MEDIATS
Mediation: Training and Society Transformation

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# Mediation in progress

*Collection of articles*
*by participants of the Mediation project:*
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Mediation: Training and Society Transformation/ MEDIATS
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Project goal:

- enable Universities to be one of the key players in facilitation of the processes of mediation in Azerbaijan, Georgia and Ukraine to enhance democracy and objective problem resolution by acquiring best European practices.

Specific project objectives:

1. To develop and implement Master's degree program «Mediation».
2. To establish sustainable Mediation Federation.
3. To promote mediation values within the society in Azerbaijan, Georgia and Ukraine.

Project Duration:

- November 15, 2018 – November 14, 2022.

Project Coordinator:

- Netherlands Business Academy, the Netherlands.

Project Co-coordinator:

- «KROK» University, Ukraine.

Partners:

- Fundacion Universitaria San Antonio, Spain,
- Turiba University, Latvia,
- «KROK» University, Ukraine,
- V.N. Karazin Kharkiv National University, Ukraine,
- Yuriy Fedkovych Chernivtsi National University, Ukraine,
- Khazar University, Azerbaijan,
- Ganja State University, Azerbaijan,
- Ilia State University, Georgia,
- Batumi Shota Rustaveli State University, Georgia,
- Hultgren Nachhaltigkeitsberatung UG, Germany.

Activities:

- Learning of EU experience,
- Development of MDP in Mediation,

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**Savchenko Viktor**
***V.N. Karazin Kharkiv National University,***
***Kharkiv, Ukraine,***
savchenko.viktor@gmail.com,
ORCID: 0000-0001-7104-3559

# THE VALUE OF THE WILL OF THE PARTICIPANTS IN MEDIATION AS A MANIFESTATION OF ITS PRINCIPLES AND PRINCIPLES OF CIVIL LAW

**Abstract.** Mediation is a procedure based on the rules of civil law. The legal nature of mediation is based on the rules of civil law and its specific principles. At the heart of these principles is the will of the participants in the mediation. The article examines the influence of the will of the parties on the observance of the basic principles of mediation. The article considers the issue of voluntary participation of the parties, the importance of their free will, and its limits. It has been established that the will of the parties is a prerequisite for the legitimacy of mediation and is directly reflected in the principles of this procedure. The scientific results obtained in the study could serve as the basis for the development of the conceptual foundations of mediation and the disclosure of the practical potential of this process in conflict resolution.

***Keywords:*** mediation, principles of civil law, principles of mediation, voluntariness, will.

JEL Classification: K49, I23, M19, Z13, K40

**Introduction.**

The will of the participants in mediation (mediator and parties) is a manifestation of the principles of this procedure and the principles of civil law. Any legal institution and mechanism are based on certain principles. Principles are the foundation that outlines the basic ideas.

General principles of law count among the formal sources of law. General principles may take a supportive role in guiding legal interpretation or provide an autonomous source of primary law, but it is not always clear which role is assumed (Ziegler & Jennings & Neuvonen, 2022). However, the principles of law are the vector by which civil services are provided. Including mediation. Mediation itself has its specific principles. This study will establish that the will of mediation participants is a continuation of civil law and procedural principles.

Mediation is the civil service, and therefore it is based on the principles of civil law. The importance of the principles of civil law is confirmed even by the fact that attention is paid to their study as separate law courses in European law schools (Principles of Private Law – LAWS) and leading European studies (Burgerliches Gesetzbuch). The principles of civil law are the basic provisions concretized by legal consciousness, which reflect the objective laws of development and needs of society, which exist in several areas: first, in the form of legal ideas produced by legal science, social practice as the most important, guiding legal ideas the basis of legal views of society; secondly, in the form of general provisions enshrined in Art. 3 of the Civil Code of Ukraine and follow from the content of other norms of the Civil Code of Ukraine and based on which legal regulation of civil relations are carried out (Basay, 2018).

The doctrine of private law sets out the following principles:

1) the principle of autonomy of will – the subjects freely exercise their rights and are not allowed to interfere in their affairs or oppose them;

2) principle of voluntariness – the subject is responsible for the performance of their duties, is responsible for them with their property, money, etc.;



3) the principle of legal equality – is expressed in the free expression of will and its evaluation, which is equal to others;

4) the principle of the legal protection of private interest;

5) the principle of coordination;

6) the principle of general permission (Kolodiy, 1998);

7) the principle of dispositive (Chyboha, 2013);

8) the principle of stability of civil relations, etc. (Shyhka, 2004).

Some of these principles are reflected in the principles of mediation. In particular, the Law on Mediation enshrines the following principles: mediation is conducted by mutual consent of the parties to mediation, taking into account the principles of voluntariness, confidentiality, neutrality, independence and impartiality of the mediator, self-determination, and equality of rights of mediation parties (Law on Mediation). It can already be seen that the principles of mediation are based on the principles of civil law. This study will prove that the will of mediation participants is directly correlated with these principles.

**Literature Review.**

The study of the principles of civil law has received attention in a large number of scientific papers. Representatives of classical legal doctrine have always been interested in the nature and essence of the principles of civil law. Research in this area was conducted by Pokrovsky, Shershenevich, Pobedonostsev, Meyer, Gribanov, Alekseev, Joffe, Krasavchikov, Bratus, Kolodiy, Komissarova, Aslanyan, Sverdlyk, Kuznetsova, Luts, Kharitonov, Shishka and others. However, no one paid in-depth attention to defining the will of the participants in mediation as a manifestation of the principles of civil law and the principles of mediation.

**Aims.**

The main task of this article is to identify the importance of the will of the parties in mediation. The basic principles of mediation and related principles of civil law will be explored.The main problem has been determining the place of mediation in the social sciences is

the lack of a unified approach to highlighting the content elements of mediation.

**Methods.**

Methodological framework: the study used general and special scientific methods of scientific research of legal phenomena, namely: comparative law, formal-logical, system-structural, dialectical and other methods. The dialectical method of cognition allowed to study thoroughly the national civil legislation taking into account the international standards. The comparative legal method was used to determine the common and distinctive features. Formal-logical method contributed to the establishment of the conceptual apparatus and content of current legislation, highlighting the contradictions in current legislation. The above methods were used in their interdependence. The methodology includes information on philosophical aspects, methodological foundations of scientific cognition, study of the structure and main stages of research, etc.

**Results.**

The principles of civil law are based on the natural concept of rights, which explains the fundamental importance of a free will. The relationship between the principles of civil law and freedom of will can be considered through the proposal of the relationship between natural freedom and the principles of law. Human's natural freedom cannot be manifested as a right to freedom, it can only form certain requirements, based on which the corresponding idea of freedom is formed. This idea is a prototype of the legal state of freedom until it is embodied in a specific principle (Zagoryu, 2017).

The doctrinal principles of civil law were mentioned above, but they are not fully reflected in the Civil Code of Ukraine. So in Art. 3 of the Civil Code of Ukraine clearly outlines the general principles of civil law:

1) inadmissibility of arbitrary interference in the sphere of personal life;

2) inadmissibility of deprivation of property rights, except in cases established by the Constitution of Ukraine and the law;



3) freedom of contract;

4) freedom of entrepreneurial activity, which is not prohibited by law;

5) judicial protection of civil rights and interests;

6) justice, good faith, and reasonableness (Civil Code of Ukraine).

The will of mediators is most related to specific principles of civil law, namely: inadmissibility of arbitrary interference in the private life, freedom of contract, freedom of enterprise, justice, good faith and reasonableness, the principle of autonomy of will, the principle of voluntariness, the principle of legal equality, the principle of dispositive and others.

Each of these principles is based on free will, which means that it is directly related to the will of the participants.

In the first connection, there is a clear connection between freedom of will and the principle of the inadmissibility of an arbitrary person in the sphere of private life. The content of this principle of civil law is the subjective right of a person to privacy, which corresponds to the obligation of any other person not to allow its violation, ie their non-interference in private life. In particular, it follows from this principle that public authorities and local governments, and any other persons should not interfere in the private affairs of civil law entities if they carry out their activities by the law (Dzera, Maidanik, Nosik, Pritika). On the one hand, this principle proclaims the protection of free will applied in the sphere of personal life. On the other hand, this principle restricts the freedom of will of other participants in legal relations by prohibiting arbitrary interference.

Mediation is always a procedure of interfering in a person's private life. Therefore, to adhere to this principle, mediation must always be a manifestation of the will of its participants. You cannot force the parties to mediate. This idea continues in the principle of voluntariness.

Adherence to the principle of voluntariness is a prerequisite for all civil law relations. Adherence to this principle is also provided separately for mediation. In particular, the Law on Mediation states

that Participation in mediation is a voluntary expression of the will of mediation participants. No one can be forced to resolve a conflict (dispute) through mediation. The parties to the mediation and the mediator may at any time refuse to participate in the mediation. The participation of a party in mediation cannot be considered as a confession of guilt, claims, or waiver of claims by such a party.

Therefore, mediation can take place only with the consent and desire of the parties and the mediator himself. The principle of freedom of entrepreneurial activity, which is not prohibited by law, should also be applied to a mediator.

A mediator is a business entity. Usually an entrepreneur. In turn, the normative concept of entrepreneurial activity is based on freedom of will. So in Art. 42 of the Economic Code of Ukraine, entrepreneurship is defined as independent, proactive, systematic, their own risk economic activity carried out by business entities (entrepreneurs) to achieve economic and social results and profit (Economic Code of Ukraine). This definition confirms several theses. First, the mediator enters into relations with the parties of his own free will. He may refuse mediation and may establish its procedure and conditions at the same time, a mediator is a specially trained neutral, independent, and impartial individual who conducts mediation. This means that his will is limited by these characteristics. In practice, this means that the mediator cannot give advice to the parties, resolve the conflict for them, or give preference to one of them. His will is binding on mediation but limited by its rules.

The will of the participants in mediation is also manifested through the prism of the principle of freedom of contract and discretion. These principles make it possible to determine the content of the mediation agreement and mediation agreement. Such documents are multilateral and concluded between the mediator (performer) and the parties to the mediation (clients, customers). The essence of freedom of contract is reduced to the following possibilities: 1) to conclude a contract that is not provided by acts of civil law, but meets the general principles of civil law; 2) the right to settle in the contract



provided by acts of the civil legislation, the relations which are not settled by these acts; 3) depart from the provisions of civil law and settle their relations at its discretion. The parties to the contract may not derogate from the provisions of civil law, if these acts explicitly state this, as well as if the parties are bound by the provisions of civil law due to their content or the essence of the relationship between the parties. In fact, at their own will, the participants in mediation determine the content of the essential terms of the contract: subject, cost, time, place, and so on.

Thus, the ability of mediation participants to determine the content of the mediation agreement and the mediation agreement at their own will is a manifestation of the principle of freedom of agreement and discretion.

The principles of fairness, good faith, and reasonableness are important. In European private law, the principle of justice, good faith, and reasonableness are traditionally recognized not as a set of three principles, but as a single principle, which is manifested in the unity of the three interconnected components (Maidanik, 2012). Conditions of good faith are specified in the EU Directive 93/13 / EEC of 05.04.1993 "On unfair terms in consumer contracts". So unfair is the condition of the contract, which was not discussed individually in violation of good faith causes a significant discrepancy in the rights and obligations of the parties to the contract, to the detriment of the consumer, if the contract is unfair, it does not create rights or obligations for the consumer, ie it is invalid and the contract is valid without unfair conditions (EU Directive 93/13 / EEC of 05.04.1993). The principle of good faith is widespread. For example, § 242 of the German Civil Code imposes an obligation to perform contracts in good faith (Deutsches Вьrgerliches Gesetzbuch). Thus, mediators must voluntarily and freely choose honest and fair conduct in the performance of their legal duties and the exercise of their subjective rights.

The will of the participants in mediation must be based on the principle of justice. The Constitutional Court emphasizes that justice

is usually seen as a property of law, expressed on an equal legal scale, and fair application of the rule of law presupposes a non-discriminatory approach, impartiality (Constitutional Court Judgment of 2 November 2004 № 15-RP / 2004). The principle of justice imposes on the participants the duty to be impartial in their actions, and judgments, to honestly acknowledge someone's rightness. Without this, effective mediation is technically impossible. The parties voluntarily turn to a mediator and have an interest in resolving the conflict. Their will and actions must be directed to the satisfaction of their interests by the principle of justice. In turn, the mediator is also guided by the principle of justice. But "justice" for him is the agreement of the parties, not the search for truth (who is right). This is the difference between a mediator and a judge.

The principle of reasonableness is also important. Reason as a principle of civil law is based on the idea that reason should be understood as actions that would be performed by a person with a normal, average level of intelligence, knowledge, and life experience (Aleksashina, 2012). The principle of reasonableness allows us to consider specific legal relationships through the prism of stability and "normality" for similar cases. The principle of reasonableness allows establishing the presence or absence of intent in the actions of mediators. For example, when a party tries to delay a procedure or fails to contact us, we can find out why. If this is done intentionally, it will be a violation of the principles of mediation.

Much attention is paid to the principle of equality. Thus, the Civil Code enshrines the principle of legal equality. This principle is expressed in free will and its evaluation. Art. 5 of the Law "On Mediation" states that mediation is conducted based on the equality of arms. The parties to mediation should be given equal opportunities during mediation. The mediator's responsibilities must be the same for all parties to the mediation. This means that the parties are equal to the extent of their will. They have the same amount of capacity, the ability to make decisions, express their thoughts and views, stop mediation, and so on.



All this is combined in the principle of autonomy of will. This implies that the participants in the mediation exercise their rights independently, and interference in their affairs is not allowed. It is also forbidden to oppose them.

**Discussion and conclusions.**

From all this, we can see that mediation can exist only as a manifestation of the will of its participants. The principles of civil law and mediation are based on freedom of will. The very normative concept of mediation emphasizes this. Mediation is an extrajudicial voluntary, confidential, structured procedure in which the parties, with the help of a mediator (s), try to prevent or resolve a conflict (dispute) through negotiations. The fact that mediation is an extrajudicial tool implies the will of the participants to choose this way of resolving the conflict. This makes the procedure more flexible compared to litigation. Voluntariness implies the will of the participants to take part in mediation. Confidentiality limits the will of participants to disseminate information. At the same time, participants are committed to the confidentiality of their own free will. The structure of the procedure has the advantage of the mediator's will in determining the process of the procedure. The need of the parties to resolve the conflict is the main prerequisite for mediation and also depends entirely on the participants. If one of the parties, or even the mediator himself, does not aim to resolve the conflict, then mediation cannot be successful.

As we can see, the relationship between the will of the participants and the principles of mediation is quite broad. This highlights the need to continue the study.

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