

## **THE CONCEPT AND PRINCIPLES OF "MEDIATION"**

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### **ABSTRACT**

*In this article, the concept of "mediation", its legal nature, the principles of mediation, their types are analyzed on the example of national and foreign experience. Also, the opinions of experts in the field about the feasibility of strengthening the principles of mediation in legislation are analyzed.*

**Keywords:** *concept of "mediation", principles of mediation, discretion, independence, impartiality, equal rights, confidentiality, mutual cooperation.*

### **АННОТАЦИЯ**

*В данной статье анализируются понятие «медиация», ее правовая природа, принципы медиации, их виды на примере отечественного и зарубежного опыта. Также анализируются мнения специалистов в области о целесообразности усиления принципов медиации в законодательстве.*

**Ключевые слова:** *понятие «посредничество», принципы посредничества, усмотрение, независимость, беспристрастность, равноправие, конфиденциальность, взаимное сотрудничество.*

### **INTRODUCTION**

Mediation is derived from the Latin word "medius", which means to take the middle ground between two different thinkers or parties, to show an alternative way, in turn, to be impartial and fair<sup>1</sup>. In general, the institution of mediation can be understood as the process of reaching a mutually beneficial agreement through the negotiation of a dispute between the parties through an impartial (neutral) mediator.

According to Islamic teachings, mediation is a process of dispute resolution with the participation of an impartial third party (mediator) who helps the disputing parties to find a mutually acceptable solution to the dispute. According to Islamic culture, Islam encompasses all aspects of human life, facilitating relationships built on the

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<sup>1</sup> Медиация в нотариальной практике (Альтернативные способы разрешения конфликтов)/Петер Фар (и др.); отв.редакторы К.Грефин фон Шлиффен и Б.Вегманн;(пер. с нем. С.Трушников). – М.: Волтерс Клувер, 2005. – С.3.

foundations of wisdom and compassion. In most cases, the Noble Quran calls for peaceful settlement of disputes<sup>2</sup>.

Imam Ghazali in his work "Ayyuhal Walad" says: "Do not fight with the opposite party in the presence of the judge. Try to agree. Prophet Muhammad blesses him in a hadith: "If a person first makes a claim and then gives up their claim, Allah will prepare for that person a place in Paradise and raise their level"<sup>3</sup>.

## **DISCUSSION AND RESULTS**

The researcher Meler defines the concept of mediation based on the situation of the parties and defines it as a method of voluntary settlement of disputes before the court with the participation of an impartial third party who makes a common decision based on the interests of the parties, who does not have the authority to issue an order on the resolution of disputes<sup>4</sup>. Another scientist, N. Alexander, supporting this approach, emphasizes the concept of mediation as a process of assistance of an impartial third party, who helps to conduct negotiations between two or more conflicting parties based on their needs and interests<sup>5</sup>.

The Australian National Advisory Council on Alternative Dispute Resolution defines mediation in its publication "Terms of Dispute Resolution" as follows: "Mediation is the process by which parties to a dispute, with the help of a dispute resolution professional (mediator), identify the issue in dispute, develop options, seek alternative solutions and is the process of trying to reach an agreement". According to this concept, although the mediator does not have an advisory or decision-making role regarding the content of the dispute or the outcome of its resolution, they can determine the mediation process and give advice on the process<sup>6</sup>.

The US Uniform Mediation Act defines mediation as follows: "Mediation is the process of facilitating communication and negotiation between the parties by a mediator to reach a voluntary agreement on the subject matter of the dispute"<sup>7</sup>.

According to Article 1 of the Austrian Civil Mediation Act, "mediation is a voluntary process involving the systematic support of a qualified impartial mediator between the parties to a dispute, using recognized principles, with a view to mutual

<sup>2</sup> Surah Al-Baqarah (2:178) // The Noble Quran: A. Yusuf Ali's translation and comments. Amana Corporation. 1989.

<sup>3</sup> Imam Ghazali. Child. Translation of "Ayyuhal Valad" in Uzbek language. – Tashkent, Movarohunnahr, 2005. – 85 p.

<sup>4</sup> Техника ведения переговоров нотариусами: прак.пособие/ отв.ред. Роберт Вальц; (пер.с нем. С.Трушников). — М.: Волтерс Клувер, 2005. —С.142.

<sup>5</sup> N.Alexander ' Global Trends in Mediation: Riding the Thr Wave ' in N.Alexander (ed.), Global Trends in Mediation (Netherlands:Kluwer Law International BV, 2006), p.2.

<sup>6</sup>National Alternative Dispute Resolution Advisry Council (NADRAC), Dispute Resopution Terms. 2003.p. 9.

<sup>7</sup><http://www.nadrac.gov.au/agd/www/Disputeresolutionhome.nsf/Page/RWPA>

<sup>7</sup> Ст.2 (1) UniformMediation Act (2001).

assistance and mutual agreement"<sup>8</sup>. Sh.M.Masadikov defines mediation as a method of dispute resolution with the help of an impartial mediator who helps to reach a mutually acceptable agreement between the parties and does not have the right to make a decision<sup>9</sup>.

According to the Law of the President of the Republic of Uzbekistan No. 482 "On Mediation" adopted on July 3, 2018, "mediation is the process of resolving the dispute with the help of a mediator, that is, a person engaged by the parties to carry out mediation, based on their voluntary consent, in order for the parties to reach a mutually acceptable decision"<sup>10</sup>.

The following features of mediation can be determined from the definitions mentioned above:

First, the mediation method of alternative dispute resolution is a voluntary process, and in this case the mediator will not have the right to make a decision on the dispute;

Second, in mediation, the interests of the parties have a dominant position, and all issues are based on their interests;

Third, the goal of mediation is to reach an agreement that is mutually acceptable to the parties to the dispute.

Based on the mentioned definitions and their characteristics, it is appropriate for the author to form a comprehensive definition of the concept of mediation as follows. Mediation is the process of using a professional or non-professional mediator to reach a mutually acceptable agreement between the parties to the dispute.

The essence and social purpose of law is manifested in a number of legal phenomena, first of all, in its principles and functions. According to K. I. Bayten, the principles of law are a set of rules and relationships that determine the initial ideas that form the moral and organizational basis for the emergence, development and application of law<sup>11</sup>. Based on this definition, it can be concluded that the principles of law are not directly related to the essence of the law, but to the emergence, development and operation of law, which determine ideas, rules and relations, where and how they appeared.

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<sup>8</sup> Zivilrechts-mediations-Gesetz 2003, ZivMediatG, BGBI I 29/2003.

<sup>9</sup> Ш.М.Масадиқов. Сущность медиации и проблемы ее правового регулирования в Республике Узбекистан: Диссертация.. канд. юрид. наук. — Ташкент, 2008. — С. 24.

<sup>10</sup> Law of the Republic of Uzbekistan "On Mediation" // <https://lex.uz/docs/3805227>

<sup>11</sup> Байтин М. И. Сущность права (современное нормативное правопонимание на грани двух веков). Саратов, 2001. С. 123.

Mediation as a means of resolving disputes has its basic principles regardless of the field in which it is used. These principles were developed on the basis of international documents providing for the application of the mediation procedure, the analysis of the legal documents on mediation, as well as the doctrinal developments in this field through the analysis and generalization of mediation. In general, the principles determine the future development of mediation, its individualization in relation to other institutions of alternative dispute resolution, determine the organization and conduct of mediation, and show the specific features of the legal regulation of the mediation process.

The study of the principles of mediation is of particular importance in the discovery of new social relations aimed at regulating disputes in order to reach a mediated agreement. However, the principles of mediation in all countries do not have the same content and number of principles. In particular, the Law of the Republic of Uzbekistan "On Mediation" provides for the implementation of mediation based on the principles of confidentiality, discretion, cooperation and equal rights of the parties, independence and impartiality of the mediator<sup>12</sup>.

The following principles are not reflected in the Law of the Republic of Uzbekistan "On Mediation": reliability, freedom of choice and conclusion of an agreement, expression of the will of the parties, procedural equality of the parties, assistance of the parties in resolving and regulating the dispute, informality, direct participation of the parties, to the individual, relationship orientation, creativity, future orientation, intermediary leadership. However, one of the unique features of this Law is that it contains separate articles dedicated to the disclosure of the principles of mediation, and the essence of each principle is explained in the form of separate articles.

In the special literature, several principles such as mediation's credibility, freedom of choice and agreement, expression of the will of the parties, confidentiality, discretion, procedural equality of the parties, their assistance in resolving and regulating disputes, informality, direct participation of the parties, orientation to the individual, maintaining relations, creativity, future orientation, leadership of the mediator can also be found.

The principles of mediation can be systematized into two groups according to its functional purpose:

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<sup>12</sup> Law of the Republic of Uzbekistan "On Mediation" // <https://lex.uz/docs/3805227>

1. Organizational principles - principles describing the specifics of the organization of the mediation process and the status of its participants (principles of voluntariness of the parties and impartiality of the mediator).

2. Procedural principles. Principles describing the mediation procedure (principles of confidentiality, mutual cooperation, independence and equality of the parties).

The main principles of mediation include discretion, trust in the mediator, impartiality of the mediator, confidentiality, informality, equal rights of the subjects of the mediation process, cooperation, independence, impartiality.

The principle of **voluntariness**, in its essence, is based on the absolute discretion of the parties to initiate and conduct conciliation, to conclude a mediation agreement and to execute it. This principle applies not only to the parties, but also to the mediator. The parties conclude the mediation agreement on a voluntary basis. It is not allowed to force a mediation agreement.

The principle of **independence** and **impartiality** of the mediator is manifested in the fact that any form of interference in the activity of the mediator, especially spiritual and other pressure, is not allowed. Also, the principle of independence means the independence of the mediator, their non-subordination to the conflicting parties. This principle is reflected in the legislation of the CIS countries, including according to the Law of the Republic of Uzbekistan "On Mediation", the mediator is independent, and it is not allowed to interfere in any way with the activity of the mediator in the implementation of the mediation procedure. The mediator must be impartial, implement the mediation procedure in the interests of the parties and ensure their equal participation in the mediation, and create the necessary conditions for the parties to fulfill their obligations and exercise their rights. If there are circumstances that hinder the mediator's independence and impartiality, they should refrain from carrying out the mediation procedure<sup>13</sup>.

The principle of **confidentiality** provides for the non-disclosure of information obtained during the mediation process, which in turn allows the parties to the mediation process to maintain their reputation. According to the law, the participants of mediation have no right to disclose the information that became known to them during the mediation process without the written consent of the party to the mediation who provided them, their legal successor or representative.

Mediation participants may not be interrogated as witnesses about the circumstances that became known to them during the mediation process, nor may

<sup>13</sup> Law of the Republic of Uzbekistan "On Mediation" // <https://lex.uz/docs/3805227>



they be asked to provide information related to the mediation, except for cases provided by law. The mediator may not disclose the information received by one of the parties to the other party to the mediation process without his consent.

The principle of **equal rights of the parties** to the mediation provides that the parties (subjects) of the mediation have equal rights to apply for mediation, refuse to participate in it, disclose information, and choose a mediator who helps to reach an agreement. The principle of **cooperation** of mediation subjects envisages that the parties to the conflict should not compete with each other, avoid confrontations in reconciliation processes, and try to cooperate. In Article 9 of the Law of the Republic of Uzbekistan "On Mediation", these principles are combined and called the principle of independence and impartiality of the mediator. According to it, the mediator is independent in carrying out the mediation procedure. During the implementation of the mediation procedure, it is not allowed to interfere in any way with the activities of the mediator.

The mediator must be impartial, implement the mediation procedure in the interests of the parties and ensure their equal participation in the mediation, and create the necessary conditions for the parties to fulfill their obligations and exercise their rights. If there are circumstances that hinder the independence and impartiality of the mediator, they should refrain from carrying out the mediation procedure<sup>14</sup>.

**According to Islamic teachings, mediation is based on the following principles:**

The principle of fairness. The process should be fair and equitable to all participants;

The principle of mutual cooperation. The process should be aimed at solving the dispute by the participants of the dispute in a mutually acceptable way;

The principle of orientation to the future. Include an emphasis on re-establishing relationships or recognizing failure to reach an agreement only if it is culturally significant;

Among them are the principles of providing participants with information about the specific characteristics of the parties to the agreement<sup>15</sup>.

From an Islamic point of view, mediation is a voluntary and at the same time non-binding process that leads to the conclusion of a dispute. It refers to the participation of one or more persons involved in the dispute process at the initiative

<sup>14</sup> Law of the Republic of Uzbekistan "On Mediation" // <https://lex.uz/docs/38052277>

<sup>15</sup> Kemicha F. The Approach to Mediation in the Arab World // Conference on Mediation (March 29, 1996, Geneva, Switzerland) (<http://www.wipo.int/amc/en/events/conferences/1996/kemicha.html>).

of one of the parties to the dispute. In this case, the independent mediator offers his options, taking into account the expressed wishes of the parties to the dispute regarding the settlement of the dispute<sup>16</sup>.

Moral principles based on the Islamic religion call for forgiveness towards the parties to the conflict, encouraging peaceful methods of conflict resolution, aimed at preserving human relationships in the family, business sphere, which can be destroyed during court proceedings.

In Islamic law, there are the following methods of peaceful settlement of disputes: conciliation (sulh), arbitration (tahkim) and mediation (wasaatah)<sup>17</sup>.

According to the Islamic tradition, conciliation is an agreement that resolves a dispute through the mutual consent of the parties.

Arbitration is characterized by the appointment of an arbitrator by disputing parties who recognize a particular dispute or issue. From the point of view of Islamic law, mediation is understood as a voluntary and non-binding process leading to the conclusion of a dispute. It is characterized by the involvement of one or more persons at the initiative of one of the parties. The mediator gives their advice and suggestions to find a solution that the parties want to reach<sup>18</sup>.

## CONCLUSION

the principles of mediation are the basis on which the mediator works. It is these principles that differentiate it from other alternative dispute resolution methods. Adherence to the principles of mediation is the first and most important condition for mediation to function as a legal institution and dispute resolution method. The need to observe the principles of mediation requires their consolidation in national legislation at the regulatory and legal level. The activities of the mediator are determined by functional principles such as independence, impartiality, confidentiality and equal rights of the parties to the dispute.

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<sup>16</sup> Kemicha F. The Approach to Mediation in the Arab World // Conference on Mediation (March 29, 1996, Geneva, Switzerland) (<http://www.wipo.int/amc/en/events/conferences/1996/kemicha.html>).

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