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Mediation in Georgia. Development perspectives and challenges

KEYWORDS

court mediation, private mediation, notary mediation and collective labor dispute mediation

ABSTRACT

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The article discusses the legal and systemic issues of the creation of a modern mediation institution in Georgia. It discusses Georgia's historic experience traditions of settlements of disputes by means of peaceful methods, part of which are still preserved in the high mountainous regions of the country. In 2013, the country was also introduced to the mediation for settlement of collective labour disputes, which is implemented by active involvement from the government. Already existing statistics demonstrate that mediation in the given sphere is effective and actually serves for the settlement of disputes between employers and groups of employees.

In 2019, Georgia adopted the law on mediation, which regulates the issue of private mediation conduction and execution of achieved agreements. Mediators training and professional development system were created. By the adoption of the given Law ended the almost eight-year phase of mediation legal and institutional regulation, which, according to the opinion of the author of the article, was a process prolonged in time. Unified Law could have been adopted at the early stage of the reform which would have made the process of extensive usage of mediation in the country faster.

As reason for introduction of mediation institution in Georgia is named the obligations of the country in the process of integration with the European Union, overloading of civil courts in the country and prolonged disputes.

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Introduction

The implementation of a current form mediation in Georgia, had begun after the fall of the Soviet Union, and the deconstruction of the Soviet justice system. In the 1990s, in Georgia, numerous ethnic conflicts had erupted. The demand for knowledge on mediation, negotiation and conflict management appeared naturally. American and European experts conducted training in mediation and negotiation, already since the 1990s. However, implementation of mediation in Georgia on a regulatory and institutional level had begun only in 2011, when a chapter on judicial mediation was added to the *Georgian Civil Procedure Rules*. The reason for this was, on the one hand, the need for harmonising the Georgian justice system with the EU system, on the other, the international obligation of Georgia consisting of implementing mediation. Another important reason, was the excessive strain on the courts. Civil disputes would last for years, causing irritation among both sides of the conflict. Therefore, the *Georgian Civil Procedure Rules*, was complemented by chapter XII titled „Court Mediation”. According to article 187 prima, after filing a plea in court, the case under mediation may be transferred to the mediator (natural or legal person) for ending the dispute with an agreement.

Additionally, within the reform, notaries were given the mediator function, and mediation was implemented within the area of justice in regard to minors. In 2019, the Act on Mediation was adopted, regulating the legal status of private mediation („Legislative News”, Georgia, 2019).

The aim of the article is to analyse the process of the creation and implementation of the mediation institution in Georgia, within the scope of last ten years, examining its legal basis, implementation mechanisms, and challenges appearing in the process, related to the creation of the new institution. Additionally, in the article I have presented a review of historical experiences of Georgian culture and approaches towards applying alternative methods of solving disputes.

Within the following article, I shall attempt to answer to the following questions: In which form mediation was implemented in Georgia? Did the historical and cultural experiences of Georgia favour the implementation of contemporary mediation institutions? What challenges lay before Georgia within the process of mediation implementation?

Historical and cultural experiences of mediation

In the mountain regions of Georgia, the people’s court had been used for ages. It is strictly connected with customary law. In Svaneti and Khevsureti, disputes

were solved using mediation courts and the national assembly. In Svaneti the phenomenon was called „Morwali”, while in Khevsureti „Rdžuli”. However, the term „Mediation” appeared in the 19th century. The aim of mediation was to reconcile the parties, and avoid vengeance and conflict. Based on customary law, the society had to make a decision acceptable to all parties. Additionally, the mediation of the time considered the rule of paying material compensation. The parties themselves would establish the mediation court, and decided on the person of the mediator. The court would make a unanimous decision and it was maximally close to the needs and requirements of the parties. Regarding the mechanism of decisions, in Svaneti, the oath on icon tradition was in motion. In Khevsureti such tradition did not exist, so executing the decision depended on both parties. However, the probability of executing the decision was high, as long as the agreement was voluntary and preceded by lengthy negotiations. Moreover, if someone refused to execute the decision, he was met with condemnation from his fellow countrymen, and excluded from the community.

Historically speaking, between contemporary mediation and ancient Georgian tradition, there are both similarities and differences. For example, an essential similarity occurs in terms of the rules of mediator selection – the mediator had to be acceptable for both parties. Organising individual and mutual meetings during negotiations, as well as, retaining and not revealing information received within the process of mediation is also a similarity (Culukiani, 1990). In terms of differences, obviously, the Georgian traditional law did not include a clear distinction between a judge and a mediator, which in turn is characteristic of current mediation. Historically, the law in Georgia was more focused on negotiation and mediation than on creating and executing norms (Oniani, 2020). Mediation itself in Georgia was considered a prestigious activity, which currently creates the historical basis for the development of mediation in contemporary Georgia (Dawitaszwili, 2004).

In 1864, within the scope of the ongoing judicial reform in the Russian Empire, in Georgia the institution of the judges of peace had begun to be implemented. Despite the fact, that the institution was introduced by the occupant and was not an organic element of our law, we may assume that the Georgian traditions of solving disputes peacefully, had benefited their operations. Additionally, it is a curious fact, that Ilia Chavchavadze, the author of the idea of contemporary statehood, had worked as a justice of peace for some time. In his publications I. Chavchavadze is referring to alternative methods of dispute solving. Discussing the process of implementing the justice of peace institution in the Russian Empire in broad terms, I. Chavchavadze states, that the more the economic life is developed, the more disputes appear. In his opinion, people need law that is swift and less formal.

Long-lasting disputes affect the economic activity negatively, and yield unnecessary cost. He considered the alternative for long and expensive court processing, to be the increase of the number of justices of peace (Czawczawadze, 1886). His views expressed in the 19th century, still answer to the issues of the Georgian justice system, particularly, that courts are overburdened with cases, and citizens must wait for decisions for months.

Therefore, one may state that the thousand years of mediation tradition in Georgia, the person of the 19th century political activist Ilia Chavchavadze, as well as, most importantly, his publicist letters on the subject of mediation, created positive historical and cultural background for introducing and implementing new mediation in Georgia. However, this rich historical and cultural background did not suffice for mediation to be implemented and developed in Georgia at a fast pace.

Judicial mediation in Georgia

As I had mentioned in the introduction, the development of contemporary mediation in Georgia had begun with introducing court mediation. According to the *Civil Procedure Rules*, mediation encompasses family legal disputes, inheritance legal disputes, neighbourly legal disputes, as well as, any disputes in terms of parties' compliance. The court may pass the case on to the mediator, and his decision cannot be challenged. Additionally, the act defines the time of mediation, which cannot be more than 45 days. Within this time frame, the parties must meet at least twice. The parties are obligated to appear during mediation. In terms of unjustified absence during the meeting, the party will be obligated to cover court expenses fully, regardless of the result of a court proceeding, and will also have to pay 150 GEL/180 PLN fine („Legislative News”, Georgia, 2019). In the Tbilisi City Court, a mediation centre was established, and 20 mediators had been trained. Court mediation differs from traditional mediation; in terms of Georgia the judge charges the parties to apply mediation. Here, we are dealing with a deviation from the primary principle of mediation – voluntariness. The reform authors justify this deviation with the fact, that mediation is a new institution and the court, on own part, should favour the implementation of the institution within the society. In the case of mandatory mediation, the state takes the responsibility, that the mediations will be conducted by qualified mediators. The state pays salaries to mediators and ensures their qualifications. To a certain degree, the state „forces” the parties to participate in mediation, and in the case of refusal – applies financial sanctions.

According to point „D”, part 1, 187 of the third article prima of the *Georgia Penal Code*, mediation may encompass all disputes in terms of parties' compliance. According to the 2 part 187 of the third article prima, in the case of parties' compliance, the case may be delegated for mediation on any level of proceeding („Legislative News”, Georgia, 2019). Therefore, the entry favours situations, in which the parties will prefer to end the dispute in mediation rather than in court. Respectively, granting such rights to parties, makes the process more flexible. The parties will be able to address the mediator during every phase of the proceeding. Therefore, the legislator cancelled all formal legal barriers in this field.

If the parties reach an agreement, the court issues a ruling that acknowledges the agreement. The decision is final and cannot be challenged. Otherwise the dispute will be continued in court. Additionally, the *Civil Procedure Rules* regulate the issue of mediation confidentiality. The mediator has no right to reveal information, which he learned during executing his responsibilities, unless the parties decide otherwise. Additionally, the parties (or their representatives) have no right to reveal information which they have learned during the mediation process under the confidentiality clause, unless they decide otherwise („Legislative News”, Georgia, 2019). At the end of the manual, it was additionally indicated, which principles are the base for mediation in penal cases. The first principle is to favour applying alternative penal mechanisms. One should apply alternative measures as often as possible, instead of imprisonment or penal investigation. If an underage individual committed a minor crime for the first time, one should apply mediation and remedial justice. The other principle voluntariness. The party may involve itself in the processes only voluntarily, and pressure cannot be put on each of the parties in order to force them to participate. The parties have the right the resign from participation in remedial justice and mediation processes, and they can do it during every phase of the process. The third principle is proportionality. The limitation of a minor's activities must be proportional and considerate of the minor's age and other characteristic features, as well as, the character of the committed crime, the level of crime severity, the seriousness of damage inflicted, as well as, its impact on the society. The fourth principle is confidentiality – all information acquired within the process of mediation and remedial justice is confidential; revealing this information is unacceptable, unless the parties decide otherwise or the law assumes other solutions. The mediator selection mode for remedial justice and mediation processes, as well as, their role, are described in the decree of the Georgia Minister of Sport and Youth.

The actual activity of the pilot mediation programme had begun in 2013. In 2013–2020, within the programme, collectively 208 cases were processed, with

most ending with an agreement. Apart from that, in 2017, with the support of the European Union and the United Nations, an additional of 23 new mediators were trained. Since 2019, mediation centres had been opened in Gori and Rustavi (UNDP, Georgia, 2020).

Notary mediation in Georgia

Within the scope of reforms introduced to Georgia, notaries were also given permission to act as mediators. The 38th article was added to the Georgian act on notaries, according to which notaries can also be mediators or fill the role of a mediator. It was a peculiar innovation for Georgian notaries, who until then, had no such experience. The law defines these areas with precision, where notaries may perform mediation. These include: family legal disputes (with exception of adoption, adoption cancellation, adoption prevention, limiting parental rights, and deprivation of parental rights), inheritance and neighbour legal disputes (Georgia notary act, 2012). Additionally, within the framework of the conducted reform, a notary may act as a mediator in all cases, unless a particular dispute adopts a special rule of applying mediation.

In 2016, the scope of notary mediation was extended even more. The state had begun a project of land registration. The project aimed at making the process of registering unregistered land in country easier, and to encourage land owners to register them. At the legislative level, the notaries were instructed to perform mediation in case of disputes. On 3 June 2016, an act was proclaimed titled „On the Special Principle of Systemic and Sporadic Registry of Right to Land and Cadastral Improvement Within the Scope of the State Project”. Chapter VI of the Act establishes notary mediation as an alternative way of settling private legal disputes, and defines the principles of conducting mediations by notaries. According to 2019 data, 36065 individuals addressed notaries in the 2016–2019 period in order to settle disputes which appeared during land registration. Therefore, 1707 disputes were settled amicably (Charitonaszwili, 2018–2019). The aforementioned means that only 4 percent of disputes were settled by agreement, which in fact is not a large number. The fact demands separate examination in order to learn about the causes, but we may state that one of the most important aims of mediation – lessening the burden on courts regarding time-consuming disputes, is still a matter in question. The number of unsettled disputes (34 358) have probably been delegated to courts.

Private mediation in Georgia

The prescriptive document that regulates legal mediation, was proclaimed in Georgia in 2019. It was prescribed by international experts already in 2015. After seven years following the moment of the introduction of the legal mediation institution, an act on private mediation was adopted, which was, without a doubt, a step forward in the process of the development of the mediation institution in Georgia.

The act has application for mediation deployed on the basis of the mediation act, as well as, for court mediation described in the Georgian Civil Procedure Rules. The Act has no application regarding notary mediation, described within the Georgian „Notary Act”, the notary mediation described in the Georgian „On the Principles and Systemic and Sporadic Registry of Right to Land and Cadastral Data Improvement”, mediation described by the Judiciary Code for Minors, and mediation described by Georgian organic law – „Georgia Labour Code” used for examining and settling class disputes.

The act defines the concepts of mediation, mediator, private and court mediation with precision, as well as, establishes forms of court and private mediation. The final result developed in effect of mediation conducted by both institutions, i.e. mediation agreement, will be executed by the court, which is in compliance with international standards and European instructions.

Despite the fact, that mediations are a relatively young institution within the Georgian legal system, the state already developed a large mediation market, diversified regarding territorial reach, activity profile, and, probably, the quality of provided services. There are some small, Georgia-wide organisations that are active in conducting mediations, training mediators, among which the largest are: Georgia Mediation Centre, General Georgian Professional Mediator Association, and Georgian Mediator Association. Moreover, numerous non-government organisations, that mostly deal with educational issues, also conduct activity in terms of mediation. Mediation centres are also managed at some universities. Currently such activity is conducted by e.g. Ivane Javakhishvili Tbilisi State University, Grigol Robakidze University, and the Gori University, as lectures.

Additionally, a new institution was established, the Georgian Mediator Association, a public law entity, being an organisation created in compliance with the aforementioned act. The organisation is responsible for the institutional development of mediation and professional training of mediators. The organisation also creates a unified mediator list.

Private mediation was not prohibited until 2019. Everyone could benefit from the services of a private mediator, however executing the mediation agreement was an issue. Only an agreement reached through court mediation could be executable. We believe that it was one of the reasons for the slow pace of the development of mediation in Georgia. However, we are past this phase, and can say that Georgia has an efficient system of private and court mediation, in compliance with international standards. However, how efficient the system will be, and whether it will achieve the assumed aims, depends on the cooperation between the state, mediators, private companies, non-government sector, and the academic circles. Additionally, much depends, to what degree these entities will be able to coordinate themselves and take common effort in order to increase the qualifications and skills of mediators. On the other hand, it is also very important, how society will use this institution for solve disputes, how it will deal with the institution and make it a part of its own legal culture.

In the 2013–2014 period, a project titled „Mediation: transformation of conflicts in Georgia. Support for the efficiency of settling disputes through development and promotion of alternative conflict solving methods” was exactly directed at improving the development of the Georgian society, the improvement of collaboration and good communication between people.

The creation of pilot mediation centres in Gori i Tbilisi, the task of which was to mediate in conflicts in border regions, and pilot mediation in economic and family cases on the one hand, while on the other – education and promotion of mediation as a non-court mean of solving conflicts i.a. among lawyers and business institutions in Georgia. The realisation of the aforementioned was complemented by the preparation of staff of professional mediators and mediation trainers, opening and promotion of mediation centres, and creating the basic substantive infrastructure – libraries, selection of texts and films dedicated to mediation, and the promotion of the service among its potential beneficiaries and decision-makers. The concept of the project assumed to pass on Polish experiences related to the development of mediation and its establishment within the Georgian legal system within the context of: the development of mediator competencies with the consideration of the specifics of conflicts (ethnic, social, family, economic), and actions improving the quality of mediation services; recommendations regarding the systemic solutions impacting the rooting of mediation; the means of promoting mediation with the consideration of cultural determinants; introducing mediation centres. During project realisation, the experience of mediation development in Poland was used. The realisation of the project allowed to select a number of re-

commendations. Continuation and maximum effort toward even larger promotion of the institution of mediation and elimination of the negative attitude of the Georgian society due to, primarily, insufficient knowledge on mediation. Having in mind, the innovativeness of mediation institutions, and despite the enormous involvement of both mediation centres for promotion, the informational campaign should be intensified and expanded nationwide, which will increase social awareness, and the popularity, and number of cases filed for mediation. Additionally, one must propagate and influence the legislator in order to finalise the reform and fully regulate non-court mediation, particularly in terms of executing the agreement made by the parties.

Mediation in labour disputes

Mediation in class labour disputes was employed in Georgia in 2013. Georgia was obligated to this due to the „European Social Charter” acknowledged by the Georgian state. Therefore, we should highlight, that Georgia additionally agreed to comply with solving labour disputes through agreements, based on the Association Agreement with the European Union. According to the law in motion, a labour dispute between an employer and a group or an association of employees must be settled via a mediator designated by the minister. Similar to international practice, mediation in Georgia is strictly connected to the right to strike.

Four years after the legislative changes had come into force, there were 32 cases of mediations. The initiators of the processes, were employees or labour unions. 15 of the aforementioned 32 cases ended with an agreement. In 9 cases agreement could not be made, while in the remaining 8 cases, a partial agreement was made, or the process was postponed (Gwinianidze, 2019).

Despite reforms and actions of mediation institutions described in sections above, the society awareness regarding mediation is still at a very low level. According to the public opinion poll study conducted in 2019, it is clear that 86,6 percent of the society had not heard of mediation at all. The data was very similar to the 2016 study – 85,6 percent. A particularly unsettling case is the lack of information on mediation in Georgian business circles (UNDP, Georgia, 2020). According to the 2020 study 81,6 percent of representatives of companies that operate in the Georgian business sector, have had no information on mediation at all (UNDP, Georgia, 2020). It is a rather high number and it indicates, that the state has much to do in terms of promoting mediation.

Summary

The article was a review of the mediation system in Georgia, its historical and cultural basis. The existence of a certain tradition at the beginning of the reform, created reason for optimism, that the process of implementing modern mediation will be performed in Georgia successfully. Currently, mediation is used in various areas of public life. Court and notary mediation are functioning for almost 9 years. Mediation and remedial justice in penal cases for minors were employed even earlier. Since 2013 it has been made possible to settle class disputes via mediation. Finally, and most importantly, last year legal and institutional framework for the development of private mediation were established.

External factors that caused the necessity of establishing mediation institutions, were the international obligations of Georgia, and its strive to integrate with the European Union. The internal factor, that affected the establishment of mediation institutions, was the overload of courts and the excessive length of court proceedings. Regarding the view, that our historical experience and traditions could help for quick implementation and universal application of the mediation institution – it turned out that this hope was a little excessive. The pace at which mediation in Georgia is expanding, gives no reason for satisfaction. In result, the society is not benefiting from mediation fully. The reason for that lies, obviously, in errors made during mediation implementation. Particularly, mediation implementation was performed without a unified state strategy. Additionally, the informational campaign conducted by the state to promote mediation and to show its positive role, was poor. Also, on the one hand the Highest Justice Council was not involved well in the process, on the other, the non-government sector was not allowed to begin the process of private mediation development at the proper moment.

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