR

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Summary. *In the context of martial law in Ukraine, there is an urgent need to prevent/level conflict situations. However, sometimes there are circumstances in which it is difficult for the parties to resolve the conflict, and this is when the need to involve a third party arises: representatives of central or local government, lawyers, mediators, auditors, etc.*

Mediation- is an out-of-court settlement of a dispute with the help of a mediator. At the end of 2021, the Verkhovna Rada adopted the Law of Ukraine "On Mediation". Now this activity is officially regulated, and the interests of the parties are protected by law.

Russia's large-scale invasion of Ukraine has dramatically changed the perception of Ukrainian society towards all areas of civilian life, including conflict resolution. The main authority in Ukraine that resolves disputes is the court. However, since the introduction of martial law, the judiciary has been operating with certain peculiarities, some of them have ceased to operate or changed their location, and the territorial jurisdiction of cases has changed. Given the current situation and the emotional component, it is now much more difficult to make a decision on dispute resolution. Nevertheless, conflicts do exist and need to be resolved, so the issue of out-of-court dispute resolution is more relevant than ever.

Alternatives to traditional court proceedings have been known to mankind since the early stages of human civilization, since wars began. One of these

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alternative dispute resolution methods is mediation, the origins of which date back to 4000 BC in China. With the adoption of the Law of Ukraine "On Mediation" at the end of 2021, it became possible to settle disputes without going to court and with the lowest risks and costs.

Today, mediation is an effective tool for finding understanding between conflicting parties, mainly due to its flexibility. This is because the order, location (the possibility of remote conversations), duration and number of meetings depends on the parties.

In conflict situations, the parties almost always experience strong emotions that drive human decisions, and when a country is in the midst of an aggressive war, such emotions, including anger, fear, pain, and a sense of injustice, are particularly acute. In such circumstances, mediation is the best option for resolving a dispute.

Another advantage of turning to a mediator today is the significantly lower cost of the procedure compared to other dispute resolution methods.

In what disputes, during wartime, will mediation be useful?

- **Corporate disputes.** Disagreements between business partners and sometimes between top managers are common. Corporate conflicts have a negative impact on the company's operations and sometimes lead to business failure. In a situation of martial law, when entrepreneurs need to adapt to the "new realities" and transform their business, settling a dispute in court is not the best option. Applying to a qualified mediator is the shortest way to a mutually beneficial conflict resolution. In addition, the mediation procedure reduces the risk of damage to the reputation of the entrepreneur and preserves the confidentiality of such a dispute.

- **Commercial disputes**, in particular in agriculture and real estate. According to the Ministry of Agrarian Policy, the total losses from the war in Ukraine's agriculture alone amounted to \$4.3 billion. Obviously, conflicts between business partners in these industries are predictable and inevitable, including disputes over non-fulfillment of obligations under supply, storage, lease, etc. And in this aspect, mediation can be useful and effective.

- **Family and civil disputes.** Even in the pre-war period, the resolution of this category of cases by the court was an emotionally draining process. Unlike mediation, the court is guided by the rules of law and does not deal with the cause of the conflict. Currently, the following disputes are relevant for mediation: disputes over the division of marital property in situations where the property is destroyed or remains in the temporarily occupied territory, crossing the border after February 24 by a child without the consent of the other parent and, in the event of a parental divorce, establishing contact with such a child, payment of alimony, determining

the child's place of residence, disputes over non-fulfillment of obligations under a real estate lease agreement, etc.

Integration of mediation as a non-judisdictional method of conflict resolution into the national legal system is an important task both under martial law and in the post-war period. Prompt resolution of any conflicts, including legal ones, is an important factor in the development of societies and the state. Modernization of all elements of the national legal system requires innovative approaches and integration of mediation as a non-state method of dispute resolution, through which all parties come to a constructive, optimal resolution of the dispute. In the context of martial law and the post-war period, mediable cases should be more likely to be referred to mediators. This will significantly reduce the burden on the judiciary due to its staffing shortage, and will allow it to focus on those issues that can only be resolved through justice.

The administration of justice in Ukraine before February 24, 2022, required certain transformations, although it is worth emphasizing the existing achievements. This is also confirmed by opinion polls. Thus, the level of trust in the courts has increased, albeit slightly - from 20% (2020) to 28% (2022), but still with a significant majority of those who do not trust the courts in 2022 - 72% [1]. This state of affairs is explained by a number of reasons, including the overload of cases in the courts, staff shortages, etc. According to international and European human rights law, the concept of access to justice obliges states to guarantee the right of every person to apply to a court (or, under certain circumstances, to an alternative dispute resolution body) to obtain legal protection if a person's rights have been violated. Therefore, it is also a right that helps a person to achieve the realization of their rights [2]. In the context of martial law and temporary occupation of part of the territories of the Ukrainian state, limited opportunities (for objective reasons) for the administration of justice, the issue of the role of extrajudicial methods of resolving legal conflicts, in particular mediation, is once again relevant, which will contribute to more effective protection of the rights, freedoms, interests of Ukrainian citizens in resolving civil, family, commercial and other disputes.

Analysis of publications that initiated the solution to this problem. Scholars have paid attention to mediation in Ukraine in the following works: R. Arakelyan "Implementation of the Institute of Mediation in the Criminal Procedure Legislation of Ukraine" (2019) [3], E. Borodin "Mediation Mechanism in the Public Administration System" (2019) [4], A. Bortnikova "Legal Principles of Mediation as a Method of Resolving Public Law Disputes" (2019) [5], S. Yosypenko "Mediation as a way to resolve disputes in private law relations" (2019) [6], I. Lyakh "Problems of theory and practice of introducing the institution of mediation in labor law" (2020) [7], N. Mazaraki "Theoretical and legal basis for the introduction of mediation in



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Ukraine" (2019) [8], K. Tokareva "Administrative and legal regulation of mediation: current state and development trends" (2021) [9], etc. T. Bilyk, R. Havryliuk, I. Horodysky, N. Krestovska, L. Romanadze and others made a significant contribution to the educational sphere in the textbook "Mediation in the Professional Activity of a Lawyer" (2019) [11], etc.

It is important to note that the outbreak of large-scale hostilities on the territory of Ukraine has necessitated the need to focus research attention on the issue of mediation as a way to resolve legal disputes under martial law. Thus, this area was studied by L. Romanadze "Access to Justice: the Role of Mediation in Wartime and Postwar Times" (2022), O. Vasyurenko, V. Dyachenko, N. Dyachenko and others. "Mediation as an alternative way of resolving disputes in the field of intellectual property" (2022), D. Piddubnyi "Development of the Institute of Mediation under martial law in Ukraine" (2022), etc. The active integration of mediation as a non-jurisdictional method of conflict resolution into the national legal system is undoubtedly an important task both under martial law and in the post-war period. Therefore, the actualization of this research area is of great theoretical and practical importance.

The large-scale invasion of Ukraine by the Russian Federation has caused significant damage to the judicial system, with court buildings mostly destroyed in the occupied and attacked territories, the court IT system and the register of court decisions subjected to cyberattacks, resulting in limited access to justice, suspension of a significant number of court proceedings, and litigants unable to access court premises due to lack of security guarantees. The functioning of the judicial system in wartime has once again revealed long-standing and well-known problems, such as limited online court capabilities, court resources, underdeveloped system of court interaction and alternative dispute resolution. The latter significantly reduces the potential of mediation to ensure access to justice as an alternative or effective complement to judicial dispute resolution [1]. On February 24, 2022, martial law was introduced in Ukraine. Formally, its introduction does not affect the judicial process. In particular, pursuant to Article 26 of the Law of Ukraine "On the Legal Regime of Martial Law", it is prohibited to reduce or accelerate any form of judicial proceedings under martial law. At the same time, in practice, it is quite difficult to ensure the uninterrupted operation of courts during the war.

This is confirmed by the results of the judiciary's work in 2022, which are summarized below. We emphasize that it is impossible to conclude that the quality of the judiciary's work is poor as such. The existing problems in the judiciary are multidimensional and can only be resolved in comprehensive cooperation with various public authorities within their respective powers. Thus, the key problems of

access to justice in 2022 were non-compliance with the deadlines for court hearings, violation of procedural rights during pre-trial investigation, improper enforcement of court decisions, and restriction of access to court decisions. The European Court of Human Rights has once again noted the existing problems in guaranteeing everyone the right to a fair trial.

At the end of 2022, 10,400 applications against Ukraine were pending before the European Court of Human Rights. In total, in 2022, the European Court of Human Rights issued 144 judgments in cases against Ukraine, of which 21 judgments found violations of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (right to a fair trial) [16]. We believe that this is a powerful additional factor that justifies the high need to develop mediation in Ukraine as an alternative way to resolve conflicts in the field of law. It should be emphasized that in modern conditions, one of the most common legal problems/conflicts that must be resolved by the already overworked judiciary is family cases (divorce, which entails the division of property and the decision on the place of residence of joint children), inheritance cases, debt issues, etc. The above examples can be resolved through mediation and thus significantly reduce the workload of the judiciary, which in times of war can focus on urgent issues such as ensuring the foundations of national security, proceedings related to war and war crimes, etc.

According to the State Judicial Administration of Ukraine on the state of administration of justice under martial law in 2022 the territorial jurisdiction of 135 local and appellate courts was changed (transferred) by orders of the Chief Justice of the Supreme Court due to the impossibility of administering justice during martial law, of which the territorial jurisdiction of 50 local and appellate courts was restored; the territorial jurisdiction of 169 local and appellate courts was changed (transferred) (including courts whose jurisdiction was transferred during the war, in the period from 2014 to 2022). - 84 local and appellate courts of the Autonomous Republic of Crimea, Donetsk and Luhansk oblasts), which is more than 22%, or more than a fifth of the total number of local and appellate courts. At the same time, the number of judges in the courts that administered justice is 70% of the number established by orders of the SJA of Ukraine. Thus, the number of judges determined by the order of the SJA of Ukraine is 6,278 judges, and the number of judges who administered justice in 2022 is 4,434 judges. Thus, as of December 2022, the staffing shortage of judges in local and appellate courts that administered justice amounted to 1,844 judges [8]. It should be emphasized that the problem of staffing shortages has not arisen since the large-scale military invasion, but has nevertheless intensified during this period. In addition, under martial law, judges also became active participants and took their place in the Armed Forces of

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Ukraine, defending our country. Some judges are forced to undergo special trainings to ensure quality consideration of cases against encroachments on the foundations of national security related to the war and war crimes, which also, albeit temporarily, affects the speed of court proceedings. According to the well-known Ukrainian scholar and mediator L. Romanadze, Ukrainian mediators have reached a high level of development of this profession in the nearly 30 years of their community formation. One of the most comprehensive studies of mediation in Ukraine states that mediation in Ukraine is already a social and legal institution, with its own organizational structure, rules of ethics, a constant increase in the number of mediators and areas of mediation, the community of mediators has made an effective contribution to national lawmaking processes and the development of its own self-regulation [2]. Judges as mediators function in Australia, Germany, Finland and other countries. There are arguments both in favor of judicial mediation (wider opportunities for the parties to reach an agreement without paying a fee to a private mediator, respect for judges and their professionalism, their inherent impartiality, confidentiality) and against such a mechanism (mediation is not a proper exercise of the functions of a judge, judges have a different set of skills and a completely different way of exercising their personal powers).

Comprehensive implementation of mediation will help reduce corruption in the judicial mediation system. The principles of mediation allow for quick and efficient resolution of legal disputes. In fact, the legal nature of out-of-court dispute resolution is an alternative to litigation (to a certain extent). Although in many European countries, this process is integrated into the judicial system. However, such a functional combination may negate the essence of the established institute of judicial mediation, as judges will still assess the conflict through the prism of evidence and legal norms, which will contribute to a formalized approach to dispute resolution. After all, a judge-mediator is first and foremost a judge, and only then a mediator. Judicial mediation, on the other hand, is based on compromises in which the parties give up their positions. Thus, it is likely to be a "quasi-mediation". The national legislation regulates the procedure for dispute resolution with the participation of a judge. Therefore, there is no need to introduce judicial mediation. In addition, given the above arguments about the inexpediency of judicial mediation, in the Ukrainian reality - the staff shortage, exacerbated by martial law, will not be able to solve the existing problems - a quick resolution of legal disputes, which, moreover, will not require payment of court fees, the involvement of specialists, etc.

Conclusions. Summarizing the role of mediation as a method of non-state dispute resolution under martial law, the following should be noted: prompt

resolution of any conflicts, including legal ones, is an important factor in the development of societies and the State; prompt resolution of conflicts under martial law is a crucial phenomenon.

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