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CONCEPTUAL MODELS OF EVALUATIVE AND FACILITATIVE MEDIATION AND ACCOMPANYING ETHICAL CHALLENGES

Facilitative and evaluative mediation models represent the two most common approaches in the theory and practice of mediation. Their differing mechanisms significantly influence the mediation process and its outcomes. This paper explores the theoretical foundations of these models, their application in practice, and the accompanying ethical challenges.

The paper focuses on the impact of the mediator's chosen style on the autonomy of the parties, their procedural guarantees, and the outcomes of the process. Mediators may encounter numerous dilemmas during the mediation process, as they are obligated to facilitate informed decision-making by the parties without compromising their neutrality. At the same time, mediators must ensure a quality process where the parties can act within their autonomy and fully benefit from the procedural guarantees offered by mediation. It is also noteworthy how evaluative and facilitative mediation models align with the standards established by the mediation code of ethics, considering the balance between conflict resolution and maintaining fairness. Understanding this is essential to ensure that mediators maintain ethical standards and, at the same time, effectively guide the parties toward negotiations.

The purpose of this paper is to review the above-mentioned issues and evaluate how contemporary mediation practices address these challenges.

Keywords: *Facilitative mediation, evaluative mediation, mediation ethics, mediator neutrality, party autonomy, informed decision-making, quality process.*

I. Introduction

Due to its many unique values, mediation today emerges as one of the most effective mechanisms for dispute resolution. Among the advantages that make mediation especially attractive, it should be noted that mediation is a safe process, tailored to the interests of the parties, and allows them to make informed decisions through correct and objective analysis, an objective understanding of legal outcomes, which fosters a reasonable solution for each party involved. Transferring control over the outcome to the parties is precisely what distinguishes mediation from other dispute resolution mechanisms.

The success of mediation "significantly depends on the regulatory norms established by the system for the mediation process, the qualifications and skills of the mediator, as well as the style and approach used by the mediator during the course of the process."[1] Each process may require an individual approach from the mediator; consequently, the mediator's techniques, style, and methods are not fixed[2] and vary depending on the specifics of the dispute.[3] On the path to the institutionalization of mediation, professionals in the field had to answer many

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1 *Tsuladze A., The Georgian Model of Court Mediation through the Euro-American Lens, Dissertation, TSU Publishing, Tbilisi*, 2016, 43 (in Georgian).

2 *Kidner, J.,* The Limits of Mediator Labels: False Debate between Facilitative versus Evaluative Mediator Styles, Windsor Review of Legal and Social Issues, vol. 30, 2011, 167.

3 *Tsuladze A., The Georgian Model of Court Mediation through the Euro-American Lens, Dissertation, TSU Publishing, Tbilisi*, 2016, 43 (in Georgian).

questions, one of the main ones being the extent to which legislation should regulate this process.[4] Responding to this question was not an easy task, as the charm of mediation lies precisely in its informal and flexible nature, while excessive regulations could place it within a legislative framework and make its course resemble that of a court proceeding.[5] Accordingly, in most cases, the legislation regulating mediation (including that of Georgia) defines only the main aspects characteristic of the process, [6] while leaving the "regulation" of the rest to the process manager, the mediator.

By standard definition, mediation is a process based on the collaboration of the parties, led by a neutral third party, that assists them in reaching a resolution of the dispute that will be acceptable to each of them, ensuring that each party is informed about the legal outcomes of their decisions. While each mediator clearly agrees on the main purposes and objectives of the process, practice has shown that mediators may have different methods for achieving these goals. In the scientific literature, facilitative and evaluative mediation models are distinguished by assessing the style and methods used by practicing mediators, which differ depending on what defines the mediator's approach to the mediation process and how they perceive their role: as the helper of the parties, the main purpose of which is to facilitate reaching an agreement by examining the real interests and needs of the parties, or as the individual whose purpose is to provide the parties with a correct understanding of the prospects for resolving the dispute by assessing legal risks.

Although mediation does not rely on legal facts and evidence, it is essential for the parties to make informed decisions, which inherently involves a proper understanding of legal reality. However, does facilitating informed decision-making by the mediator imply that they should become a creator of a legal prediction or a legal consultant, even if both parties agree to such a role? Where is the line between facilitating a party's self-determination and the mediator's obligation to remain impartial and neutral, and between ensuring a party's informed decision-making and protecting a party's autonomy? Is there a hierarchy of mediation principles, and how should the mediator act to be the guarantor of the ethical integrity of a process based on party autonomy?[7] Is this dichotomy between mediation models real, or are there alternative ways to analyze practice?[8]

The purpose of the present paper is to discuss the aforementioned questions, evaluate the conceptual models of facilitative and evaluative mediation, and analyze their impact on important aspects such as party autonomy, fair process, neutrality, and impartiality of a mediator, and, in general, the essence of mediation as an institution.

II. General Overview of the Models

In the process of forming the institution of mediation, the traditional understanding of the essence of this dispute resolution mechanism envisioned the mediator's role as a neutral, independent, and impartial facilitator in the negotiation process.[9] However, with the development of alternative dispute resolution methods, an increasing number of parties demanded legal assessments from their mediators,[10] which, in a certain sense, was conditioned by the dominant role of lawyers among mediators.[11] Consequently, the parties also felt that the purpose of the mediator in the mediation process was precisely to analyze legal outcomes. This has led to an inconsistency between the theoretical ideals of mediation and mediator's role and the practice, as theory suggests that the mediator is not a person who provides legal advice or predicts legal outcomes of the dispute. Moreover, the

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4 *Alfini J.J., Barkai, J., Baruch Bush R., Hermann M., Hyman J., Kovach, K., Liebman, C., Press Sh., Riskin, L. L.,* What Happens When Mediation is Institutionalized?: To the Parties, Practitioners and Host Institutions, Ohio State Journal on Dispute Resolution, Vol. 9:2, 1994, 319.

5 *Kandashvili I.*, Mediation – An Effective Means of Dispute Resolution, Practical Guide, Tbilisi, 2022, 51 (in Georgian).

6 *Batiashvili I.,* The Mediation Process, its Principles and Challenges in Georgia, Journ., "Alternative Dispute Resolution – Yearbook 2022" (Bilingual edition), TSU Publishing, Vol.11, №1, 2022, 14.

7 *Chitashvili N.*, The Mediator's Dilemma on the Edge of the Principles of Party Autonomy and Justice, Yearbook of the Center for Law and Economics, Third edition, 2022, 88-95 (in Georgian).

8 *Anderson D. Q.*, Facilitative Versus Evaluative Mediation – Is There Necessarily a Dichotomy?, Asian Journal on Mediation, 2013, 66.

9 *Munjal, D.*, Tug of War: Evaluative versus Facilitative Mediator, Pretoria Student Law Review, 6, 2012, 70.

10 *Catanzaro T.,* Improving Evaluation in Mediation: How Predictive Analytics Can Be Used to Improve Evaluative Mediation, American Journal of Mediation, Vol. 15, 2022, 96-97.

11 *Tsuladze A., The Georgian Model of Court Mediation through the Euro-American Lens, Dissertation, TSU Publishing, Tbilisi*, 2016, 43 (in Georgian).

primary purpose of mediation is to reach an agreement based on the exploration of the parties' interests and needs, rather than resolving the dispute through the analysis of legal realities.[12] Consequently, considering how the mediator's role[13] and interventions were perceived, a clear line was drawn between two models of mediation, [14] which later came to be known as facilitative and evaluative mediation. The author of these models is Professor Leonard Riskin, who proposed a classification system for mediator styles[15] to practitioners and theorists and developed the grid, which „became the most common method for categorizing approaches to mediation. [...] It also provided a starting point for academic debates about the nature of mediation."[16]

Leonard Riskin attempted to assess whether mediators' approaches to problems should be broad or narrow; thus, whether the mediator should present evaluations and suggestions or facilitate negotiations without analyzing legal risks.[17] A "narrow approach" mediator believes their role is to assist the parties in resolving a technical problem, while a "broad approach" mediator considers that the purpose of mediation extends far beyond resolving a legal dispute and sees their role as facilitating the parties in analyzing and refining their interests.[18] It is through the differentiation of these approaches that the evaluative and facilitative mediation models were established.

Gradually, as the styles used by mediators in mediation evolved, the theory developed what are known as "transformative" and "narrative" mediation models.[19] The transformative, or problem-solving-oriented, mediation model was developed by Professors Bush and Folger,[20] according to which "mediation has the potential to change people [...] and transform disputes that had been transformed from human problems into legal problems [...] back into human problems",[21] to transform the destructive nature of conflict into constructive dialogue, [22] as well as to not only explore the parties' interests and needs but also to present the situation as seen from each disputing party's perspective, primarily to cleanse intense negative attitudes and transform them into positive relationships while ensuring the maximum opportunity for the parties to control the process.[23] In this regard, the transformative mediation model is characterized by its therapeutic nature, as its main purpose is to preserve relationships.[24] As for narrative mediation, this model was developed by John Winslade and Gerald Monk,[25] according to which, since it is impossible for the parties' narratives to be completely objective,[26] "the mediator helps shape the parties' perspective on the dispute by eliciting their "stories" or senses of "meaning," rather than emphasizing "facts."[27]

Since the aim of the present paper is to review the facilitative and evaluative mediation models, the focus will be specifically on their analysis in relation to the ethics of mediation.

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12 *Riskin L. L.*, Retiring and Replacing the Grid of Mediator Orientations, Alternatives Vol.21, №4, 2003, 71.

13 *Riskin L. L.*, Mediator Orientations, Strategies and Techniques, Alternatives Vol. 12, №9, 1994, 112.

14 *Munjal, D.*, Tug of War: Evaluative versus Facilitative Mediator, Pretoria Student Law Review, 6, 2012, 70.

15 *Riskin L. L.*, Mediator Orientations, Strategies and Techniques, Alternatives Vol. 12, №9, 1994, 111.

16 *Riskin L. L*, Replacing the Mediator Orientation Grids, Again: Proposing a "New New Grid System", Alternatives, Vol.23, №8, 2005, 127.

17 *Riskin L. L.*, Mediator Orientations, Strategies and Techniques, Alternatives Vol. 12, №9, 1994, 111.

18 Ibid. See also: *Tsuladze A., The Georgian Model of Court Mediation through the Euro-American Lens, Dissertation, TSU Publishing, Tbilisi*, 2016, 44 (in Georgian).

19 *Riskin L. L.*, Decisionmaking in Mediation: The New Old Grid and the New New Grid System, Notre Dame Law Review, Vol. 79, №1, 2003, 24.

20 Ibid.

21 *Alfini J.J., Barkai, J., Baruch Bush R., Hermann M., Hyman J., Kovach K., Liebman C., Press Sh., Riskin L. L.*, What Happens When Mediation is Institutionalized?: To the Parties, Practitioners and Host Institutions, Ohio State Journal on Dispute Resolution, Vol. 9:2, 1994, 315. „Most people don't have legal disputes. Instead, they have factual, emotional, and procedural disputes. Lawyers and courts translate "people" disputes into legal disputes, resolve the legal disputes and act as if that were the resolution to the "people" disputes." See additionally: *Zumeta Z.,* A Facilitative Mediator Responds", Journal of Dispute Resolution, vol. 2000, no. 2, 2000, 337.

22 *Lande J.,* Real Mediation Systems to Help Parties and Mediators Achieve Their Goals, Cardozo Journal of Conflict Resolution, Vol. 24, 2023, 352

23 *Tsuladze A., The Georgian Model of Court Mediation through the Euro-American Lens, Dissertation, TSU Publishing, Tbilisi*, 2016, 43 (in Georgian).

24 *Tkemaladze S.*, Mediation in Georgia: From Tradition to Modernity, Tbilisi, 2016, 11.

25 *Riskin L. L.*, Decisionmaking in Mediation: The New Old Grid and the New New Grid System, Notre Dame Law Review, Vol. 79, №1, 2003, 24.

26 *Hansen T.*, The Narrative Approach to Mediation, 2003, https://mediate.com/the-narrative-approach-to-mediation/ [07.11.2024].

27 *Winslade J., Monk G.*, Narrative Mediation: A New Approach to Conflict Resolution, 2000, 125-126, referenced in: *Riskin L. L.*, Decisionmaking in Mediation: The New Old Grid and the New New Grid System, Notre Dame Law Review, Vol. 79, №1, 2003, 24.

1. Facilitative Mediation

Facilitative mediation is the classical,[28] most widely used model,[29] which considers "acting as a facilitator of communication between the parties to be the fundamental role of a mediator. A facilitative mediator helps the parties understand their underlying interests, [...] develop and propose broad, interest based options for settlement, and to evaluate proposals,[30] for this reason, this model is also referred to as "Interest-Based Mediation."[31] According to the facilitative mediation model, the mediator helps the parties understand their own interests, create a realistic understanding of the legal aspects of the dispute and the consequences of impasse, and encourages the parties to think about possible solutions to the dispute themselves. This is based on the belief that the parties are best equipped to clarify their own desires and expectations. Given this, they have the ability to formulate proposals, while the mediator ensures this process using various techniques, specifically through "reality testing," active listening, the use of questions, and etc.[32] The facilitative-style mediator does not provide legal advice or offer the parties alternatives for settlement,[33] as they believe that the burden of decision-making rests with the parties and not with the mediator.[34] When the parties know that they are making the decision themselves, their actions are not aimed at persuading the mediator based on legal positions; instead, they openly[35] and freely express their actual interests in order to "facilitate mutually beneficial agreement".[36] "Such agreement is based on information and understanding rather than mediator influence or coercion".[37]

When using the facilitative mediation style, the mediator's main challenge is to ensure the parties' self-determination and guide them toward an informed decision without taking on the role of a legal advisor and in a manner that does not provide recommendations, thereby avoiding any risk to the mediator's neutral and impartial status.[38]

It is interesting to note that in countries where the mediation institution is relatively young and lacks a significant history of development, public awareness may not be high enough to properly assess the values of this dispute resolution mechanism. Parties may associate mediation with the court system and expect it to provide an evaluation of the legal situation in a similar manner, leading to similar expectations from the mediator.[39] A clear example of this is that "in Asian societies, a mediator is viewed as an authority figure and may be expected to provide guidance to the parties [in terms of legal perspective]; in contrast, in a Western context, parties may view a mediator as more of a professional service provider."[40] In this case, the mediator has the obligation to adequately explain to the parties what expectations they should have regarding both the process and the individual facilitating it – the mediator.[41]

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28 *Baksa, G*., Different Mediation Styles and Their Use in Family Mediation, Jogi Tanulmanyok, 2012, 250.

29 *Tkemaladze S*., Mediation in Georgia: From Tradition to Modernity, Tbilisi, 2016, 11 (in Georgian).

30 *Munjal, D*., Tug of War: Evaluative versus Facilitative Mediator, Pretoria Student Law Review, 6, 2012, 72.

31 *Tsuladze A., The Georgian Model of Court Mediation through the Euro-American Lens, Dissertation, TSU Publishing, Tbilisi*, 2016, 45 (in Georgian).

32 *Riskin L. L.,* Mediator Orientations, Strategies and Techniques, Alternatives Vol. 12, №9, 1994, 111-113.

33 *Tsuladze A., The Georgian Model of Court Mediation through the Euro-American Lens, Dissertation, TSU Publishing, Tbilisi*, 2016, 45 (in Georgian).

34 *Riskin L. L*., Mediator Orientations, Strategies and Techniques, Alternatives Vol. 12, №9, 1994, 112.

35 *Brooker P*., An Investigation of Evaluative and Facilitative Approaches to Construction Mediation, Structural Survey, Vol. 25 №3/4, 2007, 227.

36 Erbe N., The Global Popularity and Promise of Facilitative ADR, Temple International & Comparative Law Journal, Vol. 18, №2, 2004, 356.

37 *Levin, M.S*., The Propriety of Evaluative Mediation: Concerns about the Nature and Quality of an Evaluative Opinion, Ohio State Journal on Dispute Resolution, Vol. 16, no. 2, 2001, 268.

38 *Riskin L. L*., Mediator Orientations, Strategies and Techniques, Alternatives Vol. 12, №9, 1994, 111.

39 *Riskin L. L*., Retiring and Replacing the Grid of Mediator Orientations, Alternatives Vol.21, №4, 2003, 71.

40 *Hui Han E.C.,* Moving Beyond the "Facilitative" and "Evaluative" Divide – Considering Techniques That Can Further the Goals of Mediation, Asian Journal on Mediation, 2013, 41.

41 For example, according to Georgian regulations, the mediator is obligated to explain the main principles of mediation, the mediator's role, the rights and responsibilities of the parties, etc., to the parties before the mediation begins, in order to prevent misconceptions and expectations regarding the mediator, the process, and its outcome from arising at the outset. Law of Georgia "on Mediation", ssm, 18/09/2019, paragraph 1 of article 8.

2. Evaluative Mediation – A Pragmatic Model of Mediation

The evaluative mediation model has generated significant controversy in theory and has laid the groundwork for a prolonged discussion on the reconsideration of the essence of mediation and the role of the mediator. Scholars Kimberlee Kovach and Lela Love have referred to evaluative mediation as an oxymoron,[42] to which Leonard Riskin responded by explaining that the model he proposed described practice as it is (further emphasizing the mismatch between mediation practice and theory), while scholars were analyzing mediation as it should be.[43]

As already mentioned, the development of evaluative mediation has been driven by the integration of the legal profession into the role of the mediator, particularly evident among judicial mediators, which have considered that within the mediation process, it is necessary to explain to the parties the strong and weak legal aspects of the existing dispute, assess the prospects of resolving the dispute in court,[44] and provide recommendations to the parties.[45] Consequently, "the decision-making process passes from the hands of the parties into those of the evaluator."[46] The evaluative mediator believes that the parties expect guidance from the mediator, who will provide qualified legal services, clarify both the legal risks involved, and propose alternatives for resolving the dispute.[47]

The style of mediation employed by the mediator can significantly impact many factors, ranging from the planning of the mediation process[48] to the eventual outcome of the mediation. [49] However, within the context of evaluative mediation, the most significant aspect is the new understanding of the essence of mediation and the re-evaluation of whether this model contradicts the fundamental ethical principles of mediation. Specifically, the mediator's ability to determine legal predictions raises doubts about their neutrality, while directing the decision-making process and offering suggestions significantly narrows the realm of party autonomy, ultimately depriving mediation of its primary virtue, which is to be a "party-driven process."

III. At the Crossroads of Ethics: A Critical Analysis of the Evaluative Mediation Model

"The strengthening of ethical norms is an indication of the establishment of the relevant field as a profession."[50] Strengthening ethical standards indicates the readiness of mediators to take responsibility for their

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42 *Kovach K.K., Love L.P.*, "Evaluative" Mediation is an Oxymoron, Alternatives Vol 14. №3, 1996, 31.

43 *Riskin, L. L.*, "Mediation Quandries." Florida State University Law Review, vol. 24, no. 4, 1997, 1009.

44 *Tsuladze A., The Georgian Model of Court Mediation through the Euro-American Lens, Dissertation, TSU Publishing, Tbilisi*, 2016, 46-47 (in Georgian).

45 *Tkemaladze S.*, Mediation in Georgia: From Tradition to Modernity, Tbilisi, 2016, 11 (in Georgian).

46 *Munjal, D.*, Tug of War: Evaluative versus Facilitative Mediator, Pretoria Student Law Review, 6, 2012, 72.

47 *Riskin L. L.,* Mediator Orientations, Strategies and Techniques, Alternatives Vol. 12, №9, 1994, 111-113.

48 It's interesting that different mediation styles can influence how the mediator utilizes procedural opportunities. For example, since evaluative mediation involves assessing strong and weak positions, which makes it impossible for the mediator to maintain a balance on the neutrality scale, in such cases, the mediator tends to schedule private meetings. In contrast, in facilitative or transformative mediation—where the main goal is to help parties recognize their interests and present each other's perspectives—the emphasis may be placed on joint sessions. See.: *Tsuladze A., The Georgian Model of Court Mediation through the Euro-American Lens, Dissertation, TSU Publishing, Tbilisi*, 2016, 47 (in Georgian).

49 Different mediation styles can lead to distinct outcomes in the process. For instance, when a mediator focuses on assessing the strengths and weaknesses of the parties in a court context, the parties' real interests may be overlooked, which could facilitate a mutually desirable resolution. Specifically, a party might seek compensation not solely for financial reasons, but rather to encourage the institution to pay more attention to its customers in the future. By exploring these interests, the mediator can better understand the true objectives of each party. In this example, an evaluative mediator would analyze the claim for compensation in court, which could lead to a "losing" party being ordered to pay a sum. Conversely, in facilitative mediation, the mediator might discover that the plaintiff's interest is not simply to receive a payment but to prevent future negligence by the institution. Therefore, an alternative resolution could be proposed, such as establishing procedures for monitoring service quality, establishment of a CAPA (Corrective Action and Preventive Action) plan, etc. See additionally: *Alfini J., Barkai J., Baruch Bush R., Hermann M,. Hyman J., Kovach K., Liebman C., Press Sh., Riskin L. L.,* What Happens When Mediation is Institutionalized?: To the Parties, Practitioners and Host Institutions, Ohio State Journal on Dispute Resolution, Vol. 9:2, 1994, 314 – 315.

50 *Kovach K. K.*, Mediation, Principles and Practice, 3rd ed., Thomson West, United States of America, 2004, 395., referenced in: *Chitashvili N.*, Fair Settlement as Basis for Ethical Integrity of Mediation, Journ. „Alternative Dispute Resolution – Yearbook 2016" (Bilingual edition), TSU Publishing, Vol.5, №1, 2016, 14.

actions.[51] The mediation process does not exist beyond the realm of ethical values. It is impossible to discuss the success of mediation where ethical principles are not adequately upheld, regardless of the outcome of the dispute. The mediation process without ethical values is like music without harmony.[52] Several international instruments have been created to regulate the ethics of mediator behavior, based on which countries have also developed ethical codes in their national legislation. In Georgia, the Code of Professional Ethics for Mediators was approved in 2021. The ethical code defines the mandatory norms of professional ethics related to a mediator's competence, remuneration, impartiality, and independence, as well as encouraging voluntary and informed decision-making in support of party self-determination, guarantees of confidentiality, and other important aspects.[53] The Law of Georgia on Mediation, in turn, reinforces these significant principles and indicates, within the framework of general normative provisions, that issues not regulated by law should be resolved based on these principles (voluntariness, self-determination, mediator independence and impartiality, etc.). [54]

Mediation is a process that, unlike other alternative dispute resolution mechanisms, focuses on emphasizing and empowering the role of the parties involved.[55] Therefore, it is essential in this process to consider the extent to which the parties have the opportunity and freedom to utilize procedural mechanisms, make voluntary decisions, and take responsibility for the outcomes of those decisions.

The provision of certain ethical principles in mediation conducted by lawyer-mediators remains a challenge. Especially, when reviewing the evaluative mediation model, it is important to analyze how the provision of legal advice by the mediator is perceived and whether it is possible to maintain the status of a neutral party under these conditions. Ethical codes impose the obligation on mediators not only to remain unbiased but also to eliminate any perception of bias from the perspective of the parties involved.[56] When the mediator is a lawyer who can assess the potential outcome of the dispute in court, there is a significant temptation to use this opportunity to influence the parties and push them towards a settlement. However, all benefits of the mediation process are lost when the mediator's goal becomes solely achieving an agreement, since the success of the process does not just lie in reaching a settlement,[57] but in ensuring that this settlement is achieved under conditions of party autonomy, access to all procedural mechanisms, voluntary and informed decision-making, and a quality process. During mediation conducted by lawyer-mediators, a tendency has emerged where mediators encourage parties to settle, which exceeds the boundaries of voluntary decision-making. [58] The value of mediation extends far beyond merely resolving disputes. [59] Mediation plays a therapeutic role, as it not only aids in the resolution of disagreements but also helps maintain relationships, thereby resolving conflict on a personal level.[60]

From the moment the mediator begins to legally assess the circumstances of the dispute, three elements – self-determination, fairness of the process,[61] and the mediator's impartiality and neutrality – are immediately placed at risk.[62] This chapter will specifically address these concerns.

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51 *Chitashvili N.*, Framework for Regulation of Mediation Ethics and Targets of Ethical Binding, Journal of law, №1, 2016, 25.

52 It is interesting to note that, according to the original conception, lawyers were not considered suitable candidates for the profession of mediator because they lacked sufficient knowledge in the behavioral sciences, and there were no ethical standards in place to limit their actions. See additionally: *Riskin L.L*, Mediation and Lawyers, Ohio State Law Journal, Vol. 43, 1982, 37.

53 LEPL "Mediators' Association of Georgia", Code of Professional Ethics for Mediators, approved by the General Assembly on April 24, 2021.

54 Law of Georgia "on Mediation", ssm,18/09/2019, article 3.

55 *Anderson D. Q.*, Facilitative Versus Evaluative Mediation – Is There Necessarily a Dichotomy?, Asian Journal on Mediation, 2013, 69

56 Ethical Guidelines for Mediators, Law Council of Australia, 2018, article 2, comment A, <https://lawcouncil.au/docs/db9bd799-34d8-e911-9400-005056be13b5/Ethical> [07.11.2024].

57 *Waldman, E. A.*, "The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence." Marquette Law Review, vol. 82, №1, 1998, 165.

58 *Alfini J., Barkai J., Baruch Bush R., Hermann M,. Hyman J., Kovach K., Liebman C., Press Sh., Riskin L. L.,* What Happens When Mediation is Institutionalized?: To the Parties, Practitioners and Host Institutions, Ohio State Journal on Dispute Resolution, Vol. 9:2, 1994, 309-310.

59 Ibid, 325.

60 *Waldman, E. A.*, "The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence." Marquette Law Review, vol. 82, №1, 1998, 165-166.

61 *Chitashvili N.*, The Mediator's Dilemma on the Edge of the Principles of Party Autonomy and Justice, Yearbook of the Center for Law and Economics, Third edition, 2022, 82 (in Georgian).

62 *Munjal, D.*, Tug of War: Evaluative versus Facilitative Mediator, Pretoria Student Law Review, 6, 2012, 72.

1. Party Autonomy

The aggregation of procedural control mechanisms in the arsenal of the parties' rights is the key element that distinguishes mediation from other alternative dispute resolution methods. It relieves the parties of formalism and empowers them to manage the entire course of the process, define the content of the issues to be addressed, propose settlement terms, and make decisions regarding the resolution of the dispute by agreement or by referring the matter to court. Mediation relies entirely on the autonomy of the parties.[63] "The autonomy of the parties encompasses the principles of voluntariness, self-determination, and informed consent, which are crucial for understanding the substantive purpose of the mediation process. These principles form the foundational values of mediation and define the content of the mediator's ethical obligations."[64] "The National Mediators Accreditation System (NMAS) Practice Standards include self-determination as a component of the definition of mediation".[65] This underscores its significance. In the established behavioral standards for mediators, self-determination occupies the foremost position[66] and is defined as a voluntary, non-coercive decision made freely by each party within the framework of informed choice. Importantly, this principle applies at every stage of the mediation process.[67] Self-determination encompasses the freedom not only to accept or reject a proposed settlement but also for the parties to formulate alternatives for resolving the dispute and to independently address legal issues.[68]

Obviously, the principle of self-determination cannot be realized if the parties do not have adequate information about the legal prospects of resolving the dispute; otherwise, they will be unable to make an informed decision. The question is not whether the party should analyze the legal risks (as it is clear that they should), but rather how the mediator should ensure that this information is provided without compromising their neutrality and impartiality.[69] Does this imply that the mediator must assume the role of a legal consultant?

1.1. Beyond the Veil of Neutrality: The Mediator as Legal Advisor

1.1.1. The Evaluative Role of the Mediator

Mediation is not a process where "the winner takes it all." Mediation is based on either mutual victory[70] or an agreement that the parties are unable to reach consensus in the mediation process, leading to the dispute moving to court. The assumption of the mediator's role as a legal advisor confronts ethical principles because, as soon as the mediator begins to assess the case, it becomes impossible to present a balanced picture on the legal scale. One party will clearly have a legal advantage, while the other will have a less promising prognosis. No matter how hard the mediator tries to convey this content neutrally, highlighting one party's advantageous position already violates the principles of neutrality and impartiality,[71] and, worst of all, undermines the trust of the parties in both the mediator and the process itself.[72] In addition, the parties may perceive that, similar to a court, there is competition at play, which unconsciously pushes them to do everything possible to convince the "evaluator" (the

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63 UNCITRAL Notes on Mediation, United Nations, Vienna 2021, §10, 2, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v2107071_mediation_notes.pdf> [07.11.2024].

64 *Chitashvili N.*, The Mediator's Dilemma on the Edge of the Principles of Party Autonomy and Justice, Yearbook of the Center for Law and Economics, Third edition, 2022, 83-85 (in Georgian).

65 *Wolski B.*, An Ethical Evaluation Process for Mediators: A Preliminary Exploration of Factors Which Impact Ethical Decision-Making, Law in Context, Vol. 35, №1, 2017, 71.

66 *Levin, M.S.*, The Propriety of Evaluative Mediation: Concerns about the Nature and Quality of an Evaluative Opinion, Ohio State Journal on Dispute Resolution, Vol. 16, no. 2, 2001, 274.

67 Model Standards of Conduct for Mediators, AAA, ABA, ACR, 1994, Revised 2005, standard I, 3, <https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf> [07.11.2024].

68 *Catanzaro T.,* Improving Evaluation in Mediation: How Predictive Analytics Can Be Used to Improve Evaluative Mediation, American Journal of Mediation, Vol. 15, 2022, 101.

69 *Wolski B.*, An Ethical Evaluation Process for Mediators: A Preliminary Exploration of Factors Which Impact Ethical Decision-Making, Law in Context, Vol. 35, №1, 2017, 72.

70 *Munjal D.*, Tug of War: Evaluative versus Facilitative Mediator, Pretoria Student Law Review, 6, 2012, 69.

71 *Catanzaro T.,* Improving Evaluation in Mediation: How Predictive Analytics Can Be Used to Improve Evaluative Mediation, American Journal of Mediation, Vol. 15, 2022, 100.

72 *Anderson D. Q.*, Facilitative Versus Evaluative Mediation – Is There Necessarily a Dichotomy?, Asian Journal on Mediation, 2013, 67.

mediator) of the strength of their position and to "win" the case.[73] The parties lose control over the outcome of the process from the outset, which hinders the realization of the principle of party autonomy, as they become aware of and acknowledge the evaluator's competence, leading them to feel that they must unconditionally heed their advice. [74]

The mediator constantly faces the challenge of maintaining balance, which is not an easy task to accomplish. On one hand, the essence of the process requires equipping the parties with complete information; on the other hand, ensuring this must not cast a shadow on the mediator's neutral role.[75] According to Georgian legislation, the legal definition of the mediation process implies that it is a process in which two or more parties attempt to reach an agreement to resolve a dispute with the assistance of a mediator.[76] The notes on model rules developed by UNCITRAL specifically emphasize resolving the dispute in a way that ultimately excludes a win-lose outcome,[77] "the Directive of the European Parliament and of the Council of 2008, on Certain Aspects of Mediation in Civil and Commercial Matters" also defines mediation as a structured process in which the parties themselves, with their own efforts, seek to resolve the dispute with the assistance of a mediator.[78] Each regulation emphasizes the supportive role of the mediator. Within this facilitating role, the mediator should encourage the parties to assess the proposed alternatives themselves, but the mediator should not do this on their own.[79] "Evaluating, assessing, and deciding for others is radically different than helping others evaluate, assess, and decide for themselves."[80]

It should be evaluated how the risk of losing neutral status can be mitigated without hindering informed decision-making. In this regard, it is important to consider how the main subject of the process, namely the party, perceives the impact of the mediator's actions on impartiality and neutrality. It is interesting whether the mediator is unconditionally prohibited from expressing legal opinions in all cases or if there are circumstances that allow the mediator to assume the role of a legal advisor. [81] Notably, some codes of conduct for mediators permit the mediator to express their opinion in certain situations, specifically if the parties request it or if the mediator is confident in their competence to provide qualified advice without compromising their neutrality.[82] This example is also noteworthy since the Professional Code of Ethics for Mediators of Georgia includes similar regulations. In particular, according to the Code, the mediator "is not allowed to provide legal or other professional advice to the parties beyond their competence, assess the alternatives for resolving the dispute, or the circumstances of the case, except in cases where this is requested by the parties. They are authorized to share knowledge and information[83] related to the case while respecting the principle of impartiality."[84] Analyzing this provision makes it clear that while the mediator is prohibited from providing legal advice or assessing alternatives, there is an exception for the

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73 *Munjal, D*., Tug of War: Evaluative versus Facilitative Mediator, Pretoria Student Law Review, 6, 2012, 73.

74 Ibid, 74.

75 *Chitashvili N*., Framework for Regulation of Mediation Ethics and Targets of Ethical Binding, Journal of law, №1, 2016, 31.

76 Law of Georgia "on Mediation", ssm, 18/09/2019, paragraph „a"of article 2.

77 UNCITRAL Notes on Mediation, United Nations, Vienna 2021, §4, 1. accessible at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v2107071_mediation_notes.pdf [07.11.2024].

78 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on Certain Aspects of Mediation In Civil and Commercial Matters, article 3, § a. accessible at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008L0052 [07.11.2024].

79 *Kovach K.K., Love L.P*., "Evaluative" Mediation is an Oxymoron, Alternatives Vol 14. №3, 1996, 31.

80 *Love L.P.*, Top Ten Reasons Why Mediators Should Not Evaluate, Florida State University Law Review 24, 938. Referenced in: *Munjal, D*., Tug of War: Evaluative versus Facilitative Mediator, Pretoria Student Law Review, 6, 2012, 71.

81 A survey was conducted among the participants in the mediation to address this very question, evaluating the following circumstances: whether the assessment was clearly requested by the parties, the competence of the mediator, whether the position expressed by the mediator put pressure on the parties, at what stage of the process the assessments were made, the nature of the issues being assessed, and more. See additionally.: *Lande J.,* Real Mediation Systems to Help Parties and Mediators Achieve Their Goals, Cardozo Journal of Conflict Resolution, Vol. 24, 2023, 353-354.

82 *Hui Han E.C*., Moving Beyond the "Facilitative" and "Evaluative" Divide – Considering Techniques That Can Further the Goals of Mediation, Asian Journal on Mediation, 2013, 42.

83 The model standards in the United States allow for mediators to share information with the parties, provided that it is not of a legal nature, taking into account certain characteristics of the dispute. See: *Chitashvili N*., Framework for Regulation of Mediation Ethics and Targets of Ethical Binding, Journal of law, N1, 2016, 31.

84 LEPL "Mediators' Association of Georgia", Code of Professional Ethics for Mediators, approved by the General Assembly on April 24, 2021, §3.3.

consent of the parties.[85] Additionally, the possibility of sharing knowledge related to the case is permitted, but only while respecting the principle of impartiality. The key question arises here: where is the boundary between knowledge sharing and legal evaluation? How should a mediator convey information in a way that preserves the essence of impartiality? In this regard, Australia's ethical guidelines for mediators discourage even expressing an opinion at the request of the parties, given the high risk of compromising neutrality.[86] Furthermore, if mediators are permitted to assume the role of legal advisors, there must be norms and standards guiding such evaluations.[87] These would act as filters, ensuring the parties receive more refined information, free from any trace of bias. Society empowers judges and arbitrators with decision-making authority over case outcomes, with the function of controlling the outcome, a role grounded in their qualifications and the existence of a structured legal framework.[88] If mediators were to assume a similar role, they too would need to adhere to legal frameworks – a requirement that conflicts with the fundamental nature of mediation. Should mediators follow legal norms and provide evaluations, what would then distinguish them from judges and arbitrators? Where does the boundary lie between formal adjudication and the informal mediation process?

The superficial assessment of the aforementioned challenges might give the impression that legal education is more of a barrier than an advantage for a mediator. However, this is not the case. A mediator's ability to understand the legal landscape can be a valuable tool in planning the process and aligning the parties' interests. Nonetheless, the mediator should not directly provide legal evaluations to the parties;[89] rather, they should use various techniques to encourage the parties to seek advice from independent professionals.[90] "Using questioning techniques aimed at understanding whether a party is making a compromise decision with full awareness of their own priority interests does not constitute an undue interference in the principle of voluntariness."[91] The mediation process allows for the involvement of lawyers as representatives of the parties, which is a significant advantage for the mediator. By actively involving these representatives, the mediator can facilitate informed decision-making. Attorney representatives also bear responsibility for legitimizing the mediated agreement. But what happens if a party is not represented by a lawyer in the mediation process? Does this give the mediator the right to take on the role of a legal advisor? [92] Obviously, the answer to this question is also negative. "Providing legal advice would turn the mediator into a representative of the client, which in the eyes of the other party would constitute a serious breach of the mediator's principle of impartiality."[93] The mediator cannot provide legal assistance to the parties but is authorized to encourage them to seek advice from independent professionals[94] at least once before signing the mediation agreement and voluntarily accepting its binding force.

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[85] According to some scholars, a mediator should completely rely on the parties' preferences regarding the style to be used; specifically, if the parties desire an evaluation, the mediator should provide such consultation, while if they expect a facilitative role, the mediator should act accordingly. See: *Stulberg, J.B*., Facilitative versus Evaluative Mediator Orientations: Piercing the Grid Lock, Florida State University Law Review, Vol. 24, no. 4, 1997, 992.

[86] Ethical Guidelines for Mediators, Law Council of Australia, 2018, article 2, comment C, 3. accessible at:https://lawcouncil.au/docs/db9bd799-34d8-e911-9400-005056be13b5/Ethical [07.11.2024]. *Compare to*: In certain cases, U.S. law allows a divorce case mediator, who is also a lawyer, to provide legal advice, provided that they clarify they do not represent either party and offer consultation in the presence of both parties during a joint session. See additionally: *Riskin L.L*, Mediation and Lawyers, Ohio State Law Journal, Vol. 43, 1982, 40. It may also be required that both parties fully understand the risks associated with the fact that the mediator does not represent either of them: *Riskin L. L*., Towards New Standards for the Neutral Lawyer in Mediation, Arizona Law Review, Vol, 26, 1984, 344.

[87] *Kovach K.K., Love L.P*., "Evaluative" Mediation is an Oxymoron, Alternatives Vol 14. №3, 1996, 31.

[88] Ibid.

[89] *Compare to*: *Riskin L. L.,* Towards New Standards for the Neutral Lawyer in Mediation, Arizona Law Review, Vol, 26, 1984, 336.

[90] *Kovach K.K., Love L.P.*, "Evaluative" Mediation is an Oxymoron, Alternatives Vol 14. №3, 1996, 31. See also: Riskin L.L, Mediation and Lawyers, Ohio State Law Journal, Vol. 43, 1982, 40.

[91] *Chitashvili N*., The Mediator's Dilemma on the Edge of the Principles of Party Autonomy and Justice, Yearbook of the Center for Law and Economics, Third edition, 2022, 94 (in Georgian).

[92] Ibid, 85.

[93] Ibid., see also: *Chitashvili N.,* Specificity of Some Ethical Duties of Lawyer Mediator and Necessity of Regulation, Journal of Law N2, 2016, 33.

[94] LEPL "Mediators' Association of Georgia", Code of Professional Ethics for Mediators, approved by the General Assembly on April 24, 2021, § 4.5. See also: Model Standards of Conduct for Mediators, AAA, ABA, ACR, 1994, Revised 2005, 2, <https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf> [07.11.2024].

The mediator's impartial image is so essential in the mediation process that even a hint of doubt regarding this credibility from the parties' perspective undermines both the integrity of the process and public trust in the mediator as the individual managing it. This, in turn, puts the entire institution of mediation at risk. The inviolability of the mediator's status is so crucial that even after mediation concludes, the mediator should not assume a role as an evaluator (e.g., as a judge) for the same parties.[95] Conversely, a person cannot serve as a mediator in a case if they previously had any professional involvement with it as a judge, arbitrator, or in any other professional capacity.[96] Notably, if the mediator feels they cannot conduct the process while maintaining impartiality, the "U.S. Model Standards" authorize them to withdraw from the process. [97]

1.1.2. Mediator's Competence

Even if we were to consider it acceptable for the mediator to assume an evaluative role, other issues arise, primarily related to the mediator's competence. Since the mediation process largely relies on the parties' interests and their subjective perceptions of events, there is no thorough evaluation of facts and legal evidence. Thus, the mediator lacks the ability to accurately assess the legal landscape.[98] Even if this were feasible, the mediator may lack legal education and familiarity with judicial practice, as mediation is not a profession exclusively open to legal professionals; it is a completely new profession that welcomes individuals from any field to become mediators, provided they undergo appropriate training.[99] It is also noteworthy that even a lawyer-mediator may not have the ability to predict the outcome of a dispute in court with complete accuracy. Jurisprudence is not an exact science; therefore, predicting the fate of a case in court with absolute certainty is not possible even for practicing lawyers. If the parties rely solely on a legal assessment and voluntarily subject themselves to the binding force of a mediation agreement, they will not have a mechanism to protect themselves in case the legal assessment turns out to be inaccurate.[100]

1.2. Mediator as Decision Maker – The Institutional Identity Crisis of Mediation

The legal definitions provided in the acts governing the mediation process clearly highlight the substantive and procedural elements of the mediation institution and the supportive, facilitative role of the mediator as a neutral guide for the parties involved. According to Georgian legislation, the mediator assists the parties in reaching an agreement and is not permitted to make decisions regarding the dispute themselves.[101] "The United Nations Convention on International Settlement Agreements Resulting from Mediation" ("the Singapore Convention") also defines that mediation is a process conducted with the assistance of a mediator, which is not authorized to impose a resolution of the dispute on the parties.[102] Exactly identical regulation is provided by "UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation".[103] While explaining the process, Australia's ethical guidelines emphasize that the parties must reach an agreement themselves, while the mediator assists them in this endeavor using creative

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95 Civil Procedure Code of Georgia, Parliamentary Gazette 47-48, 14/11/1997, sub-paragraph "a", section 1, article 31.

96 Law of Georgia "on Mediation", ssm,18/09/2019, paragraph 3 of article 6. *Compare to*: *Riskin L.L*, Mediation and Lawyers, Ohio State Law Journal, Vol. 43, 1982, 39.

97 *Chitashvili N*., Framework for Regulation of Mediation Ethics and Targets of Ethical Binding, Journal of law, №1, 2016, 31.

98 *Catanzaro T.,* Improving Evaluation in Mediation: How Predictive Analytics Can Be Used to Improve Evaluative Mediation, American Journal of Mediation, Vol. 15, 2022, 99. See also: *Riskin L. L*., Mediator Orientations, Strategies and Techniques, Alternatives Vol. 12, №9, 1994, 111.

99 *Munjal, D*., Tug of War: Evaluative versus Facilitative Mediator, Pretoria Student Law Review, 6, 2012, 76-77.

100 Ibid, 78.

101 Law of Georgia "on Mediation", ssm,18/09/2019, paragraph 9 of article 8.

102 United Nations Convention on International Settlement Agreements resulting from Mediation (The "Singapore Convention on Mediation"), article 2 §3, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf> [07.11.2024].

103 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, with Guide to Enactment and Use 2018, article 1, §3; 24, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01363_mediation_guide_e_ebook_rev.pdf> [07.11.2024].

methods.[104] From these explanations, it is evident that the mediator only assumes a supportive, facilitating role and is explicitly prohibited from participating in decision-making in any form.[105]

As already noted, the principle of self-determination implies that the authority to make decisions belongs to the parties, while the mediator's role is reflected in highlighting and reconciling their interests.[106] "The mediator has legitimacy only over procedural decisions, but even this must essentially be motivated by the parties' interests and justified by the legitimate and ethical goals of the process, provided that there is acceptance/agreement from the parties." [107]

The central subject of mediation is the parties involved; this dispute resolution mechanism grants them complete trust and recognizes that they possess sufficient intellectual and emotional resources to find their own solutions to the dispute, potentially more effectively than an arbitrator or judge could.[108] The mediator's role is to assist the parties in thinking creatively through various methodological techniques, encouraging them to move beyond legal frameworks and achieve a resolution that will be desirable for each of them by ranking the diverse alternatives for resolving the dispute. [109]

The aim of the legal regulations regarding the mediation institution and the role of the mediator was to distinguish mediation from other dispute resolution mechanisms, such as court proceedings, arbitration, early neutral evaluation, or other hybrid forms. Mediation differs from arbitration in that the parties have full control over the outcome; [110] mediation is not confined within the legal framework of a competitive process,[111] and the parties are allowed to go beyond the claims made in court.[112] The mediator and the arbitrator have "different functional roles," and the procedural mechanisms are also distinct.[113]

The wrongful influence of the evaluative mediator on the parties during the decision-making process not only undermines the primary advantages of the mediation institution but also obscures the distinction between mediation and other dispute resolution mechanisms,[114] since mediation without the main expression of the principle of self-determination – decisions made independently by the parties; otherwise, is nothing else but "old wine in new bottles,"[115] as other means of dispute resolution provide the parties with the possibility of resolving issues through the intervention of another person. This understanding of the mediator's role fundamentally transforms the essence of the mediation institution.[116]

The only procedural option provided by legislation in connection with the mediation agreement is the mediator's authority to propose terms of the mediation agreement, but only in the presence of the parties' consent and with consideration of their interests and expressed positions.[117] This differs from decision-making and should not be perceived as a provision granting broad discretion regarding the outcome of the dispute. The purpose of this provision is to enable the parties to rely on the mediator's experience procedurally and, in a sense, to ensure that the mediation agreement will have enforceable content. At what stage or to what extent the mediator should

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104 Ethical Guidelines for Mediators, Law Council of Australia, 2018, article 1. Accessible at: <https://lawcouncil.au/docs/db9bd799-34d8-e911-9400-005056be13b5/Ethical>[07.11.2024].

105 *Riskin L.L*, Mediation and Lawyers, Ohio State Law Journal, Vol. 43, 1982, 29.

106 *Munjal, D*., Tug of War: Evaluative versus Facilitative Mediator, Pretoria Student Law Review, 6, 2012, 73-74.

107 *Chitashvili N*., The Mediator's Dilemma on the Edge of the Principles of Party Autonomy and Justice, Yearbook of the Center for Law and Economics, Third edition, 2022, 84 (in Georgian).

108 *Kovach K.K., Love L.P*., "Evaluative" Mediation is an Oxymoron, Alternatives Vol 14. №3, 1996, 32.

109 UNCITRAL Notes on Mediation, United Nations, Vienna 2021, 15, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v2107071_mediation_notes.pdf> [07.11.2024].

110 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, with Guide to Enactment and Use 2018, 17-24. Accessible at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01363_mediation_guide_e_ebook_rev.pdf> [07.11.2024].

111 *Riskin L.L*, Mediation and Lawyers, Ohio State Law Journal, Vol. 43, 1982, 34.

112 *Batiashvili I.,* The Mediation Process, its Principles and Challenges in Georgia, Journ., "Alternative Dispute Resolution – Yearbook 2022" (Bilingual edition), TSU Publishing, Vol.11, №1, 2022, 10-11.

113 *Munjal, D*., Tug of War: Evaluative versus Facilitative Mediator, Pretoria Student Law Review, 6, 2012, 71.

114 *Baksa, G*., Different Mediation Styles and Their Use in Family Mediation, Jogi Tanulmanyok, 2012, 254.

115 *Alfini J.J., Barkai, J., Baruch Bush R., Hermann M., Hyman J., Kovach K., Liebman C., Press Sh., Riskin L. L*., What Happens When Mediation is Institutionalized?: To the Parties, Practitioners and Host Institutions, Ohio State Journal on Dispute Resolution, Vol. 9:2, 1994, 311.

116 *Munjal, D*., Tug of War: Evaluative versus Facilitative Mediator, Pretoria Student Law Review, 6, 2012, 72-73.

117 Law of Georgia "on Mediation", ssm, 18/09/2019, paragraph 10 of article 8. See also: LEPL "Mediators' Association of Georgia", Code of Professional Ethics for Mediators, approved by the General Assembly on April 24, 2021, § 5.1.

propose the terms of the agreement may depend on various factors;[118] however, despite the existence of such a power for the mediator under the law, to maximize the realization of party autonomy and the principle of self-determination,[119] it is preferable that the mediator's intervention in this aspect be minimal. Instead, the mediator should encourage the parties to seek advice from independent professionals, including regarding the content of the agreement's terms.[120]

As a summary, it should be stated that what makes mediation attractive for the parties is the maximum realization of the principle of self-determination, "informal nature of mediation process, the chance [of parties] to be fully involved, and the lack of legal technicality".[121] Even a slight restriction of the parties' autonomy by the mediator, even for noble purposes and to ensure informed decision-making, devalues the entire value of the mediation process. Furthermore, it is noteworthy that according to the conducted research "the evaluative mediation can leave parties with a lesser feeling of success in mediation"[122] than the facilitative one. This can be explained by the fact that when the focus in mediation remains on the legal perspective, the parties may feel that they are in a process similar to adversarial legal proceedings, where they have no influence over the outcome and the decision-maker is the mediator, which is inherently incorrect.

Thus, the solution lies in utilizing the resources of independent lawyers and working with the parties on a reality check – not in such a way that the mediator makes legal predictions, but in a manner that enables the parties to reflect on the legal perspective of resolving the dispute themselves. At the foundation of the institutionalization of mediation, a trend has emerged where parties either involve representatives only to a limited extent in the process or do not consult with them at all.[123] This can be explained by a lack of awareness about the mediator's role, the role of lawyers in the mediation process, their costs, and other factors. Therefore, it is fundamentally important for the mediator to clarify all necessary details at the beginning of the process, including explaining to the parties that they can receive legal consultations free of charge from pro bono legal service providers.

2. Evaluative and Facilitative Mediation in the Context of Process Fairnes

In general, satisfaction with the outcome of mediation is influenced by two factors: when the parties perceive the process as fair and, at the same time, feel that their participation is important.[124] Ethical principles obligate the mediator to ensure a fair process, which encompasses both procedural and substantive fairness.[125]

Procedural fairness involves conducting mediation in a manner where the mediator ensures that each party has an equal opportunity to control the process, guaranteeing equal access to all mechanisms characteristic of mediation.[126] "The three elements-participation, dignity and trust-play a large role in people's assessment of procedural fairness."[127] Procedural fairness extends throughout the entire mediation process, from utilizing procedural mechanisms to making decisions independently and voluntarily. Fairness is achieved when parties

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118 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, with Guide to Enactment and Use 2018, 40, <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/22-01363_mediation_guide_e_ebook_rev.pdf> [07.11.2024].

119 *Chitashvili N.*, The Mediator's Dilemma on the Edge of the Principles of Party Autonomy and Justice, Yearbook of the Center for Law and Economics, Third edition, 2022, 85 (in Georgian).

120 *Riskin L.L*, Mediation and Lawyers, Ohio State Law Journal, Vol. 43, 1982, 40.

121 *Hui Han E.C.*, Moving Beyond the "Facilitative" and "Evaluative" Divide – Considering Techniques That Can Further the Goals of Mediation, Asian Journal on Mediation, 2013, 40.

122 *McDermott P. E.*, Discovering the Importance of Mediator Style – An Interdisciplinary Challenge, Negotiation and Conflict Management Research, Vol. 5, №4, 2012, 347.

123 *Riskin L. L.*, Towards New Standards for the Neutral Lawyer in Mediation, Arizona Law Review, Vol, 26, 1984, 334.

124 *Thibaut J., Walker L.*, A Theory of Procedure, California Law Review, Vol. 66, №3, 1978, 541 referenced in: *Waldman, E. A.*, "The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence." Marquette Law Review, vol. 82, №1, 1998, 161.

125 *Chitashvili N.*, The Mediator's Dilemma on the Edge of the Principles of Party Autonomy and Justice, Yearbook of the Center for Law and Economics, Third edition, 2022, 88 (in Georgian).

126 Ibid, 83-88.

127 *Waldman, E. A.*, "The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence." Marquette Law Review, vol. 82, №1, 1998, 161.

make decisions independently and voluntarily,[128] without coercion or pressure,[129] within the framework of appropriately facilitated balanced negotiations.[130] In this regard, it should be noted that guaranteeing procedural fairness in the context of evaluative mediation becomes challenging when the outcome of mediation is significantly influenced by the mediator's legal evaluations and imposed alternatives for dispute resolution. The primary obstacle to ensuring procedural fairness in the evaluative mediation model is the deprivation of the parties' ability to control the process and the mediator being endowed with that function.

As for substantive fairness, it imposes certain requirements on the content of the "mediation agreement itself, which must meet the minimum standards of fairness and legality."[131] It should allow the parties to have an individual perception of fairness, and the resolution should not violate the standards of fairness for third parties who were not present in the process.[132] Guaranteeing substantive fairness is one of the most challenging tasks for the mediator, as there is no ethical orientation that defines which competing values should take precedence in conditions of value competition. The difficulty of ensuring substantive fairness, considering its characteristics, is influenced by the following factors:

a) Individual Perception of Fairness

There is no universal or general definition of fairness; it is a subjective category, and its content is determined by the individual moral compass of the parties, which can differ radically from one another. Furthermore, while the mediator is deprived of the opportunity to provide legal advice to the parties or to assess the legitimacy of the mediation agreement solely based on how closely the resolution aligns with a court's decision under legislative norms, the mediator must also have the sense that the agreement meets the minimum standards of fairness and is composed according to ethical standards. Otherwise, they must terminate the process and "prevent the achievement of an agreement that unconsciously violates any of the parties' substantive interests."[133]

b) Enforceability of Agreement in Relation to Legality and Fairness

"Mediation settlement is the final product of mediation."[134] Parties are motivated to participate in the mediation process primarily because they expect to resolve conflicts in a shorter timeframe while ensuring guarantees for the enforcement of the decisions made. A mediation agreement that does not meet the standards for enforceability cannot be considered fair. According to the Civil Procedure Code of Georgia, a prerequisite for the enforceability of an agreement is the exclusion of contradictions with the law. [135] In this context, "contradiction to the legislation means unconformity with the fundamental human rights, guaranteed by the legislation. [...] otherwise, if the element of legality was perceived as a resolution of a dispute under the provisions of the legislation, then the main sign, distinguishing mediation from the court would lose its sense. The criterion while assessing the legality of mediation settlement mustn't be the fact, how the court would resolve this dispute."[136]

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128 *Chitashvili N*., Fair Settlement as Basis for Ethical Integrity of Mediation, Journ. „Alternative Dispute Resolution – Yearbook 2016" (Bilingual edition), TSU Publishing, Vol.5, №1, 2016, 11.

129 *Chitashvili N*., The Mediator's Dilemma on the Edge of the Principles of Party Autonomy and Justice, Yearbook of the Center for Law and Economics, Third edition, 2022, 88 (in Georgian).

130 *Wolski B*., An Ethical Evaluation Process for Mediators: A Preliminary Exploration of Factors Which Impact Ethical Decision-Making, Law in Context, Vol. 35, №1, 2017, 74.

131 *Chitashvili N*., The Mediator's Dilemma on the Edge of the Principles of Party Autonomy and Justice, Yearbook of the Center for Law and Economics, Third edition, 2022, 88 (in Georgian).

132 *Riskin L. L*., Towards New Standards for the Neutral Lawyer in Mediation, Arizona Law Review, Vol, 26, 1984, 354., See also: *Chitashvili N*., Framework for Regulation of Mediation Ethics and Targets of Ethical Binding, Journal of law, №1, 2016, 32.

133 *Chitashvili N*., The Mediator's Dilemma on the Edge of the Principles of Party Autonomy and Justice, Yearbook of the Center for Law and Economics, Third edition, 2022, 89-90 (in Georgian).

134 *Uznadze N*., Circumstances Excluding the Enforcement of Mediation Settlements Under the Legislation of Georgia and the Member States of the European Union, Journ., "Alternative Dispute Resolution – Yearbook 2020-2021" (Bilingual edition), TSU Publishing, Vol.10, №1, 2021, 118.

135 Civil Procedure Code of Georgia, Parliamentary Gazette, 47-48, 14/11/1997, article 363^{32}.

136 *Uznadze N*., Circumstances Excluding the Enforcement of Mediation Settlements Under the Legislation of Georgia and the Member States of the European Union, Journ., "Alternative Dispute Resolution – Yearbook 2020-2021" (Bilingual edition), TSU Publishing, Vol.10, №1, 2021, 124-125.

c) Competition of Ethical Values

The mediator is obliged to maintain neutrality throughout the entire course of the mediation process. However, "binding them with neutrality ends at the boundary of substantive inequity in the agreement."[137] In such cases, the mediator faces a conflict between the obligation of impartiality and the obligation to ensure a quality process.[138] This tension arises because, according to general standards, the mediator should not be interested in the outcome of the dispute and should not influence the substance of the agreement when it is made within the framework of informed consent. However, if the content of the agreement clearly places the parties in an unequal position, even when they voluntarily express their willingness to accept such a self-imposed limitation, it becomes the mediator's duty to investigate the reasons behind the party's consent to such inequitable terms. The mediator must assess the quality of the party's information without providing legal advice or exerting inappropriate influence on the decision. Instead, this should be achieved through mediation techniques and working on reality testing. If this proves unsuccessful, the mediator "must terminate the process with the parties' informed consent if it is impossible to achieve ethical integrity and fairness in mediation."[139]

IV. Mediation Models Today – Transformation of Perspectives, Challenges, and Recommendations

The model proposed by Leonard Riskin regarding evaluative and facilitative mediation was innovative in that it was the first attempt to categorize and assign the mediation process to the relevant model in tabular form, based on the techniques used by the mediator and the method of problem-solving. Riskin's initial model established a sharp boundary between the two models and excluded the concurrent existence of both in the mediation process. Due to this rigid approach and, more importantly, the nature of the evaluative model, this table sparked a lengthy discussion among practitioners and theorists, specifically regarding whether evaluative mediation should be considered a form of mediation at all.[140] When Leonard Riskin proposed this model to those interested in mediation practice, there was no such labeling between models; thus, it was the first attempt to scientifically structure mediation practice. Over time, practice has shown that the proposed table did not reflect reality[141] with meticulous, mathematical precision,[142] as mediation in practice is a more complex[143] and dynamic process that does not lend itself to such rigid categorization;[144] the mediator's style may vary between different models depending on various circumstances.[145] This was confirmed by research conducted within the framework of the mediation model that was considered facilitative, which revealed characteristics typical of the evaluative model and vice versa.[146]

Over time, the dominant views in the scientific literature require revision, as they no longer respond to the challenges of modernity and are characterized by anomalies.[147] This phenomenon was termed "Paradigm Shift"

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137 *Chitashvili N.*, The Mediator's Dilemma on the Edge of the Principles of Party Autonomy and Justice, Yearbook of the Center for Law and Economics, Third edition, 2022, 90 (in Georgian).

138 *Riskin L.L.*, Awareness and Ethics in Dispute Resolution and Law, Why Mindfulness Tends to Foster Ethical Behavior, Tex. L. Rev., Vol. 50, 2009, 501.

139 *Chitashvili N.*, The Mediator's Dilemma on the Edge of the Principles of Party Autonomy and Justice, Yearbook of the Center for Law and Economics, Third edition, 2022, 89 (in Georgian).

140 *Anderson D. Q.*, Facilitative Versus Evaluative Mediation – Is There Necessarily a Dichotomy?, Asian Journal on Mediation, 2013, 66.

141 *Catanzaro T.,* Improving Evaluation in Mediation: How Predictive Analytics Can Be Used to Improve Evaluative Mediation, American Journal of Mediation, Vol. 15, 2022, 98.

142 *Riskin L. L.,* Decisionmaking in Mediation: The New Old Grid and the New New Grid System, Notre Dame Law Review, Vol. 79, №1, 2003, 50.

143 *Lande J.*, Real Mediation Systems to Help Parties and Mediators Achieve Their Goals, Cardozo Journal of Conflict Resolution, Vol. 24, 2023, 352-353.

144 *Riskin L. L.,* Retiring and Replacing the Grid of Mediator Orientations, Alternatives Vol.21, №4, 2003, 72.

145 *Anderson D. Q.*, Facilitative Versus Evaluative Mediation – Is There Necessarily a Dichotomy?, Asian Journal on Mediation, 2013, 66.

146 *McDermott P. E.,* Discovering the Importance of Mediator Style – An Interdisciplinary Challenge, Negotiation and Conflict Management Research, Vol. 5, №4, 2012, 346-350.

147 *Lande J.*, Real Mediation Systems to Help Parties and Mediators Achieve Their Goals, Cardozo Journal of Conflict Resolution, Vol. 24, 2023, 347.

by Thomas Kuhn.[148] This is exactly what happened in the case of Leonard Riskin's models. Over time, the author himself revised the original theory several times because it did not address certain challenges.

Among the model's shortcomings, the professor pointed out the fact that the old model focused solely on the mediator, while it is important for all participants in the process to receive appropriate attention.[149] Additionally, Leonard Riskin identified the main flaw of the model that there is no clear and distinct boundary between evaluative and facilitative approaches, and that the mediator can use both in a single process; [150] only the substantive significance is attributed to the form of expression, time, and context.[151] This is precisely what should be the main focus when assessing the model's flaws. In reality, the challenge is not whether the mediator predicts the outcome of the dispute and assesses the judicial prospects, but rather how this assessment is utilized in the process and presented to the parties. Thus, the issue is the form of expression of this assessment, rather than a standalone legal prediction as the mediator's individual, subjective disposition toward the outcome of the dispute. When the topic of discussion in academic circles was whether "a facilitative or evaluative style should be adopted, it was suggested that the right question to ask is: What is the right approach to help the parties accurately evaluate their alternatives?"[152] The problem is not the legal assessment itself, but its influencing and guiding nature, which is unacceptable.[153]

There is no structured, written standard for the mediation procedure. Legislation regulates the basic principles of the process, ethical standards, entry requirements for the profession, and other essential issues, while how a mediator should plan the process depends on their individual approaches and techniques, which they choose based on the specifics of the dispute. For example, there is no standard that dictates whether a mediator should open the process with individual meetings or joint sessions, which techniques to use, or examination of which issues to emphasize. All of this occurs through improvisation and is gradually planned in the mediator's mind as the process unfolds. There is also no clear guideline in the legislation or ethical regulations on how a mediator should mitigate the risks of bias or, at a minimum, the perception of bias by the parties, in such a way that their expressed opinions are not considered evaluative or attempts to influence the achievement of an agreement while simultaneously facilitating the realization of the principle of self-determination for the parties and informed decision-making. This depends on how the mediator plans the process and which techniques they employ.

Obviously, the initial phase of mediation is crucial for the mediator to gain the trust of the parties, understand the content of the disagreement, and utilize the opportunity to explore the interests of the parties. "Assessment of alternatives should not be done at an early stage of the mediation. The mediation should focus first on helping the parties to communicate with each other, understand each other's interests and having a conversation. A premature consideration of alternatives may cause parties to be positional, and may thereby create tension that makes it difficult for parties to continue their negotiations."[154] In addition to this, the location and manner of presenting alternatives hold significant importance. Most importantly, alternatives should not come from the mediator, and their feasibility should not be discussed in a joint meeting, as this could undermine the trust of the parties in the mediator and the process itself.[155] First and foremost, it is essential for the mediator to explore the interests of the parties in individual meetings, identify points of overlap, and bring them closer together. Only after this can discussions about alternatives take place. However, even at this stage, the mediator

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148 *Kuhn T.S.,* The Structure of Scientific Revolutions, 4th ed. 2012, referenced in: *Lande J.,* Real Mediation Systems to Help Parties and Mediators Achieve Their Goals, Cardozo Journal of Conflict Resolution, Vol. 24, 2023, 347.

149 In light of this, Professor Riskin proposed a new model that categorizes the decision-making process into substantive, procedural, and meta-procedural decision-making and takes into account the assessment of the influence of factors such as the circumstances causing the conflict, the planning of the mediation procedure, etc. See: *Riskin L. L*, Replacing the Mediator Orientation Grids, Again: Proposing a "New New Grid System", Alternatives, Vol.23, №8, 2005, 128.

150 *Riskin L. L*, Replacing the Mediator Orientation Grids, Again: Proposing a "New New Grid System", Alternatives, Vol.23, №8, 2005, 127.

151 *Riskin L. L.,* Decisionmaking in Mediation: The New Old Grid and the New New Grid System, Notre Dame Law Review, Vol. 79, №1, 2003, 15.

152 *Anderson D. Q*., Facilitative Versus Evaluative Mediation – Is There Necessarily a Dichotomy?, Asian Journal on Mediation, 2013, 73.

153 Ibid, 70-71.

154 Ibid, 74.

155 *Hui Han E.C*., Moving Beyond the "Facilitative" and "Evaluative" Divide – Considering Techniques That Can Further the Goals of Mediation, Asian Journal on Mediation, 2013, 42-43.

must exercise caution regarding how they present their views to the parties. A good technique in this case is to use the intellectual resources of the party's representative to conduct a reality check. Specifically, the mediator might ask the representative to assess, based on their experience, what the judicial practice is like for similar types of cases and what outcome they anticipate in court. This way, the mediator directs the vector of legal assessment towards the representative, thereby informing the party without personally expressing an evaluation.[156] In this manner, the evaluation is heard in the mediation process, but not by the person who is obligated to maintain neutrality; instead, it comes from the party's representative, whose role and purpose in this process is indeed to provide legal consultation. The goal of using this technique is to inform the party in such a way that it does not cast a shadow on the mediator's neutral and impartial status. In cases where a party does not have a representative present in the mediation process, the mediator may assign them the task of consulting with a lawyer before the next meeting and consider alternatives accordingly.[157] The root of the problem, as already mentioned, lies in the techniques and methodologies employed by the mediator, taking into account the interests and needs of the parties.

V. Conclusion

As revealed by the analysis of evaluative and facilitative mediation models, the modern perception of this dichotomy is no longer as rigid as in the original scientific work. Despite differing opinions, the analysis of scientific literature and legal acts indicates that it is largely recommended for the mediator not to assume the role of a legal advisor or decision-maker. They must not only be impartial (a subjective category) but also be perceived as such (an objective category). Parties cannot expect to receive legal services from the mediator, as the mediator's role and purpose in the mediation process fundamentally differ from those of a judge, arbitrator, or attorney. This understanding of the mediator's role undermines the institution of mediation and fundamentally alters its nature. A proper analysis and understanding of the roles of the mediator and mediation are essential for the institution to secure an appropriate place in society. The mediator carries significant responsibility in both raising public awareness and shaping correct expectations.

An ethical dilemma arises when there is a "[c]hoice of competing values (ideas of goodness)"[158] which suggests "a variety of alternative and contradictory courses of action".[159] "[160] The mediation process is constantly accompanied by ethical dilemmas. This has been, is, and will be the case. What is essential is that the mediator does not lose the correct orientation within this hierarchy of values. The mediator should "reconcile neutrality with ethical mediation."[161] Even though ethical codes and rules of conduct for mediators, along with relevant legislative acts, regulate the basic principles of ethical behavior, they cannot determine a course of action for every possible ethical dilemma, nor do they establish a hierarchy of ethical principles.[162] "The ethical challenge should be addressed through a complex analysis of the factual circumstances of the case and a method of weighing values."[163] In this process, significant emphasis is placed on the mediator's methodology, the techniques they use, and the proper planning of the process, as it is the mediator who guarantees the integrity of public trust towards both the mediation process and the institution itself.

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156 *Anderson D. Q*., Facilitative Versus Evaluative Mediation – Is There Necessarily a Dichotomy?, Asian Journal on Mediation, 2013, 74.

157 *Hui Han E.C*., Moving Beyond the "Facilitative" and "Evaluative" Divide – Considering Techniques That Can Further the Goals of Mediation, Asian Journal on Mediation, 2013, 43.

158 Joseph Fletcher, 'Situation Ethics, Law and Watergate' (1975-1976) 6 Cumberland Law Review 35, 55., referenced in: *Wolski B*., An Ethical Evaluation Process for Mediators: A Preliminary Exploration of Factors Which Impact Ethical Decision-Making, Law in Context, Vol. 35, №1, 2017, 65.

159 Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2nd ed, 2014) 16., referenced in: *Wolski B*., An Ethical Evaluation Process for Mediators: A Preliminary Exploration of Factors Which Impact Ethical Decision-Making, Law in Context, Vol. 35, №1, 2017, 65.

160 *Wolski B*., An Ethical Evaluation Process for Mediators: A Preliminary Exploration of Factors Which Impact Ethical Decision-Making, Law in Context, Vol. 35, №1, 2017, 65.

161 *Lakhani, M. A*., "Ethical Mediation." Advocate (Vancouver Bar Association), vol. 79, no. 6, 2021, 849.

162 *Chitashvili N*., The Mediator's Dilemma on the Edge of the Principles of Party Autonomy and Justice, Yearbook of the Center for Law and Economics, Third edition, 2022, 91, 95 (in Georgian). See also: *Riskin L. L.,* Towards New Standards for the Neutral Lawyer in Mediation, Arizona Law Review, Vol, 26, 1984, 337.

163 Ibid.

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