
Legal and Psychological Aspects of Mediation

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The article focuses on gradual innovation of mediation into the practice of social conflict resolution in the light of legal and psychological means of mediation. While mediation is perceived as a conflictological concept and is more widely used in dispute settlement and resolution, a new interdisciplinary field of theoretical knowledge with its own conceptual framework as well as a new professional and practical field are beginning to form both in Russia and in other countries.

As theoretical and practical aspects of innovation in mediation require consolidation not only for its national development but also for the guaranteed international cooperation, the article touches upon some of the particular theoretical issues of the topic in question: terminological consistency, consolidation of the system of mediation principles, the phenomenon of juridisation of mediation and its limits.

Keywords: mediation, juridisation of mediation, mediation alternativeness, the dialectic of the political and the psychological in mediation, mediation principles, confidentiality in mediation, a mediator's neutrality, mediation lawyers.

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Mediation is a fairly new method, a so called alternative dispute resolution method (*Abbrev.* ADR), and therefore it is not thoroughly studied. Due to the fact that in Russia the process has just started and there is cultural impact on mediation practice in different countries, neither Russian nor foreign studies have developed terminological consistency. Therefore, it is difficult to provide a scientific classification of ADR. Such a classification would make it possible to conduct a comparative analysis and further universalization, which are definitely essential not only for the scientific support of mediation development but also for its management. Not surprisingly, today the term mediation is used in various interpretations in publications, legislation and especially in discussions. It is rather common to interpret it as any means of resolving a dispute (a case) other than classical legal judicial proceedings established by the procedural legislation. As a result, it seems appropriate to offer a definition of mediation the way the author of this article sees it, which should provide for the proper understanding of the text and for the correct critique of its ideas.

Having cleared the definitions, we can move on to characterising the alternativeness of mediation among other dispute resolution methods in order to understand the role and meaning of mediation in forming modern behavioural culture within a conflict.

The next step will be a short review of the stages of implementing mediation in dispute resolution and the role of the law in this process.

In Russia, the legalisation of mediation resulted in the formation of two mediation practices, one of which gravitates towards the traditional mediation procedure and the other one rather discernibly contains a large number of legal tools. The comparison of the two established mediation practices, one of which is essentially based on using the knowledge from the field of psychology (communication theory) and the other one gravitates towards legal formalisation and the use of legal techniques in examining a conflict – since it is designed for the settlement of disputes that arise solely from certain legal relations, already officially formalised – will mark two practical fields and two theoretical directions of the development of mediation in Russia. Within this discussion, the phenomenon of juridisation of mediation will be characterised as a dialectical struggle between the legal form and the psychological (communicative and conflictological) content, which is to some extent anthropological and even philosophical, all in all, non-legal content of mediation. All this will let us understand the essence of mediation, the need in its expanded implementation and a possibility for lawyers to use a mediation approach, as well as make suggestions concerning further institutionalisation of mediation.

1. Mediation as an alternative to the judicial resolution of a dispute is the organisation of negotiations between the disputing parties, who have to resolve the dispute themselves. The distinguishing features of mediation are free (in their subject and form) negotiations between the parties, aimed at serving the interests of both parties and not at evaluating the evidence that supports the legal positions and ensures the victory of one position over the other one, mutual voluntary participation in the mediation, confidentiality of the discussion, equality of the parties, mediators' neutrality and the fact that they are not superior to the parties. These distinguishing features have formed the systems of mediation principles that are relatively common for different countries and different mediation practices. The principles of mediation are established by legislation, professional regulations of mediators' activities, standards and codes created by self-regulatory associations of mediators and in international documents [2].

A mediator is an organiser of an effective process of direct negotiations¹ [2]. He is the master of effective communication and this is his contribution to the dispute resolution. The parties lack this skill, and therefore, they need the mediator for settling of their case through negotiation.

¹ For the purposes of this Directive the following definitions shall apply:

(a) 'Mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by

Thus, for the parties the main feature of mediation as a procedure is that the parties will discuss the problem themselves, together and independently rather than seek its resolution by an authority. A mediator is an intermediary between the parties regarding the organisation of the negotiation, as this person is skilled in negotiating and the parties are familiar with the problem.

The disputing parties see mediation as an intervention of a third party into the conflict; however, this is an independent and neutral person who organises the negotiation concerning the conditions of their further interaction. This interaction will be defined by the parties themselves and will be recorded in the final document of this negotiation, a mediation agreement.

Therefore, we can define mediation in the following way: mediation is a method of conflict resolution through negotiations between the disputing parties, conducted by a mediator.

2. Mediation as a specific practice of dispute resolution developed in the last thirty years of the 20th century, it has become an alternative to legal procedures of conflict settlement. It was as alternative (a) in its content: the parties had to discuss the problem that had arisen between them with each other instead of discussing the other party's behaviour in the problematic situation with a judge; the dispute was resolved while the parties were trying to find a constructive and mutually acceptable resolution of the conflict through negotiation, mediators helped them, using their knowledge and experience in communication and conflict behaviour psychology; (b) in people who implemented it: mediators were mostly psychologists; and (c) in its basis (approach): from the parties' standpoints, mediation was aimed not only at eliminating the conflict between them but also at the positive transformation of their relations, mediation is mainly characterised by its orientation at the future [7]². These are psychological aspects of mediation, which demonstrate its nature, alternative to legal proceedings.

Modern mediation plays a special part among other non-legal procedures, such as negotiation, conciliation, an ombudsman, a private court system, arbitration and a 'mini-trial'³ [11]. It is a basic procedure [8], because, as it was developing, other alternative dispute resolution methods (ADR) were formed, such as facilitative mediation, observation mediation, 'shuttle mediation'[1], 'venues for consensus seeking' used in collective (intergroup or other large-scale social) conflicts, etc. We should, however, distinguish between mediation as a basic procedure and the so called restorative justice, or conciliation, used in criminal cases.

themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State. It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seized to settle a dispute in the course of judicial proceedings concerning the dispute in question.

(b) 'Mediator' means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation [2].

² The orientation at the future, in the author's view, does not exclude but, on the contrary, require that the parties consider the state of affairs in the past to develop a new better pattern of interaction between them in their common future. Upon this issue the author agrees with Carrie Menkel-Meadow [7,9]. However, considering the past in mediation does not mean retaliation for the past; it means accepting the past and accepting the other party in the conflict as such, as a whole, as given (as set conditions of the task to solve) for the resolution in question.

³ E.g. in Israel, the procedure of 'a case resolution' conducted by 'other' lawyers has developed as an alternative to mediation, where a mediation lawyer aims at an active and directive role in the process (typical for lawyers), offering other lawyers, representatives of the disputing parties, compromise decisions that bring together their initial procedural positions. This procedure has been a successful replacement of mediation, since it served the same purpose as the introduction of ADR – reducing the case-load of the court system. It is quicker than litigation and allows to minimise legal proceedings costs and avoid a predictable court decision which satisfies neither of the parties. During this procedure, the disputants speak the same legal language, act within usual legal schemes – they evaluate the system of legal bases of the parties' positions with legal instruments, having a clear understanding of the legal perspective of the case [10].

Many forms that are the derivatives of the basic mediation procedure have developed because of its institutionalisation. During this process, not only has mediation integrated into the system of various dispute resolution procedures (including the legal ones) but there has also been an introduction of mediation into these legal procedures of dispute resolution. This is how mediation was introduced in a legal process; it now has been conducted by 'other' judges, not those who conducted legal proceedings, or former judges, or outstanding lawyers. Derivative forms of ADR, developed while mediation was adapting to disputes that are of legal nature (disputes that derive from legal relations) and its own susceptibility to legal categories and means of settlement of disputable relations of the stated legal nature, sometimes complement and sometimes replace the initial, traditional mediation in the system of ADR, which, e.g. happened in Israel [10]. The author of this article proposes calling this adaptability and susceptibility of mediation together with some external integration of the law into the field of mediation *juridisation of mediation*⁴ [6]. Since evolution stages of mediation as an area in the life of society are marked by juridisation, there is a need to provide a review of them.

3. In the last thirty years of the 20th century, as mediation was spreading, it began to take official organisational forms in the USA and in European countries [12, 1]. Bodies and organisations that regulate conflicts were created; first, they united mediators and arbitrators, and then they started to regulate mediation activities. Lawyers, such as former judges and attorneys, began to practice mediation. This was the beginning of 'juridisation' of mediation, when legal aspects of mediation began to strengthen: evaluation of a situation along with evaluation of the parties' behaviour within the law, a mediation lawyer's active involvement in determining conditions of a mediation agreement, introduction of legal paperwork, which made confidentiality incomplete (up to provisions that a mediator shall inform the authorities about the threat to human rights of a person involved in the conflict – e.g. the threat to the basic rights of the child that the mediator identifies during the discussion of the dispute between spouses, the child's parents) and which made mediation itself more formal and thus less flexible. At the same time, legal conditions were created for the development of the quality of mediation services, i.e. regulation of mediators' activity by various standards. This regulation is characterised by promoting self-regulation of the occupation within free associations of mediators. Nevertheless, mediation still remained an alternative to other legal procedures.

4. In Russia, the spread of mediation was triggered by systematic political and economic transformations that strengthen individual initiatives in many areas of life. Legally, it substantially expanded the area of establishing rights and liabilities between the parties by contracts, as well as put the issue of ensuring the performance of various obligations on the agenda. This encouraged learning how to promote and protect one's individual interests in negotiations and created the demand in the help of mediators in conducting such negotiations when the parties came to a dead-end in seeking consolidated solutions.

In Russia, legislation and economic relations grew significantly and became more complicated, and participants of economic activity became more diverse, which also created reasons for disputes among them.

Court trial and protection are guaranteed to every participant of economic activity and every citizen in order to protect their basic constitutional rights and rights under the law. In the past, the court system shared its case-load with the so called administrative jurisdiction (non-judicial bodies with managerial power to consider conflicts), which has now been minimised. The priority given to court proceedings created 'congestions' in the process. There was a need for another procedure,

⁴ Not to be confused with the global phenomenon of juridisation of areas of life in modern society, i.e. 'overproduction of laws' and expansion of areas of legal regulation, which increases the field of legal relations and, therefore, of legal conflicts [6].

quicker and still as effective, so that it would be in such demand among disputants as court proceedings are.

First, mediation developed purely as a conflictological practice and was practised mostly by professional psychologists and conflictologists. Non-professionals, people with innate or socially acquired skills to settle conflicts and reconcile rivals, have never been cast out by the practical field of mediation (as long as a mediator is neutral to the dispute and the parties and as long as they possess the abovementioned skills).

In the mid-90s mediation was legalised in Russia in the form of mediation in collective labour disputes, which was entrenched in the Federal law of 23 November 1995 *On the Procedure of Collective Labour Dispute Resolution*. Today such mediation is regulated by chapter 61 of the Labour Code of the Russian Federation and particularly by art. 403 which has the title *Consideration of a Collective Labour Dispute Involving a Mediator*. Unfortunately, analysts of mediation do not consider this procedure, specific for collective labour disputes, and quiet frequently they claim that mediation is not applicable to collective labour disputes [4]. This is not true. Only the provision of another Federal law, No.193-FZ of 27 July 2010 *On the Alternative Procedure of Dispute Resolution Involving a Mediator (the Procedure of Mediation)* (hereinafter referred to as the 2010 Law) are not applicable to mediation procedures, since there is a clause that specifically states that. But this clause was introduced into the law due to the fact that for collective labour disputes the procedure of mediation is regulated by an act of higher legal force, the Labour Code of the Russian Federation.

Thus, by the second decade of the 21st century two fundamentally different ways of the development of mediation have formed in Russia, while mediation itself was introduced in the early 1990s. One way is dominated by legal aspects of dispute settlement, the other one by psychological aspects, which along with philosophical aspects have created a whole system of mediation and other procedures that form ADR (dispute resolution alternative to legal proceedings). The task of sharing the case-load of the court system resulted in the growth of mediation as a new professional field among lawyers, since lawyers, being consolidated (at least within particular professional areas), easily guided the procedure into the legal and conflictological fields. Mediation in Russia can be extra-judicial, not related to legal proceedings, as well as triggered by legal proceedings or at least by its distant possibility. But is it effective?

An attempt to monitor Russian mediation practice [5] has led to the results which are not reassuring for evaluating the progress of attaining the stated goal. The researchers faced difficulties in acquiring up-to-date information about the state and development of mediation in the country as a whole; the data in the form of answers to the questionnaire were insufficient, moreover, it was representatives of the judicial system that provided the data more actively. The researcher confirmed that mediation is developed and spread unequally around the country.

It may be noted that interest in mediation and its spread is growing in one direction – training and accreditation of mediators, a growing number of organisations that position themselves as providing either mediation services or training of mediators, a growing number of regulations, document forms, i.e. supportive resource forms of mediation. However, the demand in mediation services does not increase in proportions at the very least comparable to organisational and legal efforts made for their extensive implementation. It appears that juridisation of mediation as the development of an effective model is happening at a much faster pace than the social practice of mediation as new model of behaviour in a conflict which it must regulate.

The 2010 Law names the following goals of introducing mediation as an alternative procedure: 1. creating legal conditions for implementing mediation, 2. encouraging the development of business partnership and forming business ethics and 3. harmonising social relations (part 1, art.1 of the 2010 Law). As we see, common social goals prevail; the goal to help the court system cope with ‘the overdemand in justice’ is not directly expressed. At the same time,

the issue of sharing the case-load of the court system is always discussed within the topic of mediation promotion. That is why the judiciary, being a community most interested in the effect of mediation promotion, intervene in this process, which obviously aggravates juridisation. The danger of exceeding the limits of juridisation arises when a mediation lawyer, acting as a judge, substitutes the means of psychological analysis and influence on participants, i.e. to analyse the subjective aspect of a conflict he/she uses the means of legal analysis and legal measures of conflict resolution (in other words, converges the legal positions of the parties in the light of evaluating the objective aspect, the participants' actions as legal or illegal). According to the judiciary, sharing the case-load of the court system should be done through mediation procedures with legal content (techniques of conducting mediation). Although in the 2010 Law mediation is called an alternative procedure, it is really an alternative only to litigation, and these two procedures have the same position in the system of legal procedures that exist in the Russian legal system. Besides courts that belong to the judiciary, in Russia there are arbitration courts and some other special bodies for dispute consideration, e.g. for resolving disputes between employees and employers companies create Labour disputes commissions.

That is, mediation, litigation, consideration of labour disputes in labour disputes commissions and consideration and resolution of collective labour disputes with a mediator are separate types of legal procedures. Moreover, litigation is the central and strategic component, because any other type of procedures does not exclude litigation, it is still possible in the future.

The 2010 Law, which introduced mediation into civil, economic and labour relations regulated by the law, has fundamentally changed the nature of alternativeness of mediation as a special procedure: in subjects, in methods (techniques), in documentation and regulation of the process of entry, participation and ending mediation. According to the 2010 Law, mediation is an alternative not to all legal procedures; having become a legal procedure itself, it is now an alternative only to litigation.

The table demonstrates the comparative analysis of traditional mediation and mediation that underwent juridisation according to five major features: (1) principles, (2) conditions of application, (3) obstacles for implementation, (4) requirement for participants, (5) procedural rules. On the left, there are features marked by ordinal numbers, in the middle and right columns, there is their description for each form.

No.	Traditional mediation aimed at resolving a dispute and at improving person-to-person relationships, relations in groups and among groups of people	Mediation aimed at settling legal disputes, at encouraging the development of partnership, at forming business ethics and at harmonising social relations
1	1.1 A mediator's neutrality 1.2 A mediator's emotionlessness 1.3 Voluntariness 1.4 Equality 1.5 Active participation in seeking a solution 1.6 Cooperation 1.7 Flexibility and	1.1 The parties' mutual willingness to mediate 1.2 Voluntariness of the procedure 1.3 Confidentiality 1.4 Cooperation 1.5 Equality of the parties 1.6 A mediator's impartiality 1.7 A mediator's independence

	1.8 Confidentiality	
2	<p>2.1 Consent to the intervention of the third party, a Mediator</p> <p>2.2 Willingness to change relations for the better (or inevitable maintenance of relations) after the dispute resolution</p> <p>2.3 Orientation at cooperation both in seeking a solution and in its implementation</p> <p>2.4 Orientation at a win-win outcome (aiming at consensus, not compromise)</p> <p>2.5 Aiming at keeping confidentiality</p> <p>2.6 The law 'does not work'</p> <p>2.7 Significant losses resulting from the conflict</p>	<p>2.1 The subject of the dispute being a part of civil (including economic activity), labour and family legal relations; as well as in other cases, specifically indicated by the law</p> <p>2.2 applicable before, during and after filing a case to the court</p> <p>2.3 reaching an agreement to conduct the procedure</p> <p>2.4 is not an obstacle for filing a case to the court</p>
3	<p>3.1 one of the participants is inexorable in his/her position</p> <p>3.2 there is a serious difficulty in communication</p> <p>3.3 a wish to attract public attention</p> <p>3.4 legal incapacity of at least one of the disputants, other reasons that make personal participation in mediation impossible</p>	<p>3.1 is not applicable to collective labour disputes (a special procedure established by art. 403 of the Russian Labour Code is applicable instead)</p> <p>3.2 is not applicable to civil, labour and family legal relations when they affect or may affect interests of the third parties who do not participate in mediation or public interests</p>
4	<p>4.1 Legal capacity of the parties</p> <p>4.2 Personal participation in the procedure</p> <p>4.3 Readiness to cooperate</p> <p>4.4 Acknowledgement of the value of future relations</p>	<p>Requirements for professional (art.16 of the Law) and non-professional (art.15 of the Law) mediators are different, and there are no such requirements for the parties</p>
5	<p>Are determined by the parties</p>	<p>Are determined with regard to the legal requirements (art.11) using one of the two ways: (1) by referring to the regulations of the organisation that conducts mediation, (2) by a mediator with regard to the parties' wishes</p>

Mediation is conducted in accordance to the stated law and some other regulatory documents which were created by the community of practising mediators, such as the The Code of Mediators of Russia (2012), standards and rules of professional mediator activity and associations of mediators. Thus, mediation has become not only a field of professional activity but also a field of regulatory effect, including that of legal standards. The array of regulations does not always reflect the principles of mediation that were formed before and independently from legal regulators and the principles enshrined in the Federal law on mediation. Mediation that had been practised before the law was passed and mediation that must be practised according to this law differ to such an extent that we can argue that two mediation practices have developed in Russia. In order to ensure legitimacy of mediation these practices must converge. Thus, the following way from research to efficient practice through the methods of legal psychology is possible:

1. Conducting complex study by research groups, where among participants there are both representatives of the legal science and psychology scientists, in order to determine to what extent mediation as a specific procedure can be legally regulated.
2. Developing methodological concepts of educating (retraining) mediators (both lawyers and psychologists, while understanding the difference in people's perception of a conflict with regard to the predominant type of professional thinking).
3. Introduction of educational programmes, diverse in their content and level, that aim at forming the culture of dialogue as a whole and communicative skills of conducting constructive negotiations, including negotiations with conflict resolution and involving a mediator.
4. Using a free legal assistance system, created in Russia in 2012, to correctly inform citizens about a possibility of resolving their problems through mediation (while consulting on the issues that can be solved within this system and at the same time through mediation).

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