

Court mediation as a Means of Access to Justice and a Prerequisite for the Development of Private Mediation

Today, due to the diversity of public relations, the problem with overloading courts is stated all over the world. For the effectiveness of justice, countries are introducing alternative means of dispute resolution and promoting development. A number of substantive and procedural advantages of alternative mechanisms to resolve disputes are recognized in practice and theory.

The aim of the paper is to share the experience of foreign countries with Georgian readers, including critical opinions which is essential for the proper promotion of alternative mechanisms to resolve disputes and develop legal policy in this field. The paper briefly reviews the main problems of dispute resolution by judicial and non-judicial methods, and the introduction of the institution of preliminary conciliation is proposed as a solution.

Key words: mediation, conciliation, arbitration

1. Introduction

Public relations are developing and changing, as a result, the new fields are emerging, for example, the digital economy. The digital economy brought about enhancing civil relations which still have not been regulated. Increasingly changing world makes civil conflicts more and more diverse that causes the need for justice. If the conflict of interests between people had not arisen, a man would not have coined the word justice and thought of the idea which it is based on.¹ Justice is the art of restoring and maintaining a balance between conflicting interests of a human, which can be achieved through the application, observance and consideration of appropriate standards and values. And regarding the question related to the standards and values, scientists develop the opinion in two directions: justice based on laws is formal justice and justice based on parties - creative justice.² When choosing a way to resolve a dispute from the two directions, the psychological approach of the parties to conflict resolution is decisive. Creative justice can be implemented through the means of alternative resolutions of a dispute: arbitration, mediation, conciliation, and also by the preventive judicial bodies, such as notaries. By analyzing the statistics of using the alternative means to resolve a dispute, having discussion about the legal culture of the society is feasible. In countries where non-judicial means of making a decision are more developed, its population might be well prepared to take the responsibility for deciding their own destiny in more compromising way than radical. However, it is possible to develop a contrary conclusion that includes applying to the alternative method of resolving a dispute caused by the judicial bureaucracy. When the people, the source of government, give the power to the courts to administer justice, but experience a failure to get it on time, then they independently try to find and develop other alternative ways. It is a historical fact that ADR has been introduced into the civil procedure system of various countries as a remedy against structural, overloaded and expensive court systems: the UK's Lord Woolf reform is a good example.³ As a rule, the exact concept or definition of "civil disputes" is not available. In most cases such disputes are defined in a negative way and include all disputes that are not of a blood or administrative nature.⁴ This is due to the variety of relationships that ensures civil circulation despite an exhaustive list.

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¹ Carver Th.N., Essays in Social Justice. Harvard University Press, 2013, 3, <<https://doi.org/10.4159/harvard.978067428-7907>> [29.05.2023].

² Elnegahy Sh., Can Mediation Deliver Justice? Vol. 18, 2017, 766, <https://www.cardozojer.com/s/CAC305_crop.pdf> [29.05.2023].

³ Zappalaglio A., Recent Developments Concerning Mandatory Mediation in Italy: Some Comments on a Troubled History, 2013, 3, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2478268> [29.05.2023].

⁴ Eliantonio M., Backes Ch.W., Van Rhee C.H., Spronken T.N.B.M., Berlee A., Standing Up for Your Right(s) in Europe, 2012, 13, <https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI_ET%282012%29462478> [29.05.2023].

Although the main purpose of civil proceedings is the resolution of these conflicts, the way of conducting does not depend on civil law but it determines the realization of the rights granted by civil law and depends on the general relations between a citizen and the state defined by the specific constitution. The recognition of fundamental human rights by the constitution has a direct impact on civil procedural law. International approaches are also important, which in terms of procedures are mainly established in Article 6 of the European Convention on Human Rights and Fundamental Freedoms.

Nowadays, among the three main legal ways of solving civil conflicts, such as court, arbitration and mediation/conciliation, which are collectively called the triad of conflict resolution, the main distinguishing factor lies in the limits of freedom and autonomy of the parties. A mediator is an assistant to the negotiation, a facilitator of communication, and the substantive resolution of the dispute depends on the parties. Therefore, the entire responsibility for decision-making refers to the obligations of the parties. In addition, they are free to determine their rights and duties. In the case of arbitration, the freedom of the parties is expressed by the choice of arbitration and the acceptance of the arbitration agreement. And, after the case is delivered to arbitration, its decision becomes binding. The parties entrust the arbitrator not only with the dispute resolution, but also recognize the final authority of the arbitrator. Accordingly, the freedom of the parties is fairly limited and the responsibility of resolving the dispute rests with arbitration. From this point of view, arbitration is obliged to resolve the conflict. As for the court, after filing the lawsuit, the resolution of the dispute is completely beyond the competence of the parties and is transferred to the court. Courts have no right to deny justice in civil cases, even because of ambiguity or absence of a rule. Although the risks to the parties are much higher than participation in ADR, the binding mechanisms of the court establishes a new psychological attitude among the parties: they expect fair, fast and efficient administration of justice. If these expectations are not met, parties and society, in general, get disappointed. On the other hand, the participants of the civil circulation striving for the security are seeking free spaces, which is blatant with the recent conflict between the principles of "rule of law" and "rule of code". This creates the virtual world lacking in control of an alternative state⁵ where people independently build up economic relations. This means that there is already a space where a certain relationship is adjusted without traditional law. Therefore, it is very vital for the government to maintain the state forms for regulating civil disputes. Accordingly, it is important to highlight the preferences and drawbacks of various means of civil dispute resolution, which will further set the perspective of their development.

2. Experience of Foreign Countries

Due to overloading courts, many states have introduced legislation to encourage ADR. In Austria, for example, the Mediation Legislation (*Mediationsgesetz*) was interposed in 2004. In Belgium, a new legislation of mediation has been adopted by Parliament (sections 1724–37 of the Belgian Judicial Code) and the interest in ADR is expressed at the supranational level. Within the framework of the European Council, the Commission for the Efficiency of Justice (CEPEJ in French) considers the mediation as an alternative to litigation in civil cases (including electronic mediation). On 21 May 2008 the European Union adopted the Directive 2008/52/EC of the European Parliament and the Council on certain aspects of mediation related to civil and commercial issues.⁶

Regarding the review of mediation, it is important to consider the experience of countries that have already gone through the path of institutionalizing mediation. For example, the Belgian Mediation Act came into force in 2005. This act distinguishes between voluntary out-of-court and court mediation. The mediation

⁵ *Kharitonashvili N.*, Comparative civil process, "Bona Causa", 2022, 163 (in Georgian).

⁶ *Van Rhee C.H., Verkerk R.*, Civil Procedure, Elgar Encyclopedia of Comparative Law, 2012, 143, <https://www.-academia.edu/18369806/CIVIL_PROCEDURE_Elgar_Encyclopedia_of_Comparative_Law_Second_Edition_2012_p_140_156?auto=download> [29.05.2023].

introduced in Georgia is similar to the Belgian court mediation. According to Belgian lawyers, voluntary court mediation is positively evaluated but court mediation does not enjoy great success that is resulted in formality.⁷

In terms of alternative dispute resolution methods, it is also interesting to discuss the experience of Italy, where the European Union 2013/11/EU ADR and 2013/11/EU consumer ADR directives were implemented. In the opinions of Italian scientists, the term ADR, which means alternative dispute resolution, can also be interpreted as an adequate dispute resolution. In the first Italian Code of Civil Procedure (1865), the title of the seven articles of the introduction was "conciliation". By the Law 261/1892, the judge "can invite one party to a private hearing" (*ante litteram caucus*) to reach a reconciliation. Hence, conciliation/mediation belongs to the Italian legal and judicial culture, which was ceased by the World Wars. Legal norm no. 5/2003 (in force since 2005) established voluntary mediation, but nobody used it "because it was not mandatory".⁸ The further development of mediation in Italy is also connected with the overloaded judicial system. In 2009, the court system included 5,826,440 civil cases. Mandatory mediation, which was introduced only in 2010, met with fierce opposition from the lawyers (the issue of culture and income) and neglect from the judges (the issue of culture).⁹ After mandatory mediation had come into force, Italian lawyers began a strong movement against it. The main reason for starting the fight was given by several decisions of the Court of First Instance that a decision of the Constitutional Court on the issue of whether mandatory mediation was compatible with the right of access to a court provided with the Article 24, Section 1 of the Italian Constitution. The Italian Constitutional Court declared all rules on mandatory mediation unconstitutional. However, due to the influence of the European Union, the so-called "Mandatory Law" No. 69/2013 established mediation as a mandatory first step before applying to court¹⁰. As a result of 20 years of diverse changes, mandatory and voluntary methods of alternative dispute resolution, mediation, conciliation, etc. have been fully utilized in Italy.¹¹ It is particularly important to do a comparative review of different means of dispute resolution in order to identify the problematic issues preventing these institutions from perfect functioning and outline future perspectives.

3. The Means of Alternative Dispute Resolution in Georgia

Mediation in its essence, is a product of customary law and states are trying to legislate it. Georgia is a small country with its territory and population. The Georgian language and culture are less intimate to European culture. In accordance with the history, the introduction of mediation in Georgia can be seen as a prescribed development, however, the institution of mediation has existed since ancient times. Mediation appeared in Georgia at an early, pre-state stage of social development. This way of resolving disputes was preserved in the Middle Ages and it has been followed in some parts of Georgia.¹²

On June 27, 2014, an Association Agreement was signed between the European Union and the European Atomic Energy Community and their Member States. The agreement was arranged with Georgia on July 18, 2014¹³ which was ratified by the Georgian Parliament. The agreement clearly defines the obligation of the State of Georgia to develop alternative means of dispute resolution (mediation, arbitration) and create favorable conditions for their use.

By the amendments to the Civil Procedure Code of December 20, 2011, there was established mediation through the court in Georgia. Although court mediation had existed in Georgia since 2011, to expand the

⁷ *Matteucci G.*, Mandatory Mediation, the Italian Experience, Vol. 16, 2015, 189, <https://www.researchgate.net/publication/286409655_MANDATORY_MEDIATION_THE_ITALIAN_EXPERIENCE> [29.05.2023].

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Silvestri E.*, Too much of a Good Thing: Alternative Dispute Resolution in Italy, 2017, 79, <https://www.academia.edu/36857715/Too_much_of_a_good_thing_Alternative_Dispute_Resolution_in_Italy> [29.05.2023].

¹¹ *Ibid.*

¹² *Tkmaladze S.*, Mediation in Georgia: from tradition to modernity, 2016, 10, <https://www.ge.undp.org/content/georgia/ka/home/library/democratic_governance/mediation_in_georgia_2016.html> [29.05.2023].

¹³ Association Agreement Between the European Union and the European Atomic Energy Community and Their Member States, of the One Part, and Georgia, of the Other Part, <https://eur-lex.europa.eu/eli/agree_internation/2014/494/2021-06-17> [29.05.2023].

legal guarantees of the rights of the parties, on September 18, 2019, the Law of Georgia "On Mediation" was adopted.

Subsequently, Georgia joined the Convention regarding "International Agreements on Mediation resolutions" (the so-called Singapore Convention "On Mediation") approved by the Resolution N73/198 of the United Nations General Assembly adopted on December 20, 2018. On June 21, 2021, based on the Law No. 668 the Code of Civil Procedure was added the article which determined the participation of the court in recognition and enforcement of international mediation settlements by the United Nations Convention of August 7, 2019.

According to the current legislation, mediation, in contrast to arbitration, can be subject to all types of disputes, except for the categories of great public importance which require investigative powers of the court, in particular, the disputes related to cancellation or invalidation of adoption, restriction and deprivation of parental rights, as well as violence against women and / or domestic violence however, these issues do not include the dispute related to the child custody after divorce, which is also characterized with a high publicity and considers the interests of a child. The mediation process, in turn, does not determine the issues related to the child's participation in solving them.

Conforming to the Code of Civil Procedure, a dispute might be referred to a mediator at any stage of the proceedings. In the cases provided with the same code, the judge assesses the facts of the relevant case in advance and without the consent of the parties he makes a decision. If the private mediation is applied on the same dispute without results, with the consent of the parties, a judge decides to refer the case to the mediator. In addition, the Resolution of the High Council of Justice of Georgia, December 27, 2019 No. 1/366 "On Approving the Court mediation Program" further specifies the grounds for referring a case to court mediation which makes the court review and study the case and assess its "mediation abilities". Following the reservation provided with the paragraph 2 of Article 187¹ related to the issue of the obligation of court mediation defined by Chapter XXI¹ of the Civil Code, the decision to transfer the case to the mediator will not be appealed. The non-appealability of a statement regarding preventive detention has been established in the procedural legislation several times. After appealing to some procedural norms in the Constitutional Court, they were canceled.¹⁴ However, the inadmissibility of appealing the decision about transferring the case to the mediation court is due to the voluntariness of making agreement in mediation process. Also, because of the voluntary nature of the mediation process, the parties are obliged to attend only two sessions of the mandatory mediation to make an informed decision about the mediation process and its results. Simultaneously, the parties have the right to unilaterally terminate the mediation process at any stage without the obligation to reach an agreement. The obligation to appear at the session is supported by the opportunity for a mediator (Article 8.1 of the Law "On Mediation") to inform the party about the principles of mediation, the rights of the parties, the possibility of having a representative, the procedure for enforcement to make a decision about the aptness of participation and agreement in the mediation process in full compliance with the principle of self-determination.

According to the Paragraph b¹⁾ of Article 186 of the Georgian Criminal Procedure Code, a claim is not admitted if there is an agreement sealed by a notary within the regulations of notarial mediation; or on the ground of the clause b³⁾ of the same article, there is an agreement on mediation between the parties. Due to the agreement, parties do not apply to the court until the specified terms are fulfilled, except for the case when the plaintiff can prove that he might be irreparably harmed without a trial; There existed the similar reservation concerning the arbitration reservation between parties, in particular, Article 186, Paragraph 1, Sub-Clause d) provided an inadmissibility of the claim if the parties could not conclude an agreement, or there was an agreement between the parties to refer the dispute to arbitration for the resolution. The article was removed by Law No. 3220 of March 18, 2015, and by the Article 2721 of the Law of the Civil Code, the arbitration agreement became the basis for termination of proceedings based on the application of the party. This change is fully in compliance with the right to the trial provided with the Article 6 of the European Convention on Human Rights. And the agreement on mediation which makes the parties fulfill the obligations not to apply to arbitration or the court before using mediation, cannot be considered as a limitation of the right because the

¹⁴ The decision of the First Collegium of the Constitutional Court of Georgia on February 16, 2004 in case No. 1/1/186.

law provides an exception regarding the mentioned rule, and simultaneously, the legal power of the reservation of mediation is determined by the restrictive covenants established by the will of the parties. In addition, unlike arbitration, the decision in mediation is not made by the third party, the process is fully based on a voluntary agreement, the autonomy of the parties, and the unlimited power of the parties to terminate the mediation at any stage. Thus, if the legal change was justified in arbitration, today, mediation does not tolerate to limit the interests of the party and the right to apply to the court, based on the possibility of ending the negotiation at any stage of the mediation process and terminating it.

One, but not the only important goal of mediation is to unload courts. In this regard, it is worth analyzing the procedure of transferring the case to mediation by the court. The court should accept the dispute in proceedings however, the parties have to prepare a lawsuit, which in turn, must satisfy a number of admissibility conditions stipulated by the Code of Civil Procedure. The court has to check the prerequisites for admissibility of the claim, make a decision on transferring the dispute to mediation, and after the successful completion of the mediation process, approve the settlement or, in case of disagreement, renew the proceedings at the request of the party. But can the courts be unloaded by only the exemption from hearing stages of the case? That is why, intending to unload courts the advantage of private and notary mediation is revealed because disputing parties are not obliged to observe such formalities and can directly apply to a notary or private mediator from the unified register of members. For this purpose, the normative reform of mediation, realized in 2019 strengthened the broad legal warranty of private mediation, including the possibility of securing and enforcing mediation settlements with legislative regulations. In addition, the widespread use of mandatory court mediation can raise the public awareness about mediation which will reinforce private mediation in the state. Mandatory mediation makes parties or legal representatives of the parties initiate private mediation at the stage of starting a dispute without appealing to the court. One of the advantages of mediation is the cost-effectiveness of the process that saves time and resources. According to the Articles 38 and 39 of the Georgian Civil Code, the claims arising from the Article 187³ of the Code A3 are paid for only by 1% (not less than 50 GEL) of the cost of dispute resolution. If the dispute is not resolved by the agreement of the parties during the court mediation process, the plaintiff is obliged to additionally submit a check confirming the payment of 2% of the dispute resolution cost (not less 50 GEL) for reviving a dormant judgement. In addition to the above, based on the Code A6), the fee in the amount of 50 GEL is paid for the application on the assurance of mediation settlement. The Code A7) charges 150 GEL for the application on the enforcement of the mediation settlement. This type of arrangement awakes the question: if the party pays the court fee for the lawsuit, can a plaintiff state in advance that he does not agree to have his dispute resolved through mediation and wants to apply to the court? Discussing the problematic questions of saving the resources of the parties requires critical analysis. If we make an economic analysis of small-value claims, we can conclude that in such disputes, when the plaintiff pays only 100 GEL and receives an enforcement notice ‘‘for free’’, at the end of the dispute through mediation, he has to pay 250 GEL, which really increases the costs of litigation. So, compared to the court settlement, utilizing mediation as a court service is connected with a greater financial burden for the party. This is the main reason for the practice experienced by the Georgian court since 2012 about returning the fee to the parties after the court approves the mediation settlement as an act of court settlement. This practice should be strengthened by legislative changes and the rule of refunding the fee during the approval of the court settlement reached before the substantive review should be extended to the case of the approval of the mediation settlement as well. Despite the fact that the party needs some assistance of a lawyer to draw up a claim and pay a fee for using the court mediation service, the court still gets to know the case, considers the prerequisites for its admissibility, and only after passing this stage, transfers the case to the mediator, according to the rule established in the practice of court mediation. If the party/parties have indicated their consent in the claim and counterclaim for using the mediation mechanism, the case is transferred to mediation even before the preparatory session.

In relation to the language of mediation proceedings, according to the Article 5, Clause 10 of Decision No. 1/366 of the Supreme Council of Justice of Georgia of December 27, 2019 "On Approving the Court mediation Program", after consultation with parties the mediation consultant determines the language of the

mediation, and, if it is necessary, additionally ensures the involvement of an interpreter and/or an expert in the mediation process. In case the mediation settlement is reached, the text of the dispute settlement must be written in Georgian. The court mediation is allowed to imply a non-state language however, the text is written not in the state, in which Abkhazian is included, but only in the Georgian language. In connection with this reservation, there arises the question of its constitutionality because the Constitution clearly defines that the administration of justice must be executed in the state language. This confirms the validity of the point of view that although court mediation is not a process of direct administration of justice because the result of the mediation process is not related to the achievement of a “fair” agreement, and the achievement of an agreement is the result of the process (just about the settlement), the parties must understand that using this mechanism, they cannot achieve absolute justice, but should be able to end the conflict, considering their own interests and the interests of another side.¹⁵ In this case, mediation cannot be an alternative form of justice, but an adequate form of resolving the dispute.¹⁶

Directive N2008/52/EC of the European Parliament and the Council "On certain aspects of mediation regarding civil and commercial matters" states that the parties themselves determine the duration of the mediation process, but it also points out the requirement for an individual country to set a limit to the duration of the mediation process. The mentioned reference is essential for organizing the process, as the uncertainty of the deadlines can delay it. The term for the court mediation is 45 days, but not less than 2 meetings however, the term can be extended by the agreement of the parties. Mediation cannot become a basis for delaying justice, because one of the parties can terminate the process without the consent of another party and the mediator. Compulsory attendance at the first two sessions facilitates making an informed decision after getting to know the substantive-procedural advantages of mediation. This is supported by a number of norms of the Mediation Law and the Mediator Code of Ethics.

The mechanism of the court to make control over the enforcement of the mediation is also noteworthy. The Seventh Chapter XLIV¹³ of the Georgian Criminal Law provides for the participation of the court in the enforcement of ex mediation settlement. The court refuses to impose the mediation settlement if its content contradicts the legislation of Georgia or if, depending on the content of the mediation settlement, its enforcement is impossible. Accordingly, the court considers the case and verifies its compliance with the law. A court ruling about the refusal to enforce a mediation settlement can be appealed through a private litigation. While there is a mediation act on the settlement of the parties, but due to its illegality and/or non-enforceability, the court refuses to enforce it, the parties have the right to apply to the court for a retrial of the case. Especially, Article 272, paragraph d¹⁾ provides terminating the proceeding if a mediation settlement has been drawn up; The court has to issue another order on the enforcement of the mediation settlement. The decision is made in the form of a ruling and the party is given a writ of execution. The ruling on the enforcement of the mediation settlement is final and not entitled to appeal. The party, after the non-execution of the mediation settlement, should have the right to dispute the same case in the court or exercise the control over the legitimacy of the mediation settlement before terminating proceedings on the dispute. Considering this fact, the Mediation Reform Group has started working on changes to the law which furnish equalization of the results of court and mediation settlements. In particular, the purpose of the planned reform is to recognize both judicial and mediation settlements approved by the court ruling as the basis for the termination of proceedings. In such a case, the judgment is performed according to the rule of execution of the court decision to prevent the danger of non-enforcement of the mediation settlement and loss of the right to appeal to the court after the completion of the proceedings.

Private and notarial mediation is a particularly flexible mechanism in term of time, financial resources and execution. The statistics of mediation carried out within the framework of the state land registration project are as follows: 43,395 mediation processes have been registered in notary offices since August 1, 2016.

¹⁵ *Kandashvili I.*, Judicial and non-judicial forms of alternative dispute resolution on the example of mediation in Georgia, Tbilisi, 2018, 65, <http://press.tsu.ge/data/image_db_innova/Kandashvili%20Irakli.pdf> [29.05.2023] (in Georgian).

¹⁶ *Silvestri E.*, Too much of a Good Thing: Alternative Dispute Resolution in Italy, 2017, 79, <https://www.academia.edu/36857715/Too_much_of_a_good_thing_Alternative_Dispute_Resolution_in_Italy> [29.05.2023].

1978 mediation processes were successfully completed.¹⁷ These statistics display how many cases the court was unloaded of, and at least two parties in this number of cases saved the costs of attorney and court, as well as time and human resources. However, the quantity of mediations completed without making a settlement indicates that the psychology and legal awareness of the population in Georgia still cannot voluntarily resolve the dispute through notarial mediation. As for the practice of private mediation, there are no official statistical data on the practice of private mediation after implementing the normative reform. The Association of Mediators of Georgia has realized a number of private mediation pro bono projects, including family mediation cases. In 2023, a private mediation project will also be implemented in cooperation with the City Hall Legal Clinic and Grigol Robakidze University. Initiating private mediation, the parties are aware of the benefits of mediation, confidentiality and a number of other advantages. Thus, the parties do not want to use the enforcement mechanism because the mediation settlement often ends with its voluntary execution during the mediation process. That is why there are no extensive statistics of court approval of private mediation settlement, which indicate the preventive role of private mediation and the advantages of voluntary mediation settlement. When discussing the mechanisms for resolving civil disputes, it is important to emphasize the role of arbitration which has the authority to consider only property disputes. Based on the theory of delocalization, it is regarded as a supranational legal institution that is separated from the legal space of that state where it maintains its permanent and main place.¹⁸ Arbitration has a very interesting connection with justice. The European countries of German law focus on this connection while in the USA, it is believed that arbitration is not a justice-implementing body, but a special service for businesses that offers its "clients" a short, cheap and qualified solution to the dispute.¹⁹ There is a view that choosing arbitration to resolve their dispute, parties are willing to eschew state judicial power and apply to private means to reach a decision. According to the legitimate expectation of the parties the dispute will be heard by their arbitrator(s), whose decision shall be final and not the subject to judicial review.²⁰ However, based on past experience, judicial control has been imposed on arbitration that is manifested in the system of enforcement of arbitration decisions and which is necessary for performing state supervision. The decision is given Res Iudicata effect: the parties are restricted from applying to the court on the same subject on the same basis. Provided previous experience in Georgia, arbitration is less popular and mainly used in small credit disputes. The initiators of arbitration procedures are mostly financial organizations. However, many transnational business and commercial disputes in the world are currently settled by arbitrators rather than judges. It appears that common and civil law practice has achieved more harmonization in arbitration than in court.²¹

It is obvious that the combination of mediation and arbitration (MAD-ARB) is gaining ground which means transforming a completed mediation process into arbitration. So, two well-established processes to manage a conflict convert into one hybrid process. The development of Med-Arb reflects a growing societal trend that is increasingly related to conflict resolution through various forms of less formal, more expedient processes.²²

4. Conciliation and the Prospect of its Implementation

Conciliation appears to be a particularly interesting institution of resolving civil disputes. It involves the discussion of the dispute by the mediator, who is endowed with broader powers to intervene the dispute than the mediator. Conciliation is widely applied in both continental and common law countries. It is provided for

¹⁷ *Kharitonashvili N.*, Notary Law, "Bona Causa" Publishing House, Tbilisi, 2021, 274 (in Georgian).

¹⁸ *Tsertsvadze G.*, Prerequisites of international arbitration, Tbilisi, 2008, 23, (in Georgian) <http://press.tsu.ge/data/image_db_innova/Disertaciebi/giorgi_cercaze.pdf> [29.05.2023].

¹⁹ *Ibid*, 23.

²⁰ *Abedian H.*, Judicial Review of Arbitral Awards in International Arbitration – A Case for an Efficient System of Judicial Review, Vol. 28, Issue #6, 2011, 553, <<https://kluwerlawonline.com/journalarticle/Journal+of+International+Arbitration-/28.6/JOIA2011044>>

²¹ *Dodson S., Klebba J.M.*, *Global Civil Procedure Trends in the Twenty-First Century*, Rev.1, 2011, 18.

²² *Baril M.B., Dickey, D.*, MED-ARB: The Best of Both Worlds or Just A Limited ADR Option?, 2014, 1.

resolving emergency disputes by the Association Agreement in the energy sector.²³ As an example of a civil law country, it is interesting to mention the practice of Belgium courts using conciliation, which imply considering the disputes by a judge, however, this procedure differs from both trial and mediation.²⁴ In accordance with the Belgian Judicial Code, the parties are allowed to submit the dispute to a judge for purpose of reaching an agreement before prosecuting.²⁵ This is a preliminary conciliation procedure, during which the court tries to persuade the parties to reach an agreement. If the parties cannot agree, the judge in a trial court is not entitled to further consider the case. Conciliation has an informal character. The parties apply to the Clerk of the Court in writing to get the opposing party informed. The judge holds an oral hearing. If an agreement is made, it vests immediately and is not subject to any appeal in. The difference between conciliation and mediation is that the conciliator indirectly resolves the case, while the mediator does not give an advice on resolving the dispute. It is explained by the need for a wide autonomy of the parties and the supremacy of the principle of voluntariness. On some occasions, for example, in labor disputes, the conciliation procedure is mandatory.²⁶ Scientists believe that mandatory conciliation does not work well and they find it more expensive and unproductive tool than useful. We can assume that the obligation makes the conciliation procedure ineffectual, since voluntariness, the desire of the parties to reach an agreement is the main motivator to arrange negotiations. However, if we consider mandatory court mediation as a political mechanism for raising awareness of mediation in the state, we can admit that mandatory mediation is justified by the less interventionist role of the mediator in resolving a legal dispute, then the existence of mandatory mediation with full recognition of the deliberation of the agreement can really be regarded as a means of informing people about the mediation and institutionalizing private mediation.

5. The Problem of Resolving the Dispute through Formal Justice

Despite making an attempt at getting alternative means of resolving the dispute popular and developed, the court is still the most relevant form of settling civil disputes as its coercive mechanisms ensure the involvement of the parties. Scholars are more actively evaluating the political influence of the judicial sector. There are three elements that work on the political significance of court decisions. First of all, it is the status of judges (how they are recruited and the guarantees they enjoy), how judges define their role in the judicial and political process. The second is the arrangement of the judicial system, including legislation revision, the structure of judicial processes and the organization of the prosecution. The third factor is the political system, characterized with the separation and fragmentation of power that allows the judiciary to intervene more in the political process.²⁷ The main problem of resolving disputes in courts of Georgia is their overloading, which in turn, results in delaying the disputes that is against the principle of effective justice. One of the ways to solve the problem is to increase the judicial sector. In addition, the access to the court is often problematic for citizens. Jurisprudence is saturated with legal terms and procedures that makes more and more difficult for the people without legal education to protect their rights and have an access to legal mechanisms. The language of the law is also incomprehensible to the people who often apply to the law. In order to appeal to the court of Georgia, a plaintiff has to fill in the claim form, which is much more complicated than the form required for applying to the court in Strasbourg, and justify it in the manner accepted in practice. On the one hand, this rises the importance of the legal profession, but on the other hand, it leads to having a relation with legal mechanisms through representatives, which does not correspond to the general social meaning of law: law exists for people, and not as it is called "doctrine" in European and "law grammar" in common law.

²³ Association Agreement Between the European Union and the European Atomic Energy Community and Their Member States, of the One Part, and Georgia, of the Other Part, <https://eur-lex.europa.eu/eli/agree_internation/2014/494/2021-06-17> [29.05.2023].

²⁴ *Taelman P., Stefaan V.*, Belgian Mediation Report, 2013, 1, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2355902> [29.05.2023].

²⁵ *Ibid.*, 2.

²⁶ *Ibid.*, 1.

²⁷ *Guarnieri C., Pedersoli P.*, The Power of Judges: a Comparative Study of Courts and Democracy, Oxford University Press, New York, 2002, 3, <<http://link.library.eui.eu/portal/The-power-of-judges--a-comparative-study-of/7sQRr3Lt8cs/>> [29.05.2023].

One of the obstacles to implement justice is the excessive formality²⁸ of the process which the European Court of Human Rights has identified many times. In the recent period, courts have declined to exercise their jurisdictions. It was followed by a constitutional claim²⁹ in which the plaintiff requests to declare Article 186 of the Civil Code unconstitutional in relation to Article 31 of the Constitution of Georgia. According to the plaintiff, the disputed norm gives the judge of the city (district) court the discretionary right to refuse to accept the claim for consideration and return it the plaintiff with annexed documents. The original version of the Code did not provide for inadmissibility of the claim, it was introduced only to unload the courts, however, its excessive use can appear to be a barrier for implementing justice. This makes the preparation process of the case irrational because in some judgments the court is expected to go deep into the matter, despite the fact that the civil process is a public law, and free discretion is not allowed in it [only provided by law]. Based on the above, it is reasonable to weaken the tendency to formalize the process and simplify the procedural rules that can become law easily accessible to the public.

6. Conclusion

The research revealed that searching for different ways of resolving civil disputes is an important factor for the regulation of public relations. On the one hand, the overloading of the courts indicates the crisis of the traditional courts and, on the other hand, the growing demand for justice from the society. The analysis of the legal regulation of mediation disclosed the need to regulate the issues concerning the language of conducting the process, non-obligation of checking the conditions of accepting the claim and filling in its form, the state fee, therefore, it is appropriate to deformalize the process. To arise awareness of population around the creative justice in Georgia, it is necessary to make some measures. At the initial stage, before the people can take responsibility for resolving the dispute, the assistance of a conciliator can significantly contribute to unload the courts. The procedure of the preliminary conciliation will give parties the opportunity to discuss the possible prospects of the dispute after providing a statement of claim, without filling in the application form and going through the stage of admissibility. A conciliator, having more powers than a mediator, can consult with the parties on the resolution of the dispute. This will significantly diversify the forms of settling civil disputes, as well as encourage the parties and make justice more accessible.

In addition, to arise the awareness of mediation, it is essential to use compulsory mediation, proportionally increase the number of mediation cases and mediators, inform the parties participating in the mediation process. Also, the legal community should try to reinforce the initiation of private mediation which will ultimately prevent disputes at early stage and establish social peace.

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