



THE PRINCIPLE OF THE SELF-DETERMINATION OF PARTIES AS A BASIS FOR THE ETHICAL INTEGRITY OF THE PROCESS OF MEDIATION

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Abstract: Establishing mediation as a means of alternative dispute resolution in Georgia is supported by state policy which, inter alia, has been expressed by adopting the Law of Georgia on Mediation. Therefore, its smooth functioning within the unified system of the chain of administration of justice should be evaluated as a demonstration of public interest. In this respect, achieving public recognition of mediation, and increasing the trust of the public in mediation as to the fair process, a process based on ethical principles, is deemed important. Therefore, the purpose of this article is to study the ethical grounds of mediation-related processes. In particular, emphasis shall be placed on the fundamental principle of self-determination and its proper implementation in practice, which will promote both the implementation of the most general purpose of fairness and the formation of unanimous approaches toward the institution of mediation in public.

Keywords: Negotiation, agreement, value

Preface

It is recognised that the primary goodwill and merit of the court is conditioned by the following two aspects: the first is its high purpose, august intent, and its public calling to obtain and provide justice to people; the second is that mankind has not yet established a more democratic institution than a court¹. This unconditional truth suggests the need of mankind for justice. What is justice? Many have written on this phenomenon, yet it seems there is no concrete definition for justice². It is noteworthy that, as Socrates argued, the essence of justice is not to be found in external doing, but in a man's inward self³. The

1. *Ugrekheldze M.*, Journal Law and World No 7, Tbilisi, 2017, 42.

2. *Elnegahy Sh.*, Can Mediation Deliver Justice, Cardozo Journal of Conflict Resolution, 2017, 765.

3. *Ibid*, 762.

concept of justice has always been associated with scales. This also confirms that the concept of justice has always been orbiting around the idea of balance⁴.

“It is not fair” is a statement that reflects a feeling in a man which often leads to conflict. When in conflict, man always seeks a sense of justice in order to restore balance and bring harmony back to its place.⁵ The desire to restore justice serves as a main driving force for people to hear disputes in court. However, human beings are cognitive, social creatures who can negotiate. The trial, in all respects, can be painful and trying to avoid it is seen as natural⁶. Fully, during the life, we are constantly engaged in negotiations or making compromises⁷.

In view of the above, in some cases standard court proceedings cannot be considered as the only means of restoring justice; it should be deemed achievable by subjects of law through alternative means within the justice system. This does not decrease the significance of the court in any respect though. Moreover, it ensures the saving of court resources. For that very purpose, mediation as a social phenomenon and an alternative means of dispute resolution regulates the smooth functioning of state structures. It ensures flexibility in judicial bodies and releases the court from disputes through its swift decision-making⁸.

However, in the opinion of sceptics, mediation may not have the resources to implement the principles of fairness, and therefore, cannot ensure the protection of the interests of subjects of law. Therefore, standards that ensure the observance of fairness in the process of mediation should be determined. The answer is as follows: according to the Code of Ethics of mediation, a mediator should ensure the performance of the mediation process according to the principles of diligence, due prudence, impartiality, unacceptability of conflict of interests, and the voluntary, conscious, fair and equal participation of parties, as well as the opportunity of participation for parties and the realisation of the right of their self-determination. The laws of certain countries view the role of a mediator as assisting parties to achieve a fair settlement⁹. It is evident that where the above mentioned fundamental ethical principles are neglected, it would be impossible to implement justice as a supreme value on the individual level for each specific set of proceedings.

It is also noteworthy that, despite the entry into force of the Law of Georgia on Mediation in 2019, mediation is considered a new institution in Georgia. In addition, its efficient functioning within a unified chain of institutions administering justice is widely determined

4. Ibid, 765.

5. Ibid, 759.

6. *Zampano R.*, Settlement Strategies for Trial Judges, *Litigation 22 Litig Journal*, 1995, 3.

7. Ibid, 4.

8. *Gorghiu A.*, Judicial and Extrajudicial Mediation, *Logos Universality Mentality Education Novelty Section: Law*, 2009, 257.

9. *Chitashvili N.*, Fair Settlement as Basis for Ethical Integrity of Mediation, *Ivane Javakhishvili Tbilisi State University, National Centre for Alternative Dispute Resolution*, 2016, 9.

by academic studies and by processing fundamental principles. Their proper implementation in practice determines the level of success of the institution. As a result, doubts as to whether mediation can serve as a means of achieving justice should be eliminated. Therefore, this paper will discuss one of the above said, in particular, the self-determination of parties as the most important fundamental ethical basis and principle of mediation determining the formation of the sentiments of parties towards restoring justice. Emphasis shall be put on the contents and essence of the principle. The value in question has been supported in the Model Standards of Conduct for Mediators.

Methods of normative and comparative legal study shall be the methodological basis of the paper.

Mediation as an effective mechanism of the realisation of the principle of fairness

The Constitution of Georgia establishes the concept of a man as a supreme value. This is hardly surprising under the conditions of a democratic, developed state. In Article 113 of the Constitution adopted in 1921, it is emphasised that man represents a supreme value¹⁰. In view of the above, it is important that the system administering justice throughout the state should be in the service of protecting the interests of each and every subject of law. Thus, the need for the existence of mediation and for its development as an institution will be determined by whether or not its existence can improve people's being. For nothing can be more valuable than the attempt to make people's life better. This could be one of the main priorities of public attention, the continuous attempts at improving regulations and the expenditure of state resources. Justice must be looked upon as a fundamental principle of mediation¹¹.

Fairness in the process of mediation entails that, on the basis of knowledge of the main principles of the process, an understanding of the actual significant circumstances, the analysis of the terms and conditions of any agreement, the informed consent, the parties shall make non-coercive, voluntary decision, realising anticipated outcomes or, if they wish so, they can stop mediation at any moment. Fairness is also ensured, unless participation in the process serves to gain an unfair advantage, and is based on manipulative and intimidating methods of negotiation¹².

10. The collection of legal acts of Democratic Republic of Georgia (1918-1921), Tbilisi, 1990, 477.

11. *Steffek F., Unberath H.* (eds.), Genn H., Greger R., Menkel-Meadow C., *Regulating Dispute Resolution ADR and Access to Justice at the Crossroads*, Hart Publishing, Oxford and Portland Oregon, 2013, 17. Referenced: Chitashvili N., *Fair Settlement as Basis for Ethical Integrity of Mediation*, Ivane Javakhishvili Tbilisi State University, National Centre for Alternative Dispute Resolution, 2016, 7.

12. *Chitashvili N.*, *Fair Settlement as Basis for Ethical Integrity of Mediation*, Ivane Javakhishvili Tbilisi State University, National Centre for Alternative Dispute Resolution, 2016, 9.

In addition, to ensure justice in mediation: 1. People should be provided with the opportunity to express whatever is important for them. 2. Parties should see that their voice is heard by the authoritative person of the mediator. 3. An environment of equal opportunity for everyone should be established. 4. Dignified treatment should be assured¹³. For a party, the sense of restoration is what is important within the frameworks of any process¹⁴.

Relationship between self-determination and fairness in the process of mediation

It has been recognised that implementing fairness in the process of mediation is important from both procedural aspects and in terms of content. A kind of guarantee to achieve fairness will be created by the proper implementation of the principle of self-determination¹⁵, which is directly and immediately connected to the most general principle of fairness and legality, and so will be discussed together with those.

How will self-determination be defined? It implies coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome¹⁶. It is a possibility to make settlements resulting from free will and on a voluntary basis. In addition, the above principle should be observed from both the procedural standpoint and the material outcome.¹⁷ Oxford University defines this concept as the process by which a person controls their own life¹⁸. The biggest obstacle towards achieving one's goal is oneself rather than the opposing party¹⁹. Merriam Webster defines the terms as “free choice of one's own acts or states without external compulsion”²⁰.

It should be emphasised that this principle significantly distinguishes mediation from other means of dispute-resolution. Moreover, every action performed by the mediator during the process should be in compliance with these ethical values²¹. Therefore, the above definition

13. *Welsh N.*, Do You Believe in Magic: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation, *SMU Law Review*, 2017, 721.

14. *Menkel-Meadow J.*, Remembrance of Things Past – The Relationship of Past to Future in Pursuing Justice in Mediation, *Cardozo Journal of Conflict Resolution*, 2004, 97.

15. *Douglas S.*, Neutrality, Self-Determination, Fairness and Differing Models of Mediation, *James Cook University Law Review*, 2012, 19.

16. *Press Sh., Lurie P.*, Protecting Self-Determination in Mediation, *Best of ABA Selections: Dispute Resolution Journal*, 2014, 74.

17. *Ibid.*

18. *Welsh N.*, Do You Believe in Magic: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation, *SMU Law Review*, 2017, 726.

19. *Ury W.*, *Getting to Yes with Yourself: and Other Worthy Opponents*, Harper Collins, New York, 2014, 2.

20. *Ibid.*

21. *Alfini J.*, Mediation as a Calling: Addressing the Disconnect between Mediation Ethics and the Practices of Lawyer Mediators, *South Texas Law Review* 2008, 831.

of the self-determination of parties is rooted in the principle of personal autonomy and is expressed through the legal doctrine of informed consent²². So, self-determination is the dominant paradigm in the process of mediation which provides this process with high legitimacy that, in its turn, is based on the voluntary recognition of the parties²³. However, it is clear that the specificities of expressing this principle differ according to the legal culture in which it is defined²⁴. In any case, even those against mediation state that the self-determination of parties is part of the “magic” of mediation, and ensures the achievement of the best results: satisfaction with the process, a high incidence of settlement, and more responsibility regarding the terms of settlement²⁵.

Accordingly, it has been established that in the process of mediation, taking account of the ethical grounds of that very institution creates the possibility of implementing the most general principles of fairness. The following aspect is also important: as already mentioned, a mediator is obliged, in line with the ethical principles of mediation, to be neutral and therefore he/she has no authority to advocate for a weak party. Though ethical considerations oblige him/her to help the parties to achieve an acceptable, legal agreement²⁶.

Considering this, a mediator can be defined as a person in the procedure and process of mediation who is under an obligation to avoid making a manifestly unfair decision, and who facilitates the achievement of a fair result. This is achieved by promoting the principle of the self-determination of parties. Therefore, a mediator should create a proper environment. As has been confirmed by social experiment, the environment changes humans far more than humans change the environment²⁷.

The determination of the criteria for balancing self-determination and fairness cannot be found in the Code of Ethics of any country. It should be determined individually in close connection with every factual circumstance of a case and the interests of the parties²⁸. The concept of self-determination should not be limited to a “vacant general definition”, it should

22. *Nolan-Haley J.*, Self-Determination in International Mediation: Some Preliminary Reflections, *Cardozo Journal of Conflict Resolution*, 2006, 277.

23. *Field R., Crowe J.*, The Central Role of Party Self-determination in Mediation Ethics, the Post is a Version of a Paper Delivered at the 6th ADR Research Network Roundtable, 4 -5 December 2017. See: <https://adrnetwork.wordpress.com/2017/12/19/the-central-role-of-party-self-determination-in-mediation-ethics/>.

24. *Ibid*, 278-279.

25. *Hedeen T.*, Coercion and Self-Determination in Court-Connected Mediation: All Mediations Are Voluntary, but Some Are More Voluntary than Others, *Special Issue: Making Dispute Resolution Work*, 2005, 273.

26. *Douglas S.*, Neutrality, Self-Determination, Fairness and Differing Models of Mediation, *James Cook University Law Review*, 2012, 26.

27. *Bush R., Folger J.*, Reclaiming Mediation’s Future: Re-Focusing on Party Self-Determination, *Cardozo Journal of Conflict Resolution*, 2015, 742.

28. *Field R., Crowe J.*, The Central Role of Party Self-determination in Mediation Ethics, the Post is a Version of a Paper Delivered at the 6th ADR Research Network Roundtable, 4-5 December, 2017. See: <https://adrnetwork.wordpress.com/2017/12/19/the-central-role-of-party-self-determination-in-mediation-ethics/>.

be defined by taking into account the autonomy of the parties and their free will, since “without it, mediation’s promises of autonomy and self-determination are empty”²⁹.

Because of this definition, the above principle is included in the majority of legal acts regulating mediation. Thus, in Georgia, the principle of the self-determination of parties is recognised by the Law on Mediation adopted in 2019; moreover, Article 4 of the Professional Code of Ethics of Mediators is also dedicated to it. It would be reasonable to establish a legal definition of mediation within that same Law on Mediation.

Conclusion

Mediation as a means for the resolution of disputes represents an efficient mechanism for implementing fairness – the most general principles of morality and law. In light of this, the capabilities of mediation are significantly determined by the self-determination of parties, which is intentionally highlighted in the Model Standards of Conduct for Mediators.

In the process of mediation, a mediator can be defined as a person who is under an obligation to avoid making manifestly unfair decisions. Accordingly, a mediator is also defined as an entity obliged to observe the principle of the self-determination of parties. In consequence, the proper observance of the principle of self-determination, which results in the existence of a fair process, ensures the achievement of such state interests as the increased trust of the public in mediation. The above is connected to the purpose of improving the unified chain of subjects administering justice. Standard court proceedings cannot be deemed as the only means of achieving justice. Within a judiciary system, justice can be achievable by the subjects of law through alternative means, including mediation. The main goal of the subjects of law is to achieve justice, rather than the mere participation in court proceedings.

Taking into account both the theoretical and practical significance of the principle discussed in this paper, it should be deemed appropriate to make changes to the Law of Georgia on Mediation. Its legal definition should emphasise the essence of mediation as a process focused on protecting the interests of the parties.

Summary

On the basis of the Code of Ethics and a review of legislative acts, it can be concluded that mediation as an alternative means of dispute resolution is based on the most general principle of fairness. In addition, fairness in the process of mediation implies not only carrying out the

29. *Nolan-Haley J.*, Informed Consent in Mediation: A Guiding Principle for Truly Educating Decision-making, *Notre Dame Law Rev.*, Vol. 74, 1999, 775.



mediation process on the basis of specific rules and values, but also the fairness of the content of any settlement achieved. Therefore, the doubts of sceptics about mediation, stating that it may not have the resources to implement the principles of fairness, and therefore cannot ensure the protection of the interests of subjects of law, should be rejected. However, it is clear and obvious that standard court proceedings cannot be considered as the only means of implementing the principle of fairness. Within the frameworks of the system of administration of justice, achieving that same purpose by means of mediation using its fundamental ethical principles should be deemed possible. In addition, the principle of fairness in the process of mediation should be applied in connection with the principle of the self-determination of the parties, as long as the proper implementation of this ethical norm leads to the existence of fair process and its ethical integrity. And the achievement of the latter purpose should ensure the implementation of such state interests as the increased trust of the public in mediation, and its institutional growth. Considering all the above said, it is deemed important to raise the awareness of the public on this matter, which will result in the formation of a justice system oriented to the interests of the people. The supreme purpose is to make people's life better, and every systemic change should serve this purpose.

References:

1. Ugrekhelidze M., Journal Law and World No 7, Tbilisi, 2017.
2. Elnegahy Sh., Can Mediation Deliver Justice, Cardozo Journal of Conflict Resolution, 2017.
3. Zampano R., Settlement Strategies for Trial Judges, Litigation 22 Litig Journal, 1995.
4. Gorghiu A., Judicial and Extrajudicial Mediation, Logos Universality Mentality Education Novelty Section: Law, 2009.
5. Chitashvili N., Fair Settlement as Basis for Ethical Integrity of Mediation, Ivane Javakhishvili Tbilisi State University, National Centre for Alternative Dispute Resolution, 2016.
6. Steffek F., Unberath H. (eds.), Genn H., Greger R., Menkel-Meadow C., Regulating Dispute Resolution ADR and Access to Justice at the Crossroads, Hart Publishing, Oxford and Portland Oregon, 2013.
7. Hopt K. J., Steffek F., Mediation: Principles and Regulation in Comparative Perspective, Oxford University Press, Oxford, 2013.
8. Shapira O., Conceptions and Perceptions of Fairness in Mediation, 54 South Tex. L. Rev., 2012.
9. Welsh N., Do You Believe in Magic: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation, SMU Law Review, 2017.
10. Menkel-Meadow J., Remembrance of Things Past – The Relationship of Past to Future in Pursuing Justice in Mediation, Cardozo Journal of Conflict Resolution, 2004.
11. Douglas S., Neutrality, Self-Determination, Fairness and Differing Models of Mediation, James Cook University Law Review, 2012.

12. Press Sh., Lurie, P., Protecting Self-Determination in Mediation, Best of ABA Selections: Dispute Resolution Journal, 2014.
13. Welsh N., Do You Believe in Magic: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation, SMU Law Review, 2017.
14. Ury W., Getting to Yes with Yourself: and Other Worthy Opponents, Harper Collins, New York, 2014.
15. Alfini J., Mediation as a Calling: Addressing the Disconnect between Mediation Ethics and the Practices of Lawyer Mediators, South Texas Law Review 2008.
16. Nolan-Haley J., Self-Determination in International Mediation: Some Preliminary Reflections, Cardozo Journal of Conflict Resolution, 2006.
17. Field R., Crowe J., The Central Role of Party Self-determination in Mediation Ethics, the Post is a Version of a Paper Delivered at the 6th ADR Research Network Roundtable, 4 -5 December 2017.
18. Hedeem T., Coercion and Self-Determination in Court-Connected Mediation: All Mediations Are Voluntary, but Some Are More Voluntary than Others, Special Issue: Making Dispute Resolution Work, 2005.
19. Douglas S., Neutrality, Self-Determination, Fairness and Differing Models of Mediation, James Cook University Law Review, 2012.
20. Bush R., Folger J., Reclaiming Mediation's Future: Re-Focusing on Party Self-Determination, Cardozo Journal of Conflict Resolution, 2015. Nolan-Haley J., Informed Consent in Mediation: A Guiding Principle for Truly Educating Decision-making, Notre Dame Law Rev., Vol. 74, 1999.
21. Nolan-Haley J., Informed Consent in Mediation: A Guiding Principle for Truly Educating Decision-making, Notre Dame Law Rev., Vol. 74, 1999.