

# PROCEDURAL PRINCIPLES OF MEDIATION

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## Introduction

Like any legal process, mediation has its principles a mediator is guided by, and he/she is ruled by these principles when carrying out the whole process. In the Republic of Armenia, when the institute for mediation was introduced in 2015, first of all necessary changes were made in the RA judicial and civil procedure code and in 2018 the RA “Law on mediation” was adopted, article 4 of which defines the principles of mediation, according to which:

1. Mediation is carried out voluntarily - as a rule, the principle of volunteering is a fundamental principle on which directly depend the beginning of the mediation process and the whole procedure, as well as the final stage when confirming the mediation agreement.

This principle, as a fundamental and primary principle, also has been established both: in inner-state legal system and in the process of practical mediation. In practice, analyzing as a former mediator, I can say that if the parties or one of the parties has radical logic, it will hardly be possible to carry out the process, but not excluding the cases of participating skeptically by rejecting, in other words, when a positive solution is given anyway.

The principle of volunteering, as such, can be viewed from two perspectives:

1. organizational (regulatory) principle:
2. procedural principle - (organizing, regulating) principle.

We may say that this principle can be viewed from several perspectives:

Firstly, in order to start a mediation process, the voluntary consent of the parties is necessary, sometimes there are cases when the parties directly depend on the mediator<sup>1</sup> for reaching or receiving an agreement. And by its

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<sup>1</sup> In other words, the matter concerns negotiating method of mediation.

very nature, this principle of mediation can be analogized and identified with the principle of arbitration volunteering<sup>2</sup>. However, by its nature, arbitration has a judicial procedure, while mediation entirely depends on the parties, from the very beginning to the last moment, and the agreement is reached by applying the principle of volunteering.

Secondly, the continuation of mediation should depend on the expression of will of the parties<sup>3</sup>. It means that each party may proceed to the settlement of the dispute through the judicial investigation without causing negative consequences for itself<sup>4</sup>.

Thirdly, the purpose of achieving a mediation agreement should be realized without any psychological or other forms of pressure. At the same time, each of the parties should have the opportunity to continue, cease and negotiate a mediation agreement. We can consider the principle of volunteering from a different point of view and generalizing we can say that it has something in common with the principles of freedom and equality.

This principle, like a red thread, must stretch from the first stage to the last moment of the whole process and must be steadily sustained by the mediator. And we can say that it is an integral part of the group of organizational and procedural principles, and, why not, we can say that it is a general principle. That is why, in practice, this principle is the most applicable and is considered to be a primary principle.

**2. The principle of confidentiality**, as such, first of all it implies a rule about the prohibition of publishing information on the entire process of mediation and the original process after its completion.

As such, we can classify it as a general principle, that is to say, it is characterized as functional and organizational, since it is used throughout the process and even after completion of mediation. The principle holder is a media-

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<sup>2</sup> Kurochkin 2001, Article 123.

<sup>3</sup> See: it should be noted that the development of private law, increased guarantees of private interest in civil law, increased activity of participants in civil turnover and generally changes in the ideology of civil law regulation lead to increased autonomy and responsibility of parties to the civil, arbitration process and other persons involved in the case. This trend is positively evaluated by researchers. Vyazovchenko 2002, Art. 72.

<sup>4</sup> Boule 2010, 14-16; Menkel-Meadov, Love, Schneider 2010, 286-288.

tor by almost<sup>5</sup> 90%, about which it is informed initially and it is even mentioned in the contract. In other words, we can say that the peculiarity of this principle lies in the fact that its implementation is considered to be a compulsory provision by agreement of the parties<sup>6</sup>.

**3. The principle of equality** of the parties is one of the basic principles for a fair, ideal public order. In the professional literature, this principle is structurally interpreted by two elements:

1. principle of cooperation between the parties;
2. principle of legal equality of the parties.

At first glance, the principle of cooperation between the parties seems to have nothing to do with the principle of legal equality of the parties. This principle is expressed in the implementation of the private law institution in the process of cooperation. By its type it is closely related to such principles as: the principle of violating civil rights and obligations, as well as cooperation and mutual interest of the parties<sup>7</sup>. From this point of view, under the principle of cooperation between the parties, mediation can be perceived as a rule, according to which, the parties are able to seek opportunities by carrying out cooperation, reaching their goals, that is to say, settling the issue.

Unlike civil proceedings, the parties do not pursue the principle of competition in the process of mediation, they don't express their own point of view by presenting proofs, either; in that case they also state that during the process of mediation, the parties cooperate to find a solution to the dispute. Of course, in practice we can say that it is not obvious and as such, the parties do not feel how that principle is realized. From a legal standpoint, this principle is not established.

**4. On the basis of the principles of independence and impartiality of a mediator**, as a rule, the principle of volunteering is a fundamental principle on which directly depend the beginning of the mediation process and the whole procedure, as well as the final stage when confirming the mediation agreement.

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<sup>5</sup> Nosyreva 2002, 211-217.

<sup>6</sup> See: Green paper on alternatives in civil and commercial law, Brussels, 04.04.2002// <http://eurlex.europa> (27.04.2019).

<sup>7</sup> Dyuzheva, Yem, Zenin 2004, ch. 1.

This principle, as a fundamental and primary principle, also has been established both: in inner-state legal system and in the process of practical mediation. In practice, analyzing as a former mediator, I can say that if the parties or one of the parties has radical logic, it will hardly be possible to carry out the process, but not excluding the cases of participating skeptically by rejecting, in other words, when a positive solution is given anyway.

The principle of volunteering, as such, can be viewed from two perspectives:

1. organizational (regulatory) principle:
2. procedural principle - (organizing, regulating) principle.

It may be said that this principle can be viewed from several perspectives:

Firstly, in order to start a mediation process, the voluntary consent of the parties is necessary, sometimes there are cases when the parties directly depend on the mediator for reaching or receiving an agreement. And by its very nature, this principle of mediation can be analogized and identified with the principle of arbitration. However, by its nature, arbitration has a judicial procedure, while mediation is entirely dependent on the parties, from the very beginning to the last moment, and the agreement is reached by applying the principle of volunteering.

Secondly, the continuation of mediation should depend on the expression of will of the parties. It means that each party may proceed to the settlement of the dispute through the judicial investigation without causing negative consequences for itself.

Thirdly, the purpose of achieving a mediation agreement should be realized without any psychological or other forms of pressure. At the same time, each of the parties should have the opportunity to continue, cease and negotiate a conciliation agreement. We can consider the principle of volunteering from a different point of view and generalizing we can say that it has something common with the principles of freedom and equality.

The impartiality principle of a mediator is defined by Article 5, part 4 of UNCITRAL Model Law on "International Trade Procedure Agreement"<sup>8</sup>, but at the same time its nature is not disclosed.

It should be emphasized that the principle of impartiality and objectiveness is also of fundamental importance for the civil and arbitration proceed-

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<sup>8</sup> Hereinafter referred to as UNCITRAL.

ings, not only in theory but also in the law-enforcement practice. The fact that mediation principles, like any process principle, have stable and fundamental importance is of no doubt. The principles first of all reflect the process of mediation, they are the basis for the process of mediation, as well as are considered to be a slogan for implementation of law and mediation process of the parties. From the second perspective, the principles of mediation privatize the mediation as an independent non-legal process, and the purpose of settling the issue is also expressed. Finally, the principles of mediation are expressed by a mediator's practical activity, systemizing the debating sides. And to sum up, all these are regulated by the principles of mediation.

According to L.S. Yavich, the principles of law are divided into general social principles and specific legal principles<sup>9</sup>. The general social principles in their turn are divided into economic, political, moral, ideological and social-structural principles. If we classify mediation principles, we can say that the principles of mediation belong to both groups. M.N. Marchenko believed that any principle of law may gain an advantage if there are necessary normative acts, in which general principles of law find their reflection this or that way<sup>10</sup>.

According to lawyers S.S. Aleksen<sup>11</sup> and V. Kh. Leyshin<sup>12</sup>, the practical principles of mediation process, are also characterized by the legal principles of the same mediation.

Like any legal process, mediation has its own principles, which first of all a mediator is guided by and he/she is ruled by these principles when implementing the whole process. At the moment, many authors try to study the principles from a scientific-research perspective.

For example, A.G. Oleshanov<sup>13</sup> distinguishes the principles of civil proceedings under which the norms of different spheres of law are expressed and under which the specific expression of the norm is perceived.

In essence, we believe that in this case, there is a connection not only with civil proceedings, which is a priority, but also with the principles of civil law and other branches of law. This is explained by the fact that the content of

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<sup>9</sup> Yavich 1976, 149.

<sup>10</sup> Marchenko, Deryabina 2015, 720.

<sup>11</sup> Alekseev 1999, 293.

<sup>12</sup> Perevalov 2005, 120.

<sup>13</sup> Pleshanov 2006, 131.

a conciliation agreement is directly related to non-performance or improper performance of obligations by subjects of a statutory relationship governed by any branch of law. So whether we want or not, a mediator should take into account the valuation technique, if he/she isn't a lawyer, should be able to understand the norms and principles of the law governing inter-mediated relations. Taking into account the fact that the mediation principles are primarily developed as mediation procedural principles, it allows to observe them with a practical procedural principle. From this point of view, the principles of mediation should be understood as fundamental principles that regulate the process of conciliation in a non-legal manner and at the same time regulate legal disputes.

In legal literature of a modern society, there are issues of mediation, which point to different principles. At the same time, the authors, with few exceptions, name only the simple principles, not considering their structures and goals.

As a rule, four basic principles are distinguished in legal literature:

1. volunteering
2. principle of impartiality or non-intervention
3. principle of equality of the parties;
4. principle of confidentiality.

These principles are also present in the inner-state legal system the definitions of which will be given later. The principles of conciliation in the inner-state system also combine theoretical and practical principles, with means, they are identical and their purpose is to develop mediation and achieve the goal. The principles of conciliation are also classified into three groups:

1. Organizational-regulatory principles,
2. Procedural principles,
3. General

The first group includes the principle of volunteering, and the second group includes the principle of impartiality (neutrality) and confidentiality.

The third group consists of the principles that are typical for both: organizational and procedural principles.

### **Conclusions**

Summing up the principles of mediation, we can say that regardless of the fact in which group they are classified, whether theoretical and practical

application is the same or not, the process should be organized properly and clearly and bring to a positive result. It is worth mentioning that among other principles the diversified and influential principle is of special importance, which is both: procedural and belongs to the group of organizing principles. In fact, however, this principle is not so influential or applicable. The role and significance of principles is definitely essential from the initial stage of conciliation process to the end of the process. However, we believe that the principle of independence of the Mediator must be developed from the theoretical and practical point of view. We believe that for the development of this process and the establishment of the institute of mediation it is necessary to equate the mediator's independence to the principle of independence of judges. And for this purpose it is necessary to create instrumentation mechanisms and make legislative adjustments.

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## ՀԱՇՏԱՐԱՐՈՒԹՅԱՆ ԸՆԹԱՑԱԿԱՐԳԱՅԻՆ ՍԿԶԲՈՒՆՔՆԵՐԸ

Լուսինե Թասալյան

Ընթացակարգային սկզբունքների մեջ ուրույն տեղ ունեն բազմակողմանի և ազդող սկզբունքները, որոնք և՛ ընթացակարգային, և՛ կազմակերպող սկզբունքների խմբին են դասվում: Գործնականում, սակայն, դրանք այնքան էլ ազդեցիկ կամ կիրառելի չեն: Սկզբունքները էական դեր և նշանակություն ունեն հաշտության գործընթացի սկզբնական փուլից մինչև գործընթացի ավարտը: Սակայն անհրաժեշտ է զարգացնել հաշտարարի անկախության սկզբունքը: Կարծում ենք՝ այս գործընթացի զարգացման և հաշտարարության ինստիտուտի կայացման համար պետք է հաշտարարի անկախության սկզբունքը հավասարեցնել դատավորների անկախության սկզբունքին: Ուստի այդ նպատակով հարկավոր է գործիքակազմ մեխանիզմներ ստեղծել և կատարել օրենսդրական համապատասխան ամրագրումներ:

**Բանալի բառեր՝** հաշտարար, այլընտրանք, սկզբունք, ընթացակարգ, աշխատանք, խնդիր, Հայաստանի Հանրապետություն:

## ПРОЦЕДУРНЫЕ ПРИНЦИПЫ МЕДИАЦИИ

Лусине Тасалян

В ряду иных процедурных принципов по своей значимости особое место занимают диверсифицированный и влиятельный принципы, которые являются как процедурными, так и организационными. Однако на практике эти принципы не столь применимы и не оказывают особое влияние на ход дела. Роль процедурных принципов важна начиная с начального этапа примирения до завершения процесса. Гораздо существенней принцип независимости посредника. Полагаем, что для развития этого



процесса и создания института посредничества необходимо приравнять его к принципу независимости судей. Для этого необходимо создать контрольно-измерительные механизмы и внести законодательные изменения.

**Ключевые слова** – медиация, альтернатива, принцип, процедура, работа, проблема, Республика Армения.

## PROCEDURE PRINCIPLES OF MEDIATION

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Summing up the principles of mediation, we can say that regardless of the fact in which group they are classified, whether theoretical and practical application is the same or not, the process should be organized properly and clearly and bring to a positive result. It is worth mentioning that among other principles the diversified and influential principle is of special importance. The role and significance of principles is definitely essential from the initial stage of conciliation process to the end of the process. However, we believe that the principle of independence of the Mediator must be developed from the theoretical and practical point of view. We believe that for the development of this process and the establishment of the institute of mediation it is necessary to equate the mediator's independence to the principle of independence of judges. And for this purpose it is necessary to create instrumentation mechanisms and make legislative adjustments.

**Key words** – mediator, alternative, principle, procedure, job problem, Republic of Armenia.