

DOI <https://doi.org/10.51647/kelm.2022.3.36>

## ZASTOSOWANIE MEDIACJI W ROZWIĄZYWANIU SPORÓW PUBLICZNOPRAWNYCH Z UDZIAŁEM JEDNOSTEK SAMORZĄDU TERYTORIALNEGO W WARUNKACH DECENTRALIZACJI WŁADZY

**Yevheniia Minakova**

*kandydat nauk prawnych, docent Katedry Dyscyplin Ogólnoprawnych Dydaktyczno-Naukowego Instytutu  
Prawa i Edukacji Innowacyjnej Dniepropetrowskiego Państwowego Uniwersytetu Spraw Wewnętrznych  
(Dniepr, Ukraina)*

ORCID ID: 0000-0003-3823-3072

*kasyanenkoyv@ukr.net*

**Ihor Nalyvaiko**

*wykladowca Katedry Dyscyplin Ogólnoprawnych  
Dydaktyczno-Naukowego Instytutu Prawa i Edukacji Innowacyjnej Dniepropetrowskiego Państwowego  
Uniwersytetu Spraw Wewnętrznych (Dniepr, Ukraina)*

ORCID ID: 0000-0003-1532-2996

*nalyvaikoio@gmail.com*

**Adnotacja.** Artykuł uzasadnia zastosowanie procedury mediacji w rozwiązywaniu sporów publicznoprawnych z udziałem jednostek samorządu terytorialnego w warunkach decentralizacji władzy. Wymierny wpływ reformy decentralizacji władzy na zwiększenie uprawnień i możliwości samorządów powoduje potrzebę poszukiwania nowych przejrzystych, demokratycznych i wiarygodnych form równoważenia i ograniczania władzy władz miejskich. Reforma decentralizacji władzy spowoduje dodatkowe obciążenie organów władzy sądowniczej w zakresie rozpatrywania spraw o naruszenie obowiązującego prawa przez władze samorządowe, ze względu na brak odpowiedzialnych organów wykonawczych, które kontrolowałyby władzę miejską. Obecnie sądy są niemal jedynym skutecznym podmiotem ograniczającym samowolę władz miejskich. Jakość wymiaru sprawiedliwości w tych warunkach jest zmniejszona, więc terminowość podejmowania decyzji w sprawach o naruszenie prawa przez jednostkę samorządu terytorialnego nie jest gwarantowana. Mediacja jest jednym ze sposobów uniknięcia narastania konfliktu między organami władzy publicznej a samorządami w procesie kontroli wykonywania uprawnień delegowanych jak i samorządowych.

**Słowa kluczowe:** decentralizacja władzy, samorząd, mediacja, wspólnota, spory prawne, praworządność.

## APPLICATION OF MEDIATION IN THE RESOLUTION OF PUBLIC LEGAL DISPUTES WITH THE PARTICIPATION OF LOCAL GOVERNMENTS

**Yevheniia Minakova**

*Candidate of Law, Associate Professor at the Department of General Law Disciplines Educational and  
Scientific Institute of Law and Innovative Education*

*Dnipropetrovsk State University of Internal Affairs (Dnipro, Ukraine)*

ORCID ID: 0000-0003-3823-3072

*kasyanenkoyv@ukr.net*

**Ihor Nalyvaiko**

*Lecturer at the Department of General Law Disciplines  
Educational and Scientific Institute of Law and Innovative Education  
Dnipropetrovsk State University of Internal Affairs (Dnipro, Ukraine)*

ORCID ID: 0000-0003-1532-2996

*nalyvaikoio@gmail.com*

**Abstract.** The article substantiates the application of the mediation procedure in resolving public law disputes with the participation of local governments in the context of decentralisation of power. The tangible impact of the decentralisation reform on the empowerment of local governments necessitates the search for new transparent, democratic and reliable forms of balancing and restraining the power of municipal authorities. The reform of decentralisation of power will lead to an additional burden on the judiciary in dealing with cases of violation of current legislation by local governments due to the lack of responsible executive bodies that would control the municipal government. Currently, the courts are almost the only compelling subject to limit the arbitrariness of municipal authorities. The quality of justice in these conditions is declining, so the timeliness of decisions in cases of violations of the law by local governments is not guaranteed. Mediation is one of the ways to avoid the escalation

of the conflict between the state executive bodies and local self-government bodies in the process of control over the exercise of both delegated and self-governing powers by the latter.

**Key words:** decentralisation of power, local self-government, mediation, community, legal disputes, the rule of law.

## ЗАСТОСУВАННЯ МЕДІАЦІЇ У ВИРІШЕННІ ПУБЛІЧНО-ПРАВОВИХ СПОРІВ ЗА УЧАСТІ ОРГАНІВ МІСЦЕВОГО САМОВРЯДУВАННЯ В УМОВАХ ДЕЦЕНТРАЛІЗАЦІЇ ВЛАДИ

**Євгенія Мінакова**

*кандидат юридичних наук, доцент кафедри загальноправових дисциплін Навчально-наукового інституту права та інноваційної освіти Дніпропетровського державного університету внутрішніх справ (Дніпро, Україна)  
ORCID ID: 0000-0003-3823-3072  
kasyanenkoym@ukr.net*

**Ігор Наливайко**

*викладач кафедри загальноправових дисциплін  
Навчально-наукового інституту права та інноваційної освіти  
Дніпропетровського державного університету  
внутрішніх справ (Дніпро, Україна)  
ORCID ID: 0000-0003-1532-2996  
nalyvaikoio@gmail.com*

**Анотація.** У статті обґрунтовано застосування процедури медіації у вирішенні публічно-правових спорів за участі органів місцевого самоврядування в умовах децентралізації влади. Відчутний вплив реформи децентралізації влади на розширення повноважень і можливостей органів місцевого самоврядування зумовлює потребу пошуку нових прозорих, демократичних і надійних форм збалансування і стримування влади муніципальних органів. Реформа децентралізації влади призведе до додаткового обтяження органів судової влади розглядом справ щодо порушення чинного законодавства органами місцевого самоврядування, у зв'язку з відсутністю відповідальних органів виконавчої влади, які б контролювали муніципальну владу. Наразі суди є чи не єдиним дієвим суб'єктом обмеження свавілля муніципальних органів. Якість правосуддя в цих умовах знижується, тому своєчасність прийняття рішень у справах про порушення закону органом місцевого самоврядування не гарантована. Медіація є одним зі способів уникнути наростання конфлікту між органами державної виконавчої влади та органами місцевого самоврядування у процесі контролю за здійсненням як делегованих, так і самоврядних повноважень останніми.

**Ключові слова:** децентралізація влади, місцеве самоврядування, медіація, громада, правові спори, верховенство права.

**Introduction.** The tangible impact of the decentralisation reform on the empowerment of local governments necessitates the search for new transparent, democratic and reliable forms of balancing and restraining the power of municipal authorities. Achieving the proper level of democratic control over local self-government by relying solely on civil society activism is difficult. Therefore, the court remains the leading subject of deterrence and arbitrary discretion of local governments.

Today, the practice of alternative resolution of legal conflicts with the participation of local governments without recourse to court proceedings is increasingly discussed and applied. Mediation, which is considered as one of the alternative ways to resolve conflicts, is gaining popularity. Although this technology is more suitable for resolving private law disputes, its potential demonstrates the suitability of mediation for implementation in the public sphere.

The issue of alternative resolution of public law disputes with the participation of local governments was studied by Y. Andriyanova, Y. Barabash, N. Dovgan, A. Mamedov, A. Melnichenko, L. Nikolenko, M. Piren, N. Fedchun, S. Yaromich, etc. But the problem with applying the mediation procedure in resolving public law disputes with the participation of local governments in the context of decentralisation of power has become relevant in connection with the adoption of the Law of Ukraine "On Mediation". Expanding the scope of mediation in local self-government allows the procedure to be applied in making managerial decisions on issues of local importance. These aspects significantly affect the development of the institute of mediation in Ukraine, so they need new comprehensive research.

**The purpose of the study** is to substantiate the use of the mediation procedure in resolving public law disputes with the participation of local governments in the context of decentralisation.

**Presenting main material.** Mediation as a way of resolving public law disputes in the system of local self-government is becoming relevant in connection with the decentralisation of power.

Decentralisation reform has been accompanied by several fairly typical multi-level conflicts that touch on very irritating issues important to communities. Therefore, working with this type of conflict requires unique solutions.

Expert and informational support for decentralisation reform in Ukraine is large-scale and systematic. But, as experience has shown, specialist support and explanation of reform tasks and problems to communities was not always enough. Conflicts arise due to a lack of understanding of specific processes or other views. Some remain unfinished, go into a latent stage and may appear even for minor reasons (Робота з конфліктами в громадах у процесі децентралізації, 2020: 4). In addition, the decentralisation of power increases the potential conditions for conflicts and legal disputes at the local level on issues of local importance.

Thus, the decentralisation reform determines the need to organise limited state supervision over the exercise of their own (self-governing) powers to ensure the rule of law based on the principles of expediency and proportionality. When conducting state control, public authorities must follow a certain formalised procedure and use only those methods and techniques provided by law. When exercising state control over delegated powers by local self-government bodies, it is expedient to take measures of both persuasion and coercion to restore the rule of law and the rule of law. Only persuasion and warning can be used during the implementation of state supervision over the exercise of their powers by local governments (Мінакова, 2021: 76; Nalyvaiko, Minakova, Mediyanyk, 2021: 90; Kondratiuk, Fedchak, Lepkha, Senyk, Marets, 2021: 160). Public-law disputes between local self-government bodies and state subjects of their control are widespread, but they concern a range of issues clearly defined by law.

The purpose of public control over the activities of local governments is broader than the purpose of state control in this area, which is to ensure the rule of law and the rule of law. It includes: 1) ensuring the rule of law and the rule of law in the activities of local governments and prevention of offences; 2) assistance in solving by local self-government bodies problems and tasks significant for the territorial community; 3) improving the efficiency of local governments; 4) protection and protection of human rights and freedoms; 5) creation of conditions for self-realisation of local self-government bodies and civil society institutions; 6) increasing the responsibility of local governments (Мінакова, 2021: 88). Thus, legal conflicts in the process and due to public control occur more often and concern a broader range of grounds and issues.

The reform of decentralisation of power will lead to an additional burden on the judiciary in dealing with cases of violation of current legislation by local governments due to the lack of responsible executive bodies that would control the municipal government. Currently, the courts are almost the only practical subject to limit the arbitrariness of municipal authorities.

Today, the courts are overburdened with the number of cases per judge due to the declining number of judges and the progressive workload. The quality of justice in these conditions is declining, so the timeliness of decisions in cases of violations of the law by local governments is not guaranteed.

Numerous offences committed on the territory of Ukraine by the Russian occupation forces create a severe burden on the law enforcement and judicial systems. This is not a justifiable reason for delaying the consideration of public law disputes with the participation of local governments, but it is pretty objective. Given the importance of timely implementation of the function of local governments, blocking their decisions due to delays in court proceedings and the adoption of a final decision will lead to unpredictable consequences for communities.

Expanding the forms and grounds for state and public control over the activities of local self-government bodies will increase the number of appeals to the court based on the results of its conduct. The national judicial system is not fully prepared for this.

On November 16, 2021, the Verkhovna Rada of Ukraine adopted the Law of Ukraine "On Mediation", which opened opportunities for the full development of mediation as a holistic institution in the legal system of Ukraine. Adopting the relevant law opened opportunities for formal out-of-court settlement of disputes arising in civil, family, labour, economic, and administrative legal relations, as well as criminal proceedings during the conclusion of reconciliation agreements between the victim and suspect, accused and other public concerns. Mediation can be conducted before and during court proceedings or the execution of a court decision. Of course, mediation in dispute resolution is relevant were one of the parties in the local government or the community.

Mediation in local self-government is a practice of alternative solutions to legal conflicts without recourse to the court proceedings in the local self-government. That's for a sure approach to solution-related conflict with the local sphere of self-government, in which the neutral third party provides a structured process aimed at the formation of prerequisites and provides opportunities for conflicting parties to come to terms with each other acceptable solutions to controversial issues. Signs of mediation in the local self-government are as follows: voluntariness; confidentiality; availability of structured procedures conducting; parts intervention with the third parties (assistance in setting up a communication; assistance passage cases). Due to the processes of decentralisation that determine magnification, the share of functions and powers of bodies and officials persons local self-government, which, with significant share are likely to provoke an increase in the number of conflict situations, so the role of mediation will increase (Куйбіда, Білинська, Петрос, 2018: 78). In addition, the use of mediation in municipal government is relevant in resolving legal disputes and other conflicts and contradictions that inevitably arise in the relevant democratic processes.

With the help of mediation, local governments and the community can find standard solutions based on citizens' interests and municipal authorities' ability to make decisions of local importance, especially difficult or unpopular. Being aware of all the significance and Mediation enables the division of responsibility for decisions that take into account the interests of the community, but to the detriment of specific processes of local importance.

The main feature of mediation procedures is the acceptability of the result obtained for all parties to the conflict. In contrast, court procedures usually involve the winning and losing parties (Мельниченко, 2020: 106). Mediation

is one of the ways to avoid the escalation of conflict between state executive bodies and local self-government bodies in the process of monitoring the exercise of both delegated and self-governing powers by the latter.

During mediation, the mediator as a neutral third party must be independent of the parties to the mediation, public authorities, local governments, their officials and officials, other individuals and legal entities (Коваленко, 2021). This highlights the need to train independent, professional mediators and the demand for relevant services.

Conflict resolution, which arises with a specific frequency during their duties by civil servants or local government officials, raises issues of improving their professional competencies, including building effective communications, negotiations, etc. (Мельниченко, 2020: 107). However, the problems of introducing alternative solutions to legal conflicts in the public sphere are not limited to the unpopularity of mediation among public officials.

The problem with introducing the institution of mediation in Ukraine is the low level of public awareness. Administrative mediation is a type of alternative settlement of administrative disputes, a method of resolving them with the involvement of an administrative mediator (usually a senior official whose actions are challenged), who helps to resolve public conflict – to restore violated values of the individual in the public interest (Галунько, Діхтієвський, Кузьменко, Стеценко, 2018: 272).

The Law of Ukraine "On Mediation" stipulates that local governments and public associations may set additional requirements for mediators they attract or use, particularly the availability of special training, age, education, practical experience, etc. (Про медіацію, 2021). Thus, it is clear from the content of this norm that local governments have the right to use the services of mediators.

In the Laws of Ukraine "On Local Self-Government in Ukraine" of 21.05.1997 and "On Local State Administrations" of 09.04.1999, it is expedient to provide an alternative solution to legal public-law disputes as a result of state control. At the same time, such a rule can apply only after the amendment to the current procedural legislation.

Resolution of a legal conflict in local self-government bodies can be defined as the activity of the parties to the dispute or a third party aimed at termination by reconciling the interests of the conflicting parties or by imperative prescription of the relevant body. Like any activity, the conflict has its technology of resolution in local governments, which involves the establishment of the parties to the competition; determining the cause of its occurrence, object, subject, the motive of the parties, their purpose; identifying ways to resolve the conflict (Ніколенко, Мамедова, 2015: 32). Analysing the available disputes in the communities, the experts noticed that the approach to their settlement is often used – after identifying the conflict, intervention (dialogue or mediation) is offered. Local government officials, civic activists, dialogue facilitators or mediators often travel to the conflict site and start working there, holding meetings, mediations or dialogues in parallel. At the same time, conflictologists use official data from local governments to obtain a general description of conflict situations or tensions or state its presence in certain places or territories through open sources (Робота з конфліктами в громадах у процесі децентралізації, 2020: 5; Nalyvaiko, Chanyшева, Kozin, 2018: 230). Thus, mediation in the activities of local self-government is actively used, but mostly informally and in resolving conflicts with the public.

Mediation is terminated by agreeing by the parties to the mediation on the results of mediation, by the expiration of the mediation and/or validity of the mediation agreement, or in case of refusal of at least one of the parties to the mediation or mediator (s). mediation (Коваленко, 2021). The conclusion of such an agreement is justified in the context of public control, where its parties may be local governments and NGOs.

**Conclusions.** The appeal of the subject of control to the court with a claim to declare the act of local government illegal and its cancellation in whole or in part is justified, but the overload of the judicial system complicates the effectiveness of this form of response. The quality of justice in these conditions is declining, so the timeliness of decisions in cases of violations of the law by local governments is not guaranteed.

Mediation is one of the ways to avoid the escalation of the conflict between the state executive bodies and local self-government bodies in the process of control over the exercise of both delegated and self-governing powers by the latter. In the Laws of Ukraine "On Local Self-Government in Ukraine" of May 21, 1997, and "On Local State Administrations" of April 9, 1999, it is advisable to provide alternative dispute resolution based on the consequences of state control.

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