

Розділ 5

АКТУАЛЬНІ ПИТАННЯ КОНСТИТУЦІЙНОГО ПРАВА, ПРАВОСУДДЯ ТА ЗАХИСТУ ПРАВ ЛЮДИНИ

S. V. Bilous

student of the 1st year

specialty «Law»

Scientific supervisor: PhD, Ass. Prof. C. Yu. Karmazina

DOMESTIC VIOLENCE AND MEDIATION: THE QUESTION OF COMPATIBILITY

This topic is relevant since the institution of mediation in Ukraine appeared relatively recently. Many experts consider it acceptable to use mediation in cases of domestic violence (restorative justice), while others, on the contrary, are adherents of the so-called «retributive» justice. Scientific researcher I. Mikhailovich emphasized that the essence of alternative «non-criminal» justice is to regulate the relationship between the victim and the offender with the help of a benevolent and disinterested mediator [1, p. 281].

If we turn to the experience of European countries, then the tendency of the phased abandonment of the «approval of violence» can be noticeable. The female emancipation is one of the main reasons that led to this. Returning to the issue of domestic violence, it should be noted that the feminist movement has contributed to an increase in the level of knowledge about this topic, which can definitely be attributed to positive changes.

However, the question about whether it is possible to resolve such a complex phenomenon as domestic violence through mediation is still open both in science and in practical activity. So in this publication we will try to express our point of view on this important topic.

According to the 2010 United Nations Violence Against Women Legislation Toolkit, no. Section 3.9.1 provides a recommendation to prohibit mediation [2, p. 46]. This indication is based on the fact that such a method of resolving conflicts presupposes that both parties are equally guilty and, accordingly, understates the responsibility of the offender [1, p. 282]. It has already been embodied in main laws despite the above document is solely a recommendation and not binding.

One of the main arguments put forward by opponents of mediation in cases of domestic violence and violence against women is the fact that the victim is in an unequal position with the abuser. It should also be noted that the injured party may be dependent on the aggressor. That is why it is advisable to consider that only designated competent authorities have the right to make a decision on the use of mediation in cases of this kind.

However, one should not forget that there is a diametrically opposite opinion. Some experts believe that the use of mediation is a good alternative to litigation. This point of view is based on certain advantages of mediation: confidentiality, voluntary nature of entering the settlement process, equal treatment and impartiality of the mediator [3, p. 3].

In order to better understand the consequences of the regulation of cases of domestic violence we can turn to the research of the Austrian legal specialist K. Pelikan. The essence of her experiments was to re-interview the victims of domestic violence after the mediation procedure. The results of the research that she conducted between 1999 and 2009 turned out to be extremely interesting. Those results are the following: about half of the participants voluntarily returned to their partners and noted that their relationship had improved significantly (the majority of respondents associated these improvements with the procedure performed); and the other half of the participants eventually ended the relationship [4].

In terms of such a phenomenon as domestic violence it is also necessary to take into account its high degree of latency. According to many sources, the secrecy of this phenomenon, for certain types of violence reaches 50% [5, p. 83].

Bearing the above in mind it can be concluded that mediation in domestic violence is a very controversial issue. In my opinion, this method of resolving conflicts can be applied in cases where there has been economic violence only. It is necessary to take into account a lot of factors in each specific case on the basis of which, in turn, to draw conclusions about whether mediation is permissible. If the parties and the mediator agree to take part in this procedure, then in this case it is necessary to follow strictly defined rules for conducting mediation, not forgetting to take into account multiple risk factors, as well as all possible consequences for the victim. To my mind, first of all, in the cases with domestic violence the mediation procedure should take place in the interests of the injured party.

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