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Legal liability of mediators

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Abstract: The aim of the research is to identify possible gaps in the regulation of the legal liability of mediators and parties to the mediation process. The research methodology involved the use of dialectical, formal-legal, and comparative legal methods, as well as techniques of analysis and synthesis, deduction and induction, philosophical laws of unity and struggle of opposites, denial of negation, and others. In the main content, the legal liability of mediators is analyzed from the perspective of its positive and negative components, and the legal character of various manifestations of the legal liability of mediators and their place in the modern system of legal liability is identified. Significant attention is paid to the positive liability of mediators and its legal character is justified. In conclusion it is clarified that the institution of mediation as a whole and the legal liability of mediators in Russia are in the process of formation. It is proven that the legal liability of mediators has a public-law rather than a private-law character. Legal gaps in the regulation of the legal liability of mediators, as well as other parties to the mediation process, are identified, and ways to eliminate them are proposed.

Keywords: Mediator. Mediation. Positive liability. Negative liability. Legal offense. Legal anomie. Mediation institution.

Summary: **1** Introduction – **2** The concept of legal responsibility of mediators – **3** Conclusion – References

1 Introduction

Recently, a new participant in procedural activities - a mediator - has emerged in the Russian legal system, to whom the current legislation grants rights to resolve conflicts. However, rights without obligations and responsibilities can lead to various abuses and, in the worst-case scenario, turn into arbitrariness of the parties involved in social relations. Moreover, with a small degree of conventionality, it can be argued that by introducing the institution of mediators, the state has delegated some of its powers to private entities for conflict resolution.[1]

[1] SOLHCHI, M.A., BAGHBANNO, F. Artificial Intelligence and Its Role in the Development of the Future of Arbitration, International Journal of Law in Changing World, 2(2), 56, 2023; ALWAZNA R. Y. Culture and

This delegation is predetermined by at least several aspects. Firstly, by the desire to relieve the judicial system through expanding various methods of pre-trial conflict resolution. Secondly, by the necessity to develop various institutions of civil society, representing, among other things, public-private partnerships, which allows individuals who are not representatives of the government to participate in the public sphere of legal regulation. In this way, the state aims to increase citizens' trust in its own legal institutions by involving them in socially beneficial activities.

It should be noted that not all scientists agree with our point of view. Some authors take a purely formal approach, noting that a mediator is not endowed with the rights and duties characteristic of judicial power, but that "the character of his functions consists in mediating in the settlement of a dispute to assist the parties in developing a solution to the substance of the dispute, in assisting the mediator based on the voluntary consent of the parties in order to achieve a mutually acceptable solution".[2] They refer to Articles 1 and 2 of the Federal Law of the Russian Federation of July 27, 2010 No. 193-ФЗ "On Alternative Dispute Resolution Procedure with the Participation of a Mediator (Mediation Procedure)".[3] However, science begins where we can say "no" to the legislator. If we strictly follow the letter of the law, then a mediator is not a subject of justice, what directly comes from the constitutional provisions that "justice in the country is only carried out by the court" (Article 18 of the Constitution of the Russian Federation), but we do not claim that mediators exercise the powers of judges, we only point out the similarity of some aspects of their activities. In particular, judges also take all measures aimed at achieving a settlement agreement between the participants in

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[2] POPOVA, Yu.P. Legal responsibility of mediators, Proceedings of the conference "Development of world justice in modern conditions: problems and prospects" (Tyumen, 2014).

[3] Collection of Legislation of the Russian Federation. 2010. No. 31. Art. 4162.

a legal conflict, and as it is known, the essence of a mediator's activity is precisely in pre-trial resolution of disputes.

To determine the legal character of the responsibility of mediators, it is necessary to answer a number of important questions. Is it necessary to consider it from the perspective of a broad or narrow scale understanding, that is, solely as a consequence of a violation of law or include in the concept of responsibility lawful behavior? Questions also arise about the place of legal responsibility of mediators in the existing system of legal responsibility. In addition, it is necessary to correlate it with one of the blocks of legal responsibility at the macro level, that is, to establish whether it is material-legal or procedural, public-legal and private-legal.

2 The concept of legal responsibility of mediators

Without introducing the institution of mediators into the legal system, and most importantly, increasing trust in them from citizens, the judicial system will have a hard time coping with the increasing number of civil and other cases, as society, undergoing an information revolution, is in a state of turbulence and state bodies authorized to administer justice simply cannot react quickly and timely to the increase in their quantity. This is the one side of the "coin", the other side is that citizens and legal entities are increasingly trusting the law itself, believing that it can help resolve conflicts rather than resorting to so-called "shadow" law (or, in the terminology of other authors, "non-law"),[4] the role of which in modern legal life should only decrease over time. Moreover, as noted in literature, legal relationships are often inherently conflicting due to the mismatch of interests between parties, and the number of such legal relationships increases year by year. This is a manifestation of the law of unity and struggle of opposites.[5] On the one hand, the law is intended to regulate society's life, but on the other hand, due to various reasons both objective and subjective, it generates conflicts.[6] With the increase in both the quantity of legal norms and the strengthening role of law in society's life, the number of such conflicts will continue to increase in the nearest future. Therefore, the state needs to find various ways to resolve legal conflicts.

By introducing the institution of mediators into the legal life of modern Russia, the state should have foreseen their legal responsibility since it has a regulatory impact on the behavior of subjects, preventing possible violations of legal norms,

[4] MALKO, A.V., TROFIMOV, V.V., ZATONSKY, V.A. Once again about right and wrong, or why legal life is called legal, State and Law, 11, 57, 2020.

[5] MALKO, A.V., LIPINSKY, D.A., MARKUNIN, R.S. Positive and negative responsibility as a manifestation of dialectical logic in legal research, State and Law, 1, 17, 2021.

[6] LIPINSKY, D., BOLGOVA, V., MUSATKINA, A., KHUDOYKINA, T. The notion of legal conflict, "Conflict-Free" Socio-Economic Systems (Bingley, West Yorkshire, 2019).

including procedural ones.[7] As correctly pointed out in scientific literature, there cannot be negative legal responsibility without sanctions established in legal norms, otherwise it becomes declarative.[8]

So, first of all, we need to define the concept of legal responsibility of mediators. However, approaching this issue requires certain methodological premises, namely from a general understanding of legal responsibility, following the logic from general to specific. In domestic[9] and foreign[10] science, a significant amount of work is devoted to the concept of "legal responsibility".[11] However, up to the present time, jurists have not been able to develop a universal concept of "legal responsibility". In existing studies, both domestic and foreign, there are two diametrically opposed approaches to the essence of legal responsibility.

The first approach can be conditionally called traditional, as it is based on understanding legal responsibility as a consequence of a legal violation and essentially comes to various legal restrictions that the violator must undergo. In this case, we are only indicating the general vector of understanding legal responsibility, as within this approach it is considered both as the duty of the violator and as the implementation of a sanction, which can be equated with a special type of legal relationship - the legal relationship of legal responsibility, and is understood as the condemnation of the violator or the negative reaction of society to the committed violation.

In the context of this research, we do not aim to extensively analyze each of the scientific approaches to understanding legal responsibility, but only point out that regarding legal responsibility for a violation, we adhere to the position according to which legal responsibility for a violation is a complex phenomenon that includes the obligation of the violator to undergo legal restrictions - the state's reaction to the violation - the implementation of the obligation.

Representatives of the second approach, based on the sociological school of jurisprudence, see legal responsibility primarily as responsibility for future actions, expressed in lawful behavior of subjects, which they call positive[12] or,

[7] MALKO, A.V., LIPINSKY, D.A., MARKUNIN, R.S., MUSATKINA, A.A. Legal responsibility in the legal system of Russia: some studies and prospects of the project, State and Law, 12, 24, 2021.

[8] TOLSTIK, V.A. Legal responsibility and punishment: the problem of correlation, State and Law, 10, 63, 2010; MARKUNIN, R.S. The system of legal responsibility of public authorities: principles of formation, State and Law, 6, 35, 2020.

[9] LIPINSKY, D.A. Social Bases of Positive Responsibility, Sententia. European of Humanities and Social Sciences, 3, 49, 2015.

[10] HAYEK, F.A. Law, Legislation and Liberty: a New Statement of the Liberal Principles and Political Economy (New York: Routledge, 2003).

[11] SPAAK, T. Legal positivism, law's normativity, and the normative force of legal justification, Ratio Juris, 16, 4, 469, 2003; STILLER, G. Rechtliche Sanktionen Probieme ihrer Ausgestaltung und Anwendung, Neue Justiz, 8, 219, 1975.

[12] SCHMUTZER, R. Probleme der Verantwortung aus arbeisrechtlicher Sicht, Staat und Recht, 3, 29, 1973; SCHNEIDER, W. Zum Verhaltnis von Haftung und Verantwortlichkeit, Staat und Recht, 10–11, 37, 1972.

according to some scholars, prospective. In our view, a restricted understanding of legal responsibility impoverishes its social purpose, namely to be a regulator of subjects' behavior. Furthermore, when understanding legal responsibility only as a consequence of a violation, the integrative property of law as a whole is lost, its instrumental (formal) essence - to act as a regulator of social relations.

Legal responsibility is a complex phenomenon with internal unity, despite the presence of contradictions in it, which is determined by the corresponding philosophical law (the unity and struggle of opposites).[13] The positive and negative components of legal responsibility are precisely two opposites united in the integral phenomenon of legal responsibility. Which form of responsibility will ultimately develop depends on the behavior of the subject in social relations. Both positive and negative legal responsibilities are formally defined by legal norms, serve as a measure of subject behavior, are implemented in legal relationships, and are based on common principles while fulfilling several general functions.

The legal responsibility of mediators is a part of the general system of legal responsibility. Therefore, the most important characteristics that we have noted in the general concept of legal responsibility will necessarily find their manifestation in individual types of legal responsibility. In the case of legal responsibility of mediators, it can be both positive and negative.

It should be noted that numerous disputes about the concept of legal responsibility in general and its specific types particularly are also due to the fact that not a single normative legal act contains a legal definition of the concept of "legal responsibility." The Federal Law of the Russian Federation of July 27, 2010, No. 193-ФЗ "On Alternative Dispute Resolution Procedure with the Participation of a Mediator (Mediation Procedure)" is not an exception.[14] By the way, the term "responsibility" is mentioned in Article 17 (responsibility of mediators and organizations conducting activities to ensure the conduct of the mediation procedure) and paragraph 6 of Article 18, which addresses requirements ensuring responsibility in the activities of mediators. Referring to Article 17 of the above-mentioned law, it is stated: "Mediators and organizations conducting activities to ensure the conduct of the mediation procedure are responsible to the parties for damage caused to the participants as a result of carrying out the specified activities, in accordance with civil law." An analysis of this article provides a clear example of a legal declaration. At first glance, it may seem that the legislator formulated a referral norm, but the point is that civil legislation does not contain specific provisions providing for the legal responsibility of mediators. To determine

[13] MALKO, A.V., LIPINSKY, D.A., MARKUNIN, R.S. Positive and negative responsibility as a manifestation of dialectical logic in legal research, State and Law, 12, 24, 2021.

[14] Collection of Legislation of the Russian Federation. 2010. No. 31. Art. 4162.

the legal responsibility of a mediator, we can only operate with general provisions on compensation for damages and compensation for moral injury, fixed in the Civil Code of the Russian Federation. As it faithfully noted in juristic scientific essays, "outside the law in this case remain, for example, the dishonest behavior of the mediator or abuse of the status. At the same time, a more general reference to responsibility in the text of the law is its undisputed drawback".[15]

The analysis of the Federal Law of the Russian Federation "On Alternative Dispute Resolution Procedure with the Participation of a Mediator (Mediation Procedure)" shows that it operates with concepts inherent to the theory of positive legal responsibility, which once again emphasizes the formation of the activities of mediators under the influence of positive legal responsibility. In particular, in the above-mentioned Federal Law, terms such as "harmonization of social relations," "formation of business ethics," "equality," "impartiality," "voluntariness," and "good faith" are used. Furthermore, Article 18 specifies that "a self-regulatory organization of mediators, in addition to the rights defined by the Federal Law 'On Self-Regulatory Organizations', has the right to establish requirements for its members, additional to those provided for by the proper Federal Law, ensuring the responsibility of its members in carrying out mediator activities." Here, positive responsibility of subjects of mediation activity is primarily implied. However, legal literature has repeatedly pointed out that "positive responsibility without negative responsibility is defenseless, and negative responsibility without positive responsibility is meaningless".[16] As it has been mentioned earlier, there is no specialized legal responsibility for mediators based on general provisions of the Civil Code of the Russian Federation.

In scientific essays, it is always argued that civil legal responsibility is exclusively private-law by its character. However, as we have already indicated, a mediator, while performing its functions, becomes a subject of public activity and is vested with powers akin to authority. Therefore, even if we refer to the general provisions of the Civil Code of the Russian Federation, under which a mediator can be held legally responsible, it should be noted that it has a public, rather than private-law character.

If we analyze other fundamental normative legal acts that establish types of legal responsibility such as criminal and administrative ones, we will not find a specific subject of responsibility like a mediator. However, entitling mediators with public-law powers implies their increased legal responsibility, which stems from the general principle of establishing legal responsibility – the broader the

[15] SHURENKOVA, S.S. To the question of the responsibility of mediators: classical and online mediation, Law and Practice, 3, 207, 2022.

[16] KHACHATUROV, R.L., YAGUDYAN, R.G. Legal responsibility (Togliatti: MABiBD, 1995).

scope of authority, the stricter (according to some authors, "heightened") the legal responsibility should be.[17] Theoretically, mediators could be bribed, but they cannot be brought to justice for accepting a bribe because they are not representatives of authority, and also Article 204 of the Criminal Code of the Russian Federation (commercial bribery) excludes their responsibility. Thus, we are faced with a situation of normlessness (anomie)[18] or a state of legal irresponsibility in the field of mediation activity. In reality, there should be a reasonable balance between positive and negative responsibility since they are dialectically interconnected categories – positive responsibility should be supported by negative responsibility, and negative responsibility by positive responsibility.

It is necessary to remind that another question we are striving to explore in this article is determining the procedural or substantive juridical character of the legal responsibility of mediators. Scientists studying procedural responsibility proceed from its broad and narrow sense of understanding. In a narrow sense of understanding, procedural responsibility is always associated with its establishment in a specific regulatory legal act, the character of which is procedural. In a broad sense of understanding, procedural responsibility can be provided for by branches related to substantive law as well as procedural law. In this regard, scientists identify compositions of administrative or criminal offenses, the object of which is precisely procedural relations.[19] As we see it, the second approach to defining the legal character of procedural responsibility blurs its boundaries, turning it into a somewhat amorphous state weakly connected to each other. Therefore, we proceed from a narrow sense of understanding procedural responsibility.

An analysis of the Federal Law of the Russian Federation of July 27, 2010, No. 193-ФЗ "On Alternative Dispute Resolution Procedure with the Participation of a Mediator (Mediation Procedure)" shows that there are no measures of procedural responsibility for violations of procedural norms of mediation by the mediator or the parties themselves. Thus, we are faced with a state of legal normlessness in this area and can only speculate theoretically about the procedural responsibility of participants in the mediation process. Moreover, it is quite problematic to talk about the procedural responsibility of the parties to the dispute themselves rather than the mediator, given that the mediator is not endowed with any authoritative powers to apply measures of state coercion. Also, we do not consider it expedient

[17] KHUZHIN, A.M., ODINOKOVA, A.V. Prospects for the study of increased legal responsibility, Legal Science and Practice. Bulletin of the Nizhny Novgorod Academy of the Ministry of Internal Affairs of the Russian Federation, 3, 69, 2020.

[18] LIPINSKY, D.A. IVANOV, A.A. Review of the concepts of legal anomie in foreign and domestic sociological and legal thought, State and Law, 11, 49, 2023.

[19] MAKAREIKO, N.V., LIPINSKY, D.A. Problems of establishing the limits of procedural responsibility, Herald of Civil Procedure, 1, 107, 2011.

to grant such powers for several reasons. Firstly, by introducing the institution of mediation, the state primarily relied on the voluntariness and conscientiousness of its participants. Secondly, it assumed that the participants in the mediation process are mediators of positive legal responsibility and will not violate the prescriptions of norms fixed in the above-mentioned law. The analysis of the norms contained in it shows that they are not accompanied by corresponding sanctions.

However, any right is designed for a certain level of development of both public and individual legal consciousness. In other words, before the right to mediation can be fully realized, further development is necessary, as noted in juristic literature, various deformations are often observed in the modern legal consciousness of Russian citizens.[20] After all, a certain right may be used not for good but with the aim of causing harm, for example, through its abuse.

3 Conclusion

The current research allows us to draw several conclusions and generalizations. Firstly, the institution of mediation within the Russian law system is still in its formative stages, and consequently, it lacks a well-developed system of norms that establish legal responsibility for participants in the mediation process.

Secondly, the legal responsibility of participants in the mediation process, by its legal character, is public and positive. This is due to the fact that the relevant normative legal act regulating it does not establish negative sanctions and operates with concepts inherent to positive legal responsibility. Procedural and substantive negative legal responsibility remain legally unpinned, and a lack of regulation is observed in this sphere of legal regulation of social relations.

Thirdly, general civil law norms that establish liability for causing harm are not adapted to the legal responsibility of such a subject as a mediator. Furthermore, there are no criminal or civil law norms that provide for the legal responsibility of mediators. Accordingly, to eliminate the existing gaps, the current legislation should be adjusted to protect the parties to the dispute from possible abuses by mediators. The legislator's reliance solely on positive responsibility is not always justified, and positive responsibility without negative becomes unenforceable.

[20] MALKO, A.V., LIPINSKY, D.A., ZRYACHKIN, A.N, MUSATKINA, A.A. Psychological aspects of deformation of legal consciousness and legal responsibility, Psychology and Law, 4, 140, 2022.

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