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Self-determination as an Underlying Value of Mediation Process in Ethical Codes and Legal Scholarship: Tensions between Disputant Autonomy and Substantive Fairness

The paper analyzes two fundamental principles of mediation process – right to self-determination of the parties and essential justice. The paper is based on ethical codes of foreign countries and scientific researches in this field.

As there is no ethical code for mediators in Georgia, it is important to rise up awareness of the society regarding mediation as dispute resolution procedure based on ethical principles. Sharing international experience about standards, basic principles of mediation and their interplay is the guarantee for rising up quality of mediation process and supporting court practice.

Key Words: *Principle of Self-determination, Ethical Standard, Concept of Substantive Fairness, Ethical Dilemma, Empowerment Function of Mediation, Ethical Golden Mean, Legitimacy of Settlement, Informed Consent.*

1. Introduction

Self-determination is considered a fundamental principle of mediation. As an ethical standard it affects the whole process of dispute resolution. Therefore, it is very important to understand different elements to the principles of disputant autonomy. The reader of mediation literature and codes of conduct for mediators may be overwhelmed by the numerous aspects of self-determination and may wonder how these aspects are interconnected to the concept of substantive fairness. The article below addresses these issues, reviewing current ethical codes and legal scholarship relevant to the subject matter. In this article readers can find not only definitions of self-determination in different ethical codes and legal scholarship, but also mean-

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ing of substantive fairness in mediation process, depicting tensions between these two underlying values and ethical dilemmas in mediation process.

2. Mediation and its Underlying Values

Mediation is a process in which an independent, neutral intervener assists two or more negotiating parties to identify matters of concern, develop a better understanding of their situation, and, based upon that improved understanding, develop mutually acceptable settlement proposals.¹ Mediation is negotiation carried out with the assistance of a third party, where the mediation, in contrast to the arbitration or judge, has no power to impose an outcome on disputing parties.² "Mediation means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."³

As all other types of alternative dispute resolution, mediation is based on certain ethical standards having a huge impact on ethical decision making process, which requires careful consideration from mediators. Although there is not any precise, clear formula for ethical decision making process, three underlying values, shaping mediators' understanding of what is at stake and what is ethically requires in any give case, are: disputant autonomy, usually referred as self-determination; procedural fairness and substantive fairness. In cases that require difficult ethical decision making, these three values will likely be in tension when mediators confront such cases, they need to reflect on whether any one of these values trumps the others or whether it is appropriate to compromise one or more of these values in the ace of more compelling mandates. Thus, defining these underlying values has a high practical importance.⁴

¹ *Alfini J., Press Sh., Stulberg J.*, Mediation Theory and Practice, 3rd ed., The USA, 2013, 2.

² *Goldberg S., Sander F., Roger, N., Cole S.*, Dispute Resolution: Negotiation, Mediation, and Other Processes, 5th ed., The USA, 2007, 107.

³ Uniform Mediation Act, 2003, Section 2.

⁴ *Waldman E.*, Mediation Ethics: Cases and Commentaries, The USA, 2011, 3.

3. Self-determination as a Fundamental Principle of Mediation

3.1. Definition of Self-determination in Current Ethical Codes

The Model Standards of Conduct for Mediators, which are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts, defines Self-determination in its Standard 1st:

“A. A mediator shall conduct a mediation based on the principle of party Self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise Self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.

1. Although party Self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party Self-determination with a mediator’s duty to conduct a quality process in accordance with these Standards.

2. A mediator cannot personally ensure that each party has made free and informed choices to reach particular decisions, but, where appropriate, a mediator should make the parties aware of the importance of consulting other professionals to help them make informed choices.

B. A mediator shall not undermine party Self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.”⁵

The *Model Standards of Practice for Family and Divorce Mediation* declares:

“A family mediator shall recognize that mediation is based on the principle of Self-determination by the participants.

⁵ Model Standards of Conduct for Mediators, 2005, Standard 1st .

The *Model Standards of Conduct for Mediators* was prepared 1994 by the American Arbitration Association, the American Bar Association’s Section of Dispute Resolution, and the Association for Conflict Resolution. A joint committee consisting of representatives from the same successor organizations revised the *Model Standards* in 2005. Both the original 1994 version and the 2005 revision have been approved by each participating organization.

A. Self-determination is the fundamental principle of family mediation. The mediation process relies upon the ability of participants to make their own voluntary and informed decisions.

B. The primary role of a family mediator is to assist the participants to gain a better understanding of their own needs and interests and the needs and interests of others and to facilitate agreement among the participants.

C. A family mediator shall inform the participants that they may seek information and advice from a variety of sources during the mediation process.

D. A family mediator shall inform the participants that they may withdraw from family mediation at any time and are not required to reach an agreement in mediation.

E. The family mediator's commitment shall be to the participants and the process. Pressure from outside of the mediation process shall never influence the mediator to coerce participants to settle."⁶

The *Florida Rules for Certified and Court-Appointed Mediators* rules that a mediator is responsible for assisting the parties in reaching informed and voluntary decisions while protecting their right of Self-determination. It prohibits coercion: "A mediator shall not coerce or improperly influence any party to make a decision or unwillingly participate in a mediation."⁷ Adopting Committee notes that it is critical that parties' right to Self-determination – a free and informed choice to agree or not to agree) is preserved during all phases of mediation. It notes that a special care should be taken to preserve the party's right to Self-determination if the mediator provides input to the mediation process.⁸ It is also notable that, according to the act, consistent with standards of impartiality and preserving party Self-determination, a

⁶ Model Standards of Practice for Family and Divorce Mediation, 2001, Standard 1st.

The Symposium, which developed the Standards, included representatives from Academy of Family Mediators (AFM), Association of Family Courts and Community Professionals (AFCC), American Bar Association (ABA) Family Section, and other national, state and regional organizations. The Standards represented a consensus of the best suggestions made over a period of two years in which the Symposium met to develop them.

⁷ Florida Rules for Certified and Court-Appointed Mediators, 2003, P. II, Rule 10.310

⁸ Ibid.

mediator may provide information that the mediator is qualified by training or experience to provide.⁹

According to these definitions, there are following crucial elements to the party autonomy: voluntary and uncoerced decision; free and informed choice; process free from any pressure. Lack of these elements indicates that party's right to Self-determination is not preserved.

3.2 Self-determination in Legal Scholarship

Most simply, autonomy, frequently referred to as Self-determination in mediation codes and texts, means self-rule. Mediation strives to vest maximal control and choice with the disputant and not with the mediator, the state, or another third party. Unlike litigation, in which lawyers frame disputes and judges decide them, mediation assumes that disputants should retain control over how their conflicts are presented, discussed, and resolved.¹⁰

The principle of Self-determination in mediation offers procedural justice protections, providing parties with fairness and dignity. The inherent attraction of Self-determination is its connection to self-governance and individual autonomy. Informed consent promotes respect for human dignity through its emphasis on participatory, knowledgeable and consensual decision-making. Parties' perceptions of procedural justice are enhanced when they actively participate in the mediation process and voluntarily consent to an outcome that is free of any coercive influences.¹¹

The mediation process contains within it a unique potential for transforming people- engendering moral growth- by helping them wrestle with difficult circumstances and bridge human differences, in the very midst of conflict. This transformative potential stems from mediation's capacity to generate two important effects, empowerment and recognition. In simplest

⁹ Florida Rules for Certified and Court-Appointed Mediators, 2003, P. II, Rule 10.370.

¹⁰ *Waldman E.*, Mediation Ethics: Cases and Commentaries, The USA, 2011, 3.

¹¹ *Nolan-Haley J.*, Self-Determination in International Mediation: Some Preliminary Reflections, 7 *Cardozo J. Conflict Resol*, The USA, 2005-2006, 278-279, <http://ir.lawnet.fordham.edu/faculty_scholarship/284>.

terms, empowerment means the restoration to individuals of a sense of their own value and strength and their own capacity to handle life's problems".¹² Empowerment means empowering parties with the right to Self-determination, autonomous decision making.

The first special power of mediation is that "it is a consensual process that seeks self-determined resolutions."¹³ Mediation places the substantive out-come of the dispute within the control and determination of the parties themselves; it frees them from relying on or being subjected to the opinions and standards of outside "higher authorities," legal or otherwise. Further, mediation not only allows the parties to set their own standards for an acceptable solution, it also requires them to search for solutions that are within their own capacity to effectuate. This is called the empowerment function of mediation: its capacity to encourage the parties to exercise autonomy, choice, and Self-determination.¹⁴ One of the basis for the process of mediation is that parties have an extensive opportunity for voice and the "forum" is designed to foster courtesy and respect among the parties and the mediator. Its conceptual basis is party-empowering mechanism, party autonomy, providing parties with high level opportunities to make a self-determined, free and informed choice¹⁵. If in litigation, fairness is discovered by looking to existing law, in mediation, disputants are urged to look to their own personal norms of fairness and, while exercising Self-determination, come to a mutually acceptable outcome.¹⁶

Self-determination in the process of mediation creates benefits to the following perspectives: "each party has control over its participation in the process (including its scope, and how much time and cost it is willing to de-

¹² *Bush R., Folger J.*, The promise of Mediation, 2nd ed., The USA, 2005, 22.

¹³ *Folberg J., Taylor A.*, Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation, The USA, 1984, 245.

¹⁴ *Alfini J., Press Sh., Stulberg J.*, Mediation Theory and Practice, 3rd ed., The USA, 2013, 152.

¹⁵ *Tyler R.*, Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution, Yale Law School Legal Scholarship Repository, Faculty Scholarship Series. Paper 4992. the USA, 2011, 15, <http://digitalcommons.law.yale.edu/fss_papers/4992>.

¹⁶ *Waldman E.*, Mediation Ethics: Cases and Commentaries, The USA, 2011, 3.

vote to it); there is far less cost and time and a lower risk of an unexpected/undesirable outcome.”¹⁷

The principle of Self-determination includes the ethical responsibility of a mediator not to interfere with the parties’ right of Self-determination both in terms of substance and process. Interference with party Self-determination often implicates other standards such as impartiality and professional advice or opinions.¹⁸ Legal Rules, social conventions, and other standards that might interfere with disputant’s efforts to construct self-determining agreements are supposed to take a backseat¹⁹ and “party” Self-determination in mediation gives ownership of the conflict to the disputants.²⁰

Notwithstanding the strong emphasis on Self-determination in private mediation, scholars have observed a disconnect between its theory and practice.²¹ While Self-determination appears to be an explicit value in private mediation, in fact, much depends upon the “frame” in which mediation is conducted and the place and the culture in which mediation takes place. Expressions of Self-determination may look very different depending upon whether mediation is labeled facilitative or evaluative,²² transformative or narrative, and whether it occurs in a court-based facility or with private providers. More importantly, the lens of culture is a critical component in shaping and understanding party Self-determination. Western, individualist cultures typically honor a form of Self-determination that gives the disputing parties significant control over deciding the outcome. In contrast, more traditional, collectivist cultures value the interests of the community over those of the individual in deciding outcomes. Cultural considerations also influence mediator behavior. In Continental Europe, mediators’ civil law orientation

¹⁷ *Moens G., Evans P.*, Arbitration and Dispute Resolution in the Resources Sector, IusGentium: Comparative Perspectives on Law and Justice, Vol. 43, 2015, 110.

¹⁸ *Alfini J., Press Sh., Stulberg J.*, Mediation Theory and Practice (3rd ed.), The USA, 2013, 414.

¹⁹ *Waldman E.*, Mediation Ethics: Cases and Commentaries, The USA, 2011, 4.

²⁰ *Nolan-Haley J.*, Self-Determination in International Mediation: Some Preliminary Reflections, 7 *Cardozo J. Conflict Resol*, The USA, 2005-2006, 277, <http://ir.lawnet.fordham.edu/faculty_scholarship/284>.

²¹ *McAdoo B., Welsh N.*, Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation, 5 *Nev. L.J.*, 2004-2005, 399, <<https://core.ac.uk/download/pdf/10678690.pdf>>.

shapes their behaviors in influencing party decision-making. Likewise, in Islamic and some Arab cultures, the “wisely directive” mediator is expected to put pressure on the parties to reach an agreement. Thus, depending upon cultural contexts, moral persuasion and coercion can be justifiable practices in mediation.²²

4. Competing Values: Self-determination and Substantive Fairness

4.1 Definition of Substantive Fairness

Substantive fairness at its simplest meaning is the acceptability of the mediated result²³ and it is considered a fundamental principle of mediation²⁴. Though its uniform meaning is not still established – on one hand this concept is defined in many mediation laws and Codes of Ethics, on the other hand it is not reflected in individual legal acts²⁵. Fairness is a predominant concern in the mediation community. Few commentators would disagree that it is the normative standard governing mediation. Determining what constitutes fairness, however, is a difficult question²⁶.

Some authors argue that the fairness of mediated agreements is an issue for the parties to decide – “Justice in mediation comes from below, from the parties”,²⁷ suggesting a thesis according to which a mediation outcome

²² *Nolan-Haley J.*, Self-Determination in International Mediation: Some Preliminary Reflections, 7 *Cardozo J. Conflict Resolution, The USA*, 2005-2006, 279-280, <http://ir.lawnet.fordham.edu/faculty_scholarship/284>.

²³ *Waldman E.*, Mediation Ethics: Cases and Commentaries, *The USA*, 2011, 3.

²⁴ *Shapira O.*, Conceptions and Perceptions of Fairness in Mediation, 54 *South Texas Law Review* Vol.54, *The USA*, 2012, 282, <http://web2.ono.ac.il/Law_Publishes/files/Shapira_Fairness.pdf>.

²⁵ *Chitashvili N.*, Fair Settlement as Basis for Ethical Integrity of Mediation, *Alternative Dispute Resolution Yearbook*, TSU National Center for Alternative Dispute Resolution, Tbilisi, 2016, 24.

²⁶ *Nolan-Haley J.*, Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision-making, 74 *Notre Dame L. Rev.* N.12, 1999, 775-778.

²⁷ *Hyman J., Love L.*, If Portia Were a Mediator: An Inquiry into Justice in Mediation, 9 *Clinical L. Rev.*, 2002, 160.

agreed upon by the parties may be considered a just outcome.²⁸ Other authors argue that fairness requires that mediated agreements withstand additional tests beyond the parties' acceptance: "[t]he benchmark for evaluating fairness is whether the agreement approximates or improves upon the probable adjudicated outcome";²⁹ mediated settlements should withstand an external review to ensure that the outcome is not socially unacceptable.³⁰

Rules can be understood, construed, applied, and enforced literally, formally, and without regard to circumstances, context, and changing reality. This Article refers to such an approach as a formal approach to rules. Alternatively, rules can also be understood, construed, applied, and enforced flexibly, accommodating circumstances, context, and reality, and in accordance with the nature of the game and its spirit – substantive-realist (antiformalist) approach to rules. Professional literature in areas other than mediation has recognized a connection between fairness and the preference of substance over form and between fairness and equity. This substantive approach is sometimes described as essential fairness in search of the truth. A preference for substance over form does not mean following the rules of the game no matter what; it means following the rules in a way that fulfills the purpose and spirit of the game, and refraining from conduct that is in accordance with the rules but results in an outcome that is inconsistent with the purpose of the game.³¹

However, the mediation field is still conflicted on the question of whether fairness of result matters. Although, in practice, most mediators are uncomfortable with the role of justice arbiter, they seek to facilitate a good-enough outcome – one that promotes party autonomy while satisfying minimal notions of fairness and equity.³²

²⁸ *Stulberg J.*, Mediation and Justice: What Standards Govern?, 6 *Cardozo J. Conflict Resolution*, 2005, 216.

²⁹ *Maute J.*, Mediator Accountability: Responding to Fairness Concerns, *J. Disp. Resol.*, the USA, 1990, 368.

³⁰ *Gibson K.*, Mediator Attitudes Toward Outcomes: A Philosophical View, *Conflict Resolution Quarterly* Vol. 17, 1. 2nded., 1999, 198-209.

³¹ *Shapira O.*, Conceptions and Perceptions of Fairness in Mediation, 54 *South Texas L. Rev.*, Vol.54, The USA, 2012, 296-297.

³² *Waldman E.*, *Mediation Ethics: Cases and Commentaries*, The USA, 2011, 6.

4.2 Tension between Self-determination and Substantive Fairness

An ethical dilemma arises when there are two mediation values that govern the situation but offer competing guidance, so the mediator must choose which value must take precedence.³³ Adopting a practical approach to mediation ethics requires recognizing that value compromises and trade-offs are an integral part of doing ethics in this field. Sometimes the goal of helping disputants meet their needs and interests must be tempered by other concerns, such as protecting vulnerable parties or advancing important societal interests. Taking actions that undercut or hinder disputant autonomy may sometimes be the most ethical choice. Value trade-offs are more an inevitable end product of our efforts to attain the ethical golden mean.³⁴

Ethical dilemmas that may arise help a lot to understand the difficulty of the issue and they bring clarity to different aspects of the ethical decision-making process:

Question 1st: “The parties to a dissolution marriage mediation are set to make an agreement regarding a parenting plan which would, in the mediator’s opinion, be detrimental to the young children; or, one parent is ready to agree to an amount of child support which is significantly below the guidelines. Neither party is presented. What are competing values? How should the mediator handle the situation?”

Question 2nd: Party B appears to be emotionally intimidated by Party A. Party A, in a firm, authoritative tone, proposes a financial settlement that requires Party B to make a substantial monetary payment within a short period of time. Doing so will severely restrict her ability to meet other financial obligations, but she agrees to pay. What are the mediator’s ethical obligations? What if Party A threatens Party B with bodily harm? ³⁵

“Question 3rd: Imagine you are a divorce mediator in Alabama working with a couple in which the husband is making aggressive financial demands and the wife is passively acceding to them. The husband wants a 75 – 25 split,

³³ *Alfini J., Press Sh., Stulberg J., Mediation Theory and Practice, 3rd ed., The USA, 2013, 414.*

³⁴ *Waldman E., Mediation Ethics: Cases and Commentaries, The USA, 2011, 6-7.*

³⁵ *Alfini J., Press Sh., Stulberg J., Mediation Theory and Practice 3rd ed., The USA, 2013, 415.*

saying he is entitled to the lion’s share of assets because his wife wants the divorce and is eager to remarry. You know that no court would issue such an award. Given this couple’s financial situation, a court would order 50 – 50 split. You wonder, Should I talk to the couple about a court’s likely approach? How can I best promote each disputant’s autonomy if each is operating with minimal information? How concerned should I be with the actual terms of the monetary split? Does substantive fairness matter?”³⁶

Fundamental rule of self-determination of parties should be defined in relation to the principle of fairness and legitimacy of settlement. In such a case it is essential to find the right balance between individual interests of parties and that of the public, which is not possible to be achieved on the basis of simple mathematical algorithm, but rather requires reasonable and substantiated judgment.³⁷

Clear response on how to balance Self-determination and substantive fairness is not found in ethical codes as it is a matter of evaluation in each case. Taking all circumstances of the case into account, a mediator is expected to decide on how to address the question. Although ethical codes are ambiguous when it comes to specifying how respecting party autonomy accords with the interest in fair outcome, most of them state that informed consent is a key element to self-determination and, therefore, to the whole process of mediation. Careful considerations are needed when assessing whether parties involved take informed decisions or not. This element directly shows the interconnection between self-determination and substantive fairness. In particular, true self-determination can only materialize in circumstances in which the parties have a real opportunity to choose what to say and how to say it, and that this interpretation of self-determination is an aspect of fairness;³⁸ Informed consent is an essential aspect of party self-determination and fairness, and that “without it, mediation’s promises of autonomy

³⁶ *Waldman E.*, *Mediation Ethics: Cases and Commentaries*, The USA, 2011, 12.

³⁷ *Chitashvili N.*, *Fair Settlement as Basis for Ethical Integrity of Mediation*, *Alternative Dispute Resolution Yearbook*, TSU National Center for Alternative Dispute Resolution, Tbilisi, 2016, 31.

³⁸ *Stulberg J.*, *Mediation and Justice: What Standards Govern?*, *6 Cardozo J. Conflict Resolution*, 2005, 222.

and self-determination are empty”.³⁹ In construing the meaning of informed consent illusory and real consent should be distinguished.

5. Conclusion

It is simply not true that one’s self-determination licenses the parties to do whatever they want,⁴⁰ being empowered with self-determination is also a responsibility. Although the standard of self-determination vests maximal control and choice with the disputant and not with the mediator, the principle of substantive fairness must be respected and cannot be simply negated in the name of protecting party autonomy. It is not enough for mediators to guarantee full party participation, capacity, and balanced exchange, but the success of mediation effort must also be judged in terms of fairness and stability of agreements that are reached⁴¹. In each case, it is the responsibility of mediators to evaluate how respecting party autonomy accords with the interest in fair outcome. The clue of those ethical dilemmas that crop up during the mediation process is in informed consent of the participating parties. Informed consent as a core element to party autonomy and substantive fairness has a huge role in attaining the ethical golden mean.

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5. *Alfini J., Press Sh., Stulberg J.*, *Mediation Theory and Practice*, 3rd ed., The USA, 2013, 2, 152, 414, 415.

³⁹ *Nolan-Haley J.*, Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision-making, 74 *Notre Dame L. Rev.*, № 12, 1999, 775-778.

⁴⁰ *Alfini J., Press Sh., Stulberg J.*, *Mediation Theory and Practice* 3rded., The USA, 2013.

⁴¹ *Susskind L.*, Environmental Mediation and Accountability Problem, *Vermont L. Rev.*, Vol.6, I. 1, 1981, <<http://heinonline.org/HOL/LandingPage?handle=hein.journals/vlr6&div=&id=7&page=>>>.

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