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ՌՈՒՍԱԳԻՏՈՒԹՅԱՆ ԱՐԴԻ ՀԻՄՆԱԽՆԴԻՐՆԵՐԸ

Գիտամեթոդական հանդես

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ЕРЕВАН 2020

Երևան քաղաքում Մոսկվայի Մ.Վ. Լոմոնոսովի անվան պետական համալսարանի մասնաճյուղ

Филиал Московского государственного университета им. М.В. Ломоносова в г. Ереване

M. Lomonosov Moscow State University, Yerevan branch

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Երաշխավորվել է տպագրության Երևան քաղաքում Մոսկվայի Մ.Վ.Լոմոնոսովի անվան պետական համալսարանի մասնաճյուղի գիտական խորհրդի կողմից

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«ՌՈՒՍԱԳԻՏՈՒԹՅԱՆ ԱՐԴԻ ՀԻՄՆԱԽՆԴԻՐՆԵՐԸ» գիտամեթոդական հանդեսի առաքելությունը ՀՀ-ում ռուսագիտության՝ որպես լեզվաբանության ճյուղի մասսայականացումն է, ռուսաց լեզվի ուսումնասիրման նկատմամբ հետաքրքրություն առաջացնելը, օտարերկրյա հետազոտողների ուշադրությունը հայ գիտնականների մշակումներին հրավիրելը, դրանով իսկ հայ ռուսագիտության մասսայականացումն է, համատեղ ծրագրերի, դրամաշնորհների մշակման հնարավորության ընձեռումը, մագիստրոսների ներգրավումը հետազոտական աշխատանքներին:

Назначение научно-методического журнала «**ПРОБЛЕМЫ СОВРЕМЕННОЙ РУСИСТИКИ**» рассматривается нами в ракурсе популяризации в РА русистики как отрасли языкознания, привлечения интереса к изучению русского языка, привлечения внимания зарубежных исследователей к разработкам армянских ученых и тем самым популяризации армянской русистики, возможности разработки совместных проектов, грантов и пр., привлечения магистрантов к научно-исследовательской работе.

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ИСПОЛЬЗОВАНИЕ МЕДИАТИВНЫХ ПРАКТИК ПРИ РАЗРЕШЕНИИ ГРАЖДАНСКО-ПРАВОВЫХ СПОРОВ

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АННОТАЦИЯ

В статье рассмотрены различные виды альтернативного разрешении конфликтов, используемых в мировой практике, обозначен круг проблем, препятствующих широкому распространению медиативных процедур в Республике Армения. В силу своей гибкости и диспозитивности альтернативные способы урегулирования споров позволяют выработать наиболее адекватное решение проблемы, что способствует формированию культуры мирного и самостоятельного разрешения ситуаций участниками гражданско-правового спора. На основе изучения различных подходов в медиации, используемых в европейских странах и США, даны рекомендации по выработке оптимальной модели согласования примирительной процедуры (медиации) в РА.

Ключевые слова: классическая, интегративная, когнитивная, экосистемная виды медиации; трансформативная модель, нарративный подход, проблема директивности.

Researchers consider mediation as a negotiation process with the participation of a third neutral, impartial, non-interested in this conflict party – a mediator, who helps the parties to work out a certain agreement on the dispute, while the parties fully control the decision-making process for the settlement of the dispute

and the conditions for its resolution. As Zdrok O.N. notes, the main distinguishing feature of mediation is that the negotiations between the parties are led by a mediator, specially trained in a particular technology, assuming a specially structured procedure and targeted use of well-known communicative techniques [2].

Structuring is carried out according to the stages of mediation: introduction, presentation of the parties, discussion, caucus, general session, preparation of agreement project, exit from mediation process. Each stage of the mediation process has its own goals and objectives, and it is natural that only after solving the tasks of each stage, the mediator can move on to the next one.

During the mediation process, the mediator identifies the interests of the parties and stimulates them to develop mutually beneficial conditions for further cooperation, even if the parties are in conflict. In the mediation process, the mediator identifies the interests of the parties and stimulates the parties to develop mutually beneficial conditions for further cooperation, even if the parties are in conflict. It is extremely difficult to start the mediation process at the stage of conflict escalation, since the parties are in a strong negative emotional opposition. The assistance of a negotiating specialist in this case lies precisely in preparing the argument, development of a strategy and tactics for negotiating in order to reach an agreement most beneficial for both parties. Conciliation is used at the initial stage of mediation, when the mediator meets with each of the parties separately, tries to understand the reasons for the disagreement, and listen to suggestions for an alternative way out of the conflict situation. The mediator has great opportunities for the selective transfer of information, changing its wording, taking into account the particularities of the parties. The next stage is a discussion on the development of issues for dialog and negotiations, followed by individual mediator work with each party and the development of possible solutions for conflict resolution.

Based on the results of mediation, the parties can come to an agreement on mutually beneficial conditions, and since both parties are interested in the execution of such a mutually beneficial agreement, the issue of enforcement is not raised.

In recent years, many mediators in the West have expressed serious concern about some common trends in the use of mediation. These concerns are primarily associated with a departure from the basic postulates of mediation.

First of all, this refers to the problem of directivity, and this parameter is the most discussed among specialists who work with conflict [3].

The distortion of the principles of mediation, as noted by E.N. Ivanova, is especially often due to the client-centric, or side-centric focus of mediation [4].

Some mediators see a way out of this situation in the application of "work on two fronts" (Two-Table Approach): 1) at the level of legal reality; 2) in a broad search of options for dispute resolution.

The mediation practice is not as wide in Armenia yet, and we did not have time to acutely feel the presence of those contradictions that are characteristic to the mediation process of a number of foreign countries. Nevertheless, it is important to determine which areas of mediation may be applicable in resolving a civil dispute in our country. But first of all we need to research various mediation approaches used in European countries and the USA.

The analysis of literary sources will allow to identify several main types of mediation [6].

In the group of mediation types the researchers separate classical type, which includes facilitative, generative, or generic mediation [7]. When applying this type of mediation, the main function of the mediator is to protect the process and procedures. His intervention in the content of decisions and directivity are minimal and great importance is attached to the observance of basic principles: neutrality, voluntariness, confidentiality.

Thus, classical mediation assumes that the obligatory achievement of the intended result by the parties is not the goal of the mediator. However, the experience of a number of countries, such as Spain, Germany and Belgium, shows that the initial understanding of mediation neutrality is often distorted when the mediation is introduced into judicial practice. This is manifested in the fact that the mediator must lead the parties to an agreement, and the absence of such an agreement indicates the failure of the mediator and his lack of professionalism. It is logical that the existence of an agreement satisfies, first of all, the interest of the court, which can suspend the case based on this agreement.

Researchers consider the end of the 80s and the beginning of the 90s as the time of the appearance of evaluative and directive mediation [9]. Their main difference from the classical procedure is that the mediator can make a recommenda-

tion on the desired solution to the issue and assess the judicial prospects of the dispute. These types of mediation raise the most serious objections, since the mediator is more concerned with respecting the legal rights of clients than with satisfying their true interests.

In judicial mediation the mediation is especially tempted to become an expert and impose a "right decision" on the parties, that is why evaluative, directive mediation in the global mediation community raises the most objections to the violation of the principles of voluntariness and neutrality [5].

The problem of directivity is closely related to the cognitive aspects of the interaction of the parties in the mediation process. First of all, this concerns the degree of specialist's interference in the substantive aspects of the dispute, and on the other hand, the degree of cognitive activity, freedom of choice and responsibility of the parties [10].

The problem of directiveness in relation to judicial mediation seems especially important as many authors believe that directive mediation is not a mediation at all, but rather can be considered as a pre-trial meeting. It should also be noted that directiveness is the most problematic characteristic along which the dividing line between different types of mediation passes.

Under "directive", researchers understand the degree of mediator intervention in the mediation process, which manifests itself in two directions:

a) the level of expert directiveness, that is, the activity of mediator participation in solving substantive issues in one or more of the following ways:

– providing the parties with factual information on various aspects of the dispute, including its judicial prospects;

– statement of the "diagnosis", the subjective interpretation by the mediator of the situation itself, the characteristics of its participants, their behavior, etc.;

– the formulation by the mediator of the agenda items of the negotiations;

– recommendations to the parties on the implementation of certain actions or abandonment of them;

– advice on making a decision;

– the number of questions asked by the mediator;

– formulation of the text of the final agreement by the mediator himself.

b) the level of procedural power of the mediator, which includes`:

– detail and rigidity of the mediation procedure introduced by the intermediary himself;

– the introduction and maintenance of the rules of interaction in mediation by the intermediary himself;

– resolving procedural issues that were not initially agreed upon and arise during the negotiation process by the mediator himself, for example: choosing the party who will be the first to talk about his vision of the problem, determining the order of discussion of issues from the agenda, determining the need for a cocus, choosing the party who will be the first to take part, etc.

The degree of procedural directivity in the application of classical mediation can be completely different. The mediator can appeal to the need to comply with the rules defined by him to ensure the effectiveness of negotiations when it comes to the procedure.

As for mediation in court, it often requires considerable rigidity in observing the rules of mediation, since parties who are in emotional confrontation are prone to accusations of each other up to insults. The emotional tension provoked by the judicial review situation in itself creates significant discomfort, however, this characteristic feature of judicial mediation does not contradict the basic principles of mediation and negotiations in a cooperation strategy should remain an unchanged component of the whole process.

However, it should be noted that the directive behavior of the mediator can block the ability to find the best solution, since only the parties are experts on their own problem. The mediator inevitably relies on limited knowledge of the existing dispute, this is due to the fact that often very important information that changes the whole picture is silent or comes from clients closer to the end of mediation.

The reasons for silence can be very different: insufficient trust at the beginning of the process, incomplete awareness of the importance of the information by the client, as well as a situation where the information negatively characterizes one of the parties etc.

A separate group may include integrative mediation, which is focused on solving problems and achieving goals, and the agreement reached should be based on the interests of the parties. The main result of this type of mediation is agreement, all other issues are not as significant. Of course, one cannot fail to notice

the tendency to switch to a directive model, and the use by the mediator of pushing the parties towards an agreement, and sometimes pressure, if the parties are not inclined to make mutual concessions and negotiate. It is possible that this type of mediation should be attributed to the above-mentioned group.

The next model of mediation, which we are going to consider, is a transformative [8] or humanistic [10] one, which suggests that the mediator enables the parties to maximize their potential and does not set any stages, norms and rules. The mediator's function is to develop an action plan to improve the situation, but when resolving the contradictions, the feelings and emotions of the parties are not ignored.

The starting point for transformative mediation as a separate school was 1994, when the book of American mediators Robert Bush and Joseph Folger "The Promise of Mediation. Transformative Approach to Conflict" [1]. It should be noted that this work quickly gained wide fame and recognition among experts in the field of dispute resolution, causing a simultaneous surge of interest and criticism in their address.

The dispute resolution in the transformative model is not the main criterion for the success of mediation, and the effectiveness of the specialist's actions is judged by whether the mediator was able to contribute to the transformation of the conflict by intervening using the communicative techniques available in his arsenal. This approach allows participants to determine the course of mediation, while the mediator follows them without giving any instructions. It can be said that the transformational approach to mediation is, in a sense, aimed at freeing the parties from quick, superficial agreements under the pressure of the court. The role of the mediator is to establish a dialogue and remove emotional tension, which will allow the parties to the conflict to agree on their own and not bring the matter to court. In a number of countries, in particular in the USA, Czech Republic, France, mediators, supporters of the transformative approach, actively interact with the courts, while striving to improve relations in the interaction of the parties through transformation. Even if the parties do not conclude an agreement, the court accepts their work with the mediator. In the United Kingdom, Australia and Argentina, mediation is mandatory before the arbitral tribunal begins to consider the case,

and, as foreign experience shows, 60–80% of all cases are resolved without judicial intervention.

The narrative approach to mediation was developed by psychologists from New Zealand, Gerald Monk and John Winslade. This approach to mediation is based on a postmodern philosophy, in particular, on the assumption that people live and act in models, descriptions of reality created in the interaction of people, and none of these descriptions can be considered true. It is natural that these descriptions differ in degree of coherence and credibility, as well as in what opportunities they provide for people to realize their preferred life story.

The narrative approach to mediation suggests that it is necessary to take into account the fact that people live their lives in accordance with certain stories, and therefore the plots and meanings are more important for them than the facts and causes that lead to conflict. Accordingly, in mediation, it should be borne in mind that it is possible to play two conflicting narratives with different thematic elements. Moreover, each story will be built in such a way as to be as believable as possible. It should also be expected that each of the stories, respectively, will set its own set of possible scenarios.

The mediator, in our opinion, needs to listen to the history of the conflict in the context of discourses, clearly separate the history of the conflict from the "personal" stories, suggest the development of alternative stories that will contribute to the extinction of the conflict.

Representatives of systematic or cognitive mediation believe that disturbances in emotions and behavior in conflict often depend on errors in the cognitive process and a deficit in thinking. Under the influence of their own emotions in a conflict situation, people experience cognitive distortions. In this case, the mediator needs to help the parties recognize their own limitations in decision-making and establish effective communication between the conflicting parties. This mediation is called systematic because consists of repeating cycles for testing problems identified in the process of mediation.

Ecosystem mediation and its variant – mediation focused on the family as a system, emphasize that the parties involved in mediation do not exist in isolation, and take into account a map diagram of how certain decisions will affect the system and its elements. Ecosystem mediation is mainly aimed at resolving family

conflicts and is based on the theory of systems, which allows understanding various family structures, relationships and behaviors and helping to restore broken relationships.

By analyzing the interaction of all elements of the system, the mediator promotes joint decision-making by all participants in the process, while the mediator remains neutral. Naturally, it is assumed that reaching agreement on specific problems will contribute to improving relations between the parties, which is also one of the goals of the process.

The effectiveness of mediation and its expected result are closely related to the purpose of mediation.

The experience of using mediation in different countries, in particular in Russia, the USA, Poland, and others, indicates that there is a clear request in judicial mediation – to close the case either by reaching a settlement or by withdrawing the lawsuit. However, most judges prefer to deal with those mediators who provide this result as soon as possible. In our opinion, such a problem may arise in Armenia. Given the lack of time, the mediator's work often remains at the level of positions, which allows, in the best case, a compromise solution, rather than reaching a level of cooperation. At the same time, in many cases, the cause of the dispute is deeper and wider, and the court decision as well as the settlement reached directly on the subject of the lawsuit do not solve the problem itself. This implies the fragility of the agreement reached and the possibility of future conflicts.

Given the foregoing, we will try to determine a number of goals facing the mediation: 1) the settlement of the conflict at the level of positions; 2) reaching an agreement to withdraw the claim; 4) conclusion of a settlement agreement; 5) resolution of the conflict and conclusion of an agreement taking into account the interests of the parties; 6) the transformation of the parties' vision of the existing conflict and the modification of the relationship between the conflicting; 7) increasing the objectivity and realism of the parties in the perception and assessment of the causes of what is happening; 8) reorientation of the parties to jointly overcome the conflict situation.

The choice of the mediator's working style, in our opinion, should be based on the factor that the client, despite the complexity of the situation, the emotionality of her perception and the risk of making a mistake, is able to solve her problems

rationally and responsibly. He needs only some support and assistance in realizing his own potential. Moreover, no one other than the client himself can know how his problem should be solved. Intervention, imposing one or another vision of the problem and the possibilities of overcoming it, may interfere with the client's self-realization in choosing the really best solution for him. But at the same time, if a person has asked for help, this means that he does not have the resources necessary to solve the problem, needs the help of a specialist who better understands what is happening and how to cope with the existing difficulties. In such a situation, the application of mediation practice is not in dispute.

Regarding the issue of using a certain type of mediation or their combinations, the opinions of practicing mediators differ here. Some authors consider the combination of styles of mediation categorically impossible. They believe that their differences are fundamental, and the advantages of different types of mediation are mutually destroyed when they are used together, and the mediator loses qualifications. Other authors believe that the choice in each case is determined by the characteristics of the current situation and the characteristics of the parties. They do not see a problem in the coexistence of different types of mediation within one process.

We are inclined to hold a second opinion and believe that, subject to the basic principles of mediation, it is possible to flexibly adapt and develop an individual style that combines various techniques, which will ensure the success of mediation in court and its distribution in our country.

The use of mediation practices should also be built based on the national mentality and socio-psychological characteristics. Accordingly, in our opinion, facilitative mediation, which assumes minimal directivity and mediator's intervention in the content of decisions made, as well as observing the principles of neutrality, voluntariness, confidentiality, can become the dominant type of mediation in Armenia.

Our survey among specialists (mediators and judges), as well as a wide range of citizens who are not related to jurisprudence, revealed a number of problems:

- the procedure of mediation is inherently innovative for the modern Armenian mentality; accordingly, it is treated with some degree of distrust;

- the practical implementation of mediation procedures in Armenia was not widespread due to the low level of legal culture of the population and insufficient awareness of citizens;
- there are frequent cases when in the process of mediatio the parties actively seek advice, but do not follow the recommendations received, changing the decision imposed on them;
- often the mediator's work remains at the level of positions, which allows us to resolve the issue at best at the level of compromise, rather than reaching the level of cooperation. In many cases, the cause of the dispute is deeper and wider, and a court decision, just like a settlement on the subject of a lawsuit, does not solve the problem itself. This leads to fragility of the agreement and conflicts in the future;
- the formation of mediation practices in Armenia is complicated by the unresolved issue of the forms of interaction between the mediator and the court.

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ՄԵԴԻԱՏԻՎ ՊՐԱԿՏԻԿԱՆԵՐԻ ՕԳՏԱԳՈՐԾՈՒՄԸ ՔԱՂԱՔԱՑԻԱԻՐԱՎԱԿԱՆ ՎԵՃԵՐԻ ԼՈՒԾՄԱՆ ԳՈՐԾՆԹԱՑՈՒՄ

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Կիրառական հոգեբանության ամբիոնի ասպիրանտ
Խ. Աբովյանի անվան Հայկական պետական մանկավարժական համալսարան
Երևան, Հայաստանի Հանրապետություն

ԱՄՓՈՓՈՒՄ

Հոդվածում քննարկվել են համաշխարհային պրակտիկայում օգտագործվող հակամարտությունների այլընտրանքային լուծման տարբեր տեսակներ, նախանշվել է Հայաստանի Հանրապետությունում մեդիատիվ ընթա-

ցակարգերի լայն տարածմանը խոչընդոտող խնդիրների շրջանակը: Իր ճկունության և դիսպոզիտիվության շնորհիվ վեճերի կարգավորման այլընտրանքային միջոցները թույլ են տալիս մշակել խնդրի առավել համարժեք լուծում, ինչը նպաստում է քաղաքացիական-իրավական վեճի մասնակիցների կողմից իրավիճակների խաղաղ և ինքնուրույն լուծման մշակույթի ձևավորմանը: Եվրոպական երկրներում և ԱՄՆ-ում կիրառվող մեդիացիայի տարբեր մոտեցումների ուսումնասիրության հիման վրա հանձնարարականներ են տրվել մշակել ՀՀ-ում հաշտարար ընթացակարգի (մեդիացիայի) համաձայնեցման օպտիմալ մոդելը:

Բանալի բառեր՝ դասական, ինտեգրատիվ, ճանաչողական, էկոհամակարգային մեդիացիայի տեսակներ, փոխակերպվող մոդել, նարատիվ մոտեցում, դիրեկտիվության խնդիր:

THE USE OF MEDIATION PRACTICES IN RESOLVING CIVIL DISPUTES

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ABSTRACT

The article discusses various types of alternative conflict resolution used in world practice, outlines a range of problems that impede the widespread dissemination of mediation procedures in the Republic of Armenia. Due to their flexibility and dispositiveness, alternative methods of dispute resolution allow to

develop the most adequate solution to the problem, which contributes to the formation of a culture of peaceful and independent resolution of situations by participants in a civil dispute. Based on the study of various approaches to mediation used in European countries and the USA, recommendations are given on developing an optimal model for reconciling the conciliation procedure (mediation) in the Republic of Armenia.

Keywords: classical, integrative, cognitive, ecosystem mediation; transformative model, narrative approach, directivity problem.

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