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THE ROLE OF MEDIATION IN CRIMINAL LAW AND ITS RELATION TO THE BEST INTEREST OF THE JUVENILE

Abstract

This paper presents a multidisciplinary analysis of the Institution of Mediation within the Georgian criminal legal system. Specifically, it examines the role of the Diversion-Mediation mechanism in juvenile justice. The research substantiates the priority of this form of restorative justice, which was introduced in Georgia in 2010, despite the fact that the Georgian legal tradition historically possessed analogous institutions of mediation (such as mediating courts). A key aspect analyzed is the correlation between mediation and the constitutional and international principle of the Best Interest of the Juvenile, which ensures the minor's safety, well-being, resocialization, and the prevention of stigmatization.

Furthermore, the paper discusses the balancing function of Diversion/Mediation as an alternative mechanism to criminal prosecution. This mechanism effectively achieves the objectives of sentencing—namely, resocialization and rehabilitation—without resorting to repressive measures. An analysis of international practice (USA, Norway) reveals the growing popularity and high efficacy of restorative justice in terms of crime prevention and the satisfaction of the parties (offender/victim). Statistical data recorded in Georgia since 2010, particularly the low recidivism rate and the increasing trend of program enrollment in recent years (2022-2023) (including its extension to certain categories of adults), unequivocally confirms the high effectiveness and prospective value of the institution of mediation for the country's legal system.

Keywords: restorative justice; criminal mediation; juvenile justice; diversion; best interest of the child; victim–offender mediation; Georgian criminal law; proportionality of punishment

Introduction

The institution of mediation represents a relatively new phenomenon in Georgian criminal law. Just a few decades ago, the classic method of initiating criminal prosecution was considered the dominant mechanism for administering justice. At that time, alternative forms of restorative justice, such as involvement in the Diversion-Mediation program, were not considered.

Over time, the concept of "Mediation in Criminal Law" has become more popular, resulting in increased demand and positive attitudes from the public, including juveniles themselves. The present paper is dedicated to examining the issue of mediation within a criminal law context. We will review the current trends and evaluate the best interest of the juvenile as the fundamental starting point for the use of mediation.

Concurrently, the paper will address the issue of the mechanism's proportionality to the purposes of punishment, where we will discuss the balancing effect of this alternative mechanism, particularly in cases involving a victim and established damage.

To refine the institution of Diversion-Mediation, it is essential to maximize the sharing of international best practices and adopt models from countries where, despite the commission of a criminal act, the rehabilitation of the juvenile proceeds unimpeded and the other party is also protected from the negative consequences of the crime.

1. The Essence and History of Mediation

The term «mediation» may have originated from the Greek word medos (mediator, neutral); its Latin root verb “mederei” means to heal, and “Mediatio” means intermediation. Mediation involves a procedure or method used by a neutral intermediary (mediator) to assist the parties in resolving a dispute based on the principles of voluntariness, autonomy, and openness to outcomes. According to the Law of Georgia on Mediation, mediation is defined as: «A process, regardless of its name, through which two or more parties, with the assistance of a mediator, attempt to conclude the dispute by mutual agreement, irrespective of whether this process was initiated by the parties or through grounds and procedures stipulated by law».

Based on the content of this article, it is important to note that prior to 2010, Georgian legislation did not recognize approaches towards juveniles in conflict with the law that were based on the child's best interest and their individual needs, nor did it provide for the possibility of using alternative measures of criminal prosecution. As a rule, the institution of reconciliation between the offender and the victim in Georgia, specifically Diversion and Mediation, is used in relation to both adults and juveniles. Essentially, mediation is considered a non-judicial process for dispute resolution. When viewed through the prism of criminal law, the prosecution plays an active role, as it decides whether to divert the minor and involve them in the mediation program or initiate criminal prosecution. It would not be an overstatement to say that supporting and proactively using the mediation program in criminal law is directly linked to Georgia's active pursuit of its European path and its goal of joining the European Union family.

1.1 The Implementation of the Mediation Program in Georgian Criminal Law

When discussing the institution of Restorative Justice, it is noteworthy that the institution of mediators existed in the social life of the Georgian nation from its earliest stages of development. A Mediatory Court operated in Georgia, the purpose of which was to reconcile parties to prevent blood feuds among those in conflict.

To speak of more contemporary foundations, prior to 2010, Georgian society essentially did not recognize a type of justice focused on restorative approaches. Consequently, alternative mechanisms for criminal prosecution were implemented after 2010. Regarding the history of Diversion and Mediation, a significant legislative regulation is the Order No. 120 of February 1, 2016, of the Minister of Justice of Georgia, which includes numerous practical components in this field. The Juvenile Diversion Program was launched in 2010, though the legislative regulation at the time was very scarce. In this regard, the Explanatory Note of the Juvenile Justice Code is interesting, as it explicitly indicated, when justifying the necessity of adopting the Code, that the “necessity of adopting the Juvenile Justice Code came onto the agenda precisely because the legislation existing before 2016 did not pay sufficient attention to the best interests of the juvenile and did not prioritize alternative measures to criminal prosecution”. Finally, it is significant that since 2014, the House of Mediation has been functioning under the auspices of the Training Center of Justice of Georgia, where all conditions have been created for conducting mediation sessions. Within the scope of this article, we will also discuss the history of the implementation and development path of this institution in Georgia.

1.2 The Best Interest of the Juvenile in Criminal Law

Article 3, Section 4 of the Juvenile Justice Code defines the concept of the best interest of the juvenile, stating that the best interests of the juvenile are their “security, well-being, health protection, education,



development, resocialization-rehabilitation, and other interests, which are determined in accordance with international standards and the individual characteristics of the juvenile, as well as by taking their opinion into account." Furthermore, the Code on the Rights of the Child establishes the principle of prioritizing the child's best interests, specifically: "In determining the child's best interests, the right to personal development in a family environment, the child's social and cultural characteristics, their ability to independently realize their own rights and freedoms, and the child's views shall be taken into account". When discussing the best interest of the child in criminal law, several circumstances must be considered. It is noteworthy that "the priority of the best interest does not imply leaving a juvenile in conflict with the law without reprimand within certain limits of criminal proceedings. Therefore, on the one hand, justice and public safety, and on the other hand, the best interest of the juvenile, are in active connection with each other. Each interest, collectively, derives from the constitutional principles of a legal and democratic state". In every criminal case, authorized state agencies must objectively determine the best interest of the juvenile. This determination must not be of a formal nature. In this context, the best interest of the juvenile is directly linked to the Diversion-Mediation program.

2. Prerequisites for Inclusion in the Mediation Program

The Mediation Program represents a form of innovation in Georgian criminal law. When discussing the prerequisites for the implementation of this program, we must highlight three significant factors: the juvenile's own willingness, the principle of the best interest of the juvenile, and, most importantly, the reasoned position of the decision-maker. The Convention on the Rights of the Child establishes the obligation for states to develop measures aimed at every child implicated in committing a crime that promote the juvenile's dignity and sense of self-worth, strengthen their respect for human rights and the fundamental freedoms of others, take into account the child's age, and consider the desirability of their reintegration into society and their performance of a useful role within the community. In the rules governing the use of the Diversion/Diversion and Mediation program for juveniles and the essential terms of the agreement to be signed between the parties, the Diversion Agreement is considered a civil law contract. The parties to this contract include the accused, their legal representative, the prosecutor, the social worker, or, where appropriate, a psychologist or other person. Diversion is an alternative mechanism to criminal prosecution that diverts the young person in conflict with the law from criminal liability, punishment, and conviction. However, it assigns them responsibility for the committed act in an alternative format, thereby aiding in the comprehension of the crime committed. It is noteworthy that Georgian criminal law considers this institution under different dimensions when the fate of an adult is involved alongside a juvenile, as in such cases, the principle of considering the category of the crime applies. Unlike the case of juveniles, the Criminal Procedure Code of Georgia makes a clear stipulation for adults: in order to divert an adult, they must have committed a grave or less grave crime. Therefore, due to its limited applicability, it cannot be extended to individuals who have committed particularly grave offenses. To provide greater clarity on this issue, it is pertinent to cite Order No. 120 of the Minister of Justice of Georgia of February 1, 2016, «On the Approval of the Rules for the Application of the Diversion/Diversion and Mediation Program for Juveniles and the Essential Terms of the Agreement to be Signed Between the Parties.» This Order outlines the preconditions for Mediation/Diversion as follows, based on the following principles:

- Maximum promotion of the use of alternative mechanisms;
- Voluntariness;
- Proportionality;
- Confidentiality;

- Inadmissibility of stigmatization;
- Consideration of the true interest of the juvenile

2.1 Consent and Interest of the Juvenile

In the discussion above, the best interest of the juvenile has been highlighted multiple times as the fundamental starting point for the use of mediation. Beyond the existence of the best interest, a primary question is the clear understanding of how such an elevated circumstance, like the child's best interest, was prioritized. According to the Juvenile Justice Code, "The court is authorized, for the purpose of applying diversion, on its own initiative or based on a reasoned motion by a party, to return the case to the prosecutor, who shall offer diversion to the juvenile defendant and, with their consent, shall make a decision regarding diversion. Before making this decision, the court shall also hear the position of the other party". Consequently, apart from the decisive role played by official bodies, Diversion/Mediation cannot be realized unless the minor themselves consents to engagement and participation in it. It is universally recognized that in juvenile justice, the requirement of the legislator must in no case contradict the juvenile's best interest.

2.2 The Issue of Proportionality to the Aims of Punishment

The aims of punishment are outlined in the Criminal Code of Georgia, specifically: "The aim of punishment is to restore justice, to prevent new crimes, and to resocialize the offender". According to Article 9, Section 2 of the Constitution of Georgia, "Torture, inhuman or degrading treatment, or the use of inhuman or degrading punishment are inadmissible." It is significant to note that prior to the emergence of the Diversion/Mediation program, the strictest measures of punishment were applied to numerous individuals, and there were no alternative and balancing mechanisms to protect them from the most severe form of punishment, namely deprivation of liberty. Moreover, the Diversion Program was developed to decongest courts, correctional institutions, and temporary detention isolators, and to allow greater attention to be focused on more dangerous offenses. We share the German approach, which suggests that "Punishment in relation to a juvenile must primarily serve their education. In juvenile justice, punishment should be future-oriented". Unlike for adults, Georgian criminal legislation defines the aims of punishment differently in the case of juveniles, namely: "Resocialization-rehabilitation of the juvenile and the prevention of new crimes". While reconciliation between the offender and the victim (mediation) does not constitute a form of punishment, its significance as an active method of resolving a conflict situation is directly related to the measures to be taken between the victim and the perpetrator of the crime. An important role of the aims of punishment is to resolve the conflict between the offender and the victim and to protect public order and safety. The long-term resolution of the conflict between the offender and the victim is possible through mediation, after which the threat of recurrent crime or revictimization is significantly reduced. G. Tumanishvili discusses the individual aims of punishment and the absolute and preventative theories in correlation with mediation. He notes that if the absolute theory is adopted, the expiation of a crime is also possible through mediation, since the restoration of justice does not always necessitate a repressive policy. Mediation is precisely the balancing mechanism that, on the one hand, does not exacerbate the juvenile's criminal status and, on the other hand, does not cause public dissatisfaction through the cessation/replacement of criminal prosecution. By effectively utilizing educational justice and the targeted application of the mediation program, the aims of punishment are maximally attainable.



3. International Practice and Established Standards

International legal sources confirm that the use of mediation in criminal disputes enjoys considerable support and is particularly popular in the United States of America. One textbook expresses the view that "Criminal mediation is the same process as any other type of mediation, and the same issues frequently arise, but it is always complicated because emotions are extremely high. It is not uncommon for the defendant to be mentally unstable, poorly educated, angry, or aggressive. Sometimes the defendant combines all of these and more."

The example of Portugal is significant, where a specialized system has been established at the state level by relevant agencies to ensure the implementation of mediation in criminal disputes.

Specifically, "The Mediation System is an institution promoted by the Ministry of Justice. It allows the defendant and the victim to use mediation to resolve crime-related disputes out of court, in accordance with Law N21/2007 of June 12, 2007." The mediator contacts the accused and the victim to provide information about the specifics of the mediation procedure, including its nature, aims, and rules, as well as the rights and duties of the parties and the mediator. If the mediator fails to obtain consent from both the defendant and the victim to conduct the mediation procedure, they inform the Public Prosecutor's Office, and the court proceedings continue. In other instances, after the prosecutor returns the case to the mediator, mediation must be completed within a maximum period of three months; otherwise, the criminal proceedings will resume. The Norwegian model is interesting, as Norway is considered one of the developed countries where the institution of mediation is actively utilized. Norway was one of the leading countries in Europe to introduce the institution of mediation in criminal law. Initially, it was a pilot project established in 1981 for juvenile offenders (persons under 18 who committed a crime for the first time). Subsequently, starting in 1983, Conflict Resolution Boards were established in individual municipalities to implement experimental mediation projects in their territories. Over time, mediation was also implemented for adult offenders, and the restriction related solely to first-time offenders was removed. Cases were transferred to the Conflict Resolution Boards.

In Norway, a case can be transferred to criminal mediation in three instances:

1. When the prosecutor believes that the offender's guilt will be proven and transfers the case to a mediator for the purpose of an alternative sentence.
2. When the Norwegian Correctional Service, in agreement with the convict, determines the exact content of the community punishment within the boundaries set by the court.
3. When it is directly stipulated that participation in mediation is a condition for the suspension of the sentence.

3.1 Mediation in Criminal Law: Approaches and Current Practice – The Example of the United States of America

In the United States, all states have laws regulating mediation, and although mediation is not directly provided for in most states, the same laws apply to it nonetheless. The Victim-Offender Mediation (VOM) process continues to develop in the United States, enjoying increasingly greater popularity. It is noteworthy that national organizations, such as the American Bar Association, the National Council, juvenile and family courts, and other structures, clearly integrate the rules of mediation into their principles for the administration of justice. Currently, the existing model in the United States requires further development; specifically, there is a need to shift more significantly from traditional justice methods towards alternative mechanisms, and further expansion in this direction is necessary. The institution of mediation in criminal disputes in the United States originates from the 1970s and 1980s. It was during this period that the

implementation and integration of the Scandinavian model effectively began in the U.S. In the 70s, it covered offenses such as petty hooliganism and misdemeanors committed by juveniles. During the same period, the so-called Victim-Offender Mediation Program was established, first implemented in Minnesota. From the 80s, this project was implemented in several states, including Colorado, Pennsylvania, and others. In the 2000s, the development of mediation solidified and covered numerous areas, while in the 2010–2020 period, mediation took on a modern form and acquired the potential for use across various crimes. Based on data from the National Survey of Victim–Offender Mediation Programs operating in the United States, there are 289 Victim-Offender Reconciliation programs active. The same study indicates that approximately 65 percent of participants were required to admit guilt. Average statistics in the United States show that the average rate of willingness to participate ranges from 60 to 70 percent. In the United States, approximately 50 percent of cases are resolved by settlement if the parties agree to mediation. The institution of mediation is particularly popular in cases involving juveniles. A study conducted in 2016 in the United States found that, of the approximate number of cases involving juveniles, 5.3% were resolved through mediation, while 29% were resolved without mediation [4]. A survey conducted in the United States (by Umbreit & Coates) found that 79% of victims expressed satisfaction with the results of mediation, as did 87% of offenders.

4. Statistics on the Use of Mediation in Georgia

This chapter will focus on the rate of use of Diversion-Mediation in relation to juveniles. Prior to 2010, Georgian legislation did not recognize approaches towards juveniles in conflict with the law that were based on the child's best interests and individual needs, nor did it provide for the possibility of using alternative measures of criminal prosecution. It is noteworthy that the Diversion and Mediation program initially operated on a limited basis, covering only four cities in Georgia: Tbilisi, Rustavi, Kutaisi, and Batumi. However, since the Juvenile Justice Code stipulates that the possibility of using diversion or restorative justice measures must be considered first for a minor, the scope of the program expanded, and it has been applied throughout Georgia since 2014. According to data available in 2019, more than 3,000 juveniles had been diverted since the program's inception, of whom only 134 committed a repeat offense. This unequivocally attests to the program's effectiveness in Georgian criminal law. In 2016, the scope of the Diversion-Mediation program was broadened by the Juvenile Justice Code to include a wider circle of individuals; besides minors, it became possible to involve persons aged 18 to 21 in the program. A notable increase in enrollment in the Diversion-Mediation program was observed in 2022-2023. Specifically, in 2022, 585 juveniles and 590 adults were included in the program, and in 2023, the figures were 544 juveniles and 456 adults. This indicator is clearly growing compared to previous years.

Conclusion

The present paper has examined the essence of mediation and the diversion institution, which is widely used in criminal law. Numerous disputes have been resolved through the involvement and utilization of the Diversion-Mediation program. Georgia is considered a country that implements traditional justice, yet in parallel with the refinement of the legal system, alternative and educational justice mechanisms are also being widely introduced, which requires continuous support. The research and international surveys cited above clearly and unequivocally confirm the fact that alternative justice mechanisms enjoy enormous popularity in several European and Latin countries, making the task of crime prevention more prospective. One of the fair and progressive steps taken in the recent past is the extension of the Diversion-Mediation program to certain categories of adults, an effectiveness that is substantiated by existing statistics. The



Mediation-Diversion program excellently addresses one of the significant challenges of modern justice, specifically the issue of prioritizing the best interests of the child, as the current statistics and the growing rate of usage serve as confirmation of this fact.

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