MEDIATION
IN GEORGIA:

FROM TRADITION TO MODERNITY

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MEDIATION IN GEORGIA:
FROM TRADITION TO MODERNITY

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Dispute is an inevitable part of peoples' lives. At any stage of the development of humanity and in any part of the world, there have been disagreements which show themselves in disputes among persons and families/communities as well as in conflicts between states. Today, the growth of the Earth's population, limited natural resources and humanity's technological progress have accelerated the rhythm of life alongside many other factors which have also resulted in the frequency of disputes and their increased poignancy. In parallel, the destructive effect of these disputes has also grown. Disputes which cannot be resolved efficiently may become a significant barrier for any country's economic and democratic development.

Three general methods of dispute resolution are known: [1] first, when parties resort to force or power to resolve their dispute – the so-called "power based" method; for example, when people use physical force (fights, wars). The main characteristic of this method is that parties use power to achieve their desired outcome and/or force the other party do what he does not want to do. Second, there is the so-called "rights based" method – when disputing parties refer to a third party to determine who is right and who is entitled to what. An example of this method is the reference to the court or arbitration by a judge or arbitrator to decide on the case.[2] The third is the so-called agreement or interest-oriented method when the parties negotiate to try to find a solution which would be acceptable for both of them. An example of this approach is interest-based negotiation or mediation.

If we look at the world map and the violence that takes place everywhere, not to mention wide-scale wars, it becomes obvious that the power-based approach to conflict resolution still dominates. Similarly, if we take the caseload of Georgian courts, for example; in particular, the ever increasing

[1] These three approaches to negotiation/dispute resolution were described in William Ury, Jeanne Bret and Stephen Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict,* (JosseyBass Publishers, 1988).

[2] A right might also be used as a tool of power.

number of cases assigned per judge annually, we shall see that the transfer of responsibility to a third party (whether a judge or an arbitrator) and the delegation of decision-making to him is quite popular among us. Each of these methods certainly has advantages along with their drawbacks and it is possible that there may be disputes which can only be resolved by the use of power or by referring to the courts. However, this is rarely the case. We have simply become used to the resolution of disputes in this way; besides, there are often psychological barriers hindering attempts to negotiate with an opposing party. Consequently, in the majority of cases we act under the presumption that the use of force/power or "appealing" to a third party is the surest, if not the only, way to resolve a disagreement. In doing so, we fail to acknowledge the cost of dispute resolution which comprises financial, time and human resources in order to resolve the dispute. We do not consider if there is a better alternative. Most importantly when dealing with a dispute in this way, its resolution is only "technical" and usually only temporary; the relationship between people is not restored and often becomes more strained or even destroyed.

The dispute resolution mechanism oriented towards "agreement" or the "interests" of the parties of which mediation is an example, ensures the resolution of the dispute within a short period of time and with significantly less costs. What is most important, too, is that it helps people (as well as companies when the parties to a dispute are legal entities) restore their relationships.[3] Mediation is in a way a transformative[4] process. With its structure and the skills of a mediator, the parties are given a unique opportunity to listen to each other, learn what drives each of them when asserting a certain position and uncover their needs while exploring their own interests as well as those of the other party. As a result of all of this, when parties are equipped with more knowledge on their own and the needs and interests of the other party, the parties, as a rule, come to a turning point. They shift to a creative phase when they start searching for a solution which would correspond to the interests of them both. The very fact that a mediated agreement is always based on the will of the parties is

[3] It should be noted that the restoration of relationships is more characteristic of the so-called "facilitative" mediation than the "evaluative" model of mediation. For the difference between these models, please see footnote 8. The author of this work follows the "facilitative" style of mediation which is a classical model of mediation. Consequently, reference to mediation in this paper in the majority of cases implies a reference to the "facilitative" model of mediation.

[4] I do not mean the so-called "transformative" model of mediation. I refer to "facilitative" which in my view provides the possibility for the transformation of disputing parties towards cooperation.

a guarantee of the sustainability of such an agreement and it ensures the long-term resolution of the dispute.

One can talk extensively about mediation and its advantages. This is not, however, the purpose of this Foreword nor of this research. The pre-eminence of mediation has been recognized by leading developed countries. The European Union has also been calling its existing and to-be member states to use mediation more widely.[5]

We are happy that the European Union and the United Nations Development Programme have determined the raising of the awareness of mediation as a method for dispute resolution to be one of their priorities. It is precisely within the framework of this program that it was decided to conduct a study on the history of mediation in Georgia. It is hoped that with a better understanding of the past, we shall acknowledge not only that the peaceful resolution of disputes has been a part of our tradition but also the factors which created the need for establishment of mediation in the past. Most importantly, I hope that we shall manage to build on our past the institution of mediation which can respond to the major challenges of the present and future. This research has been conducted in the spirit of this idea.

[5] Directive of the European Parliament and EU Council 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters. Also, the call of the European Commission of August 20, 2010, http://europa.eu/rapid/press-release_IP-10-1060_en.htm?locale=en, seen on 11.09.2016.

INTRODUCTION

Each country has its own tradition of dispute resolution comprising a part of the legal culture of every society. The purpose of this work is to explore the historic roots of one specific form of dispute resolution in Georgia – mediation.

This work does not intend to be an extensive scientific research study on the historic roots of mediation. Its scope is limited by the confines of the initial mission: to provide a short historical overview of how, when and where mediation has been practiced in Georgia alongside looking at its specific characteristics. Therefore, the research may not fully represent the rich tradition of mediation of different parts of the country. In fact, the work devotes a separate chapter to the tradition of four selected Georgian regions.[6] It is hoped that other researches will have more time, resources and interest in order to further identify and describe the particular traditions of mediation in each of the country's regions.

Historical documents were consulted, interviews were held with a number of historians and a field trip was undertaken to the region of Svaneti in order to collect information for this work.

The main findings are as follows:

- Mediation was a developed method of dispute resolution already at the early, pre-state stage of social development in Georgia. It was preserved and maintained during the Middle Ages and is still being practiced in some parts of the country.

- The term "mediation" is not foreign to Georgian law. It is precisely this and a number of other terms ("bche," "morevi" and "rjulis kaci") which have been used to indicate the institution of conciliator, me-

[6] No pre-defined criteria for the selection of these parts was adopted. At the outset, it became obvious that the tradition of mediation stayed alive for a long period in Svaneti and Khevsureti and is present even today (although on a smaller scale). Several sources have been found with respect to Pshavi. Abkhazia was a particular subject of interest due to its ethnic, religious and political factors.

diator and intermediary in Georgia.

• A distinctive feature of historical mediation from contemporary mediation is that the historical mediator issued a decision. Therefore, along with the reconciliation of the parties, the mediator's function was to establish the truth. For this reason, the mediator studied the case, heard witnesses and took oaths from the parties, etc. The contemporary form of mediation excludes the possibility for a mediator to issue a decision.[7] The role of the mediator, pursuant to the system which exists today, is limited to posing questions to the parties, managing the process and assisting the parties in exploring their own interests as well as those of the other party with a view to possible ways for the resolution of a dispute.[8] The decision with respect to the dispute's settlement is made by the parties themselves. This way, it can be said that the past form of mediation was in a way a hybrid of what is mediation today, on the one hand, and arbitration, on the other hand. An element which is characteristic of modern-day mediation and was also shared by its historical counterart is its primary purpose: the reconciliation of the parties. An element characteristic of arbitration is that the mediator in the past, similar to the arbitrator today, rendered a decision. Even more, the procedure for the selection of the mediator, his challenges and the whole management of the process was to a great extent characteristic of what comprise arbitration proceedings today. Therefore, it may well be said that Georgian legal culture was familiar with the institutions of both mediation and arbitration.

• And finally, a significant role in the process of mediation was played by the taking of an oath; in particular, oath taking on an icon. This is not surprising since mediation to some extent was anal-

[7] The "evaluative" model of mediation allows the mediator to express his viewpoints and propose possible/recommended ways for the resolution of a dispute. Such an "evaluation" is non-binding for the parties.

[8] There are a number of styles/models of mediation. "Facilitative" mediation is a classical model and is oriented on the exploration of the interests of the parties. The mediator manages the process while the responsibility on the substantive outcome of the resolution rests with the parties. "Evaluative" mediation includes the possibility for a mediator to indicate to the parties their possible weak and strong points, give recommendations and share his formal or informal viewpoint on the prospective resolution of the dispute. Such an "evaluation" of the mediator is not binding for the parties. The "transformative" model of mediation is relatively new and is distinct due to the mostly passive role of the mediator. In the course of transformative mediation, the decision on the substantive outcome of the resolution as well as on the conduct of the mediation process is made by the parties.

ogous of the court process with the oath having an important evidentiary significance in customary law. It can be stated that in a way oath taking on an icon was the pillar for mediation since the trust of the parties in the process, as well as the enforceability of the decision rendered by mediators, was conditioned by the oath. There was a number of different forms and contents of oath taking which accompanied diverse procedures of reconciliation.[9] Often, the oath had the content of a curse, on the one hand, and a blessing, on the other hand. A more detailed description of the oath goes beyond the purpose of this work and, therefore, it will be described as necessary within discussions of the mediation process.

[9] For example, Egnate Gabliani refers to reconciliation by means of "lighvrine" – an oath of parity and equality given together with the co-oath givers of the offender; "lighvrine-megnaur" – the same oath given solely by the offender, etc.

Historical documents use a number of terms referring to a conciliator, mediator and intermediary. Some interpretation should be provided in relation to these terms in order to clarify the context of their usage in this work.

Mediatori/Mediatore – The term "mediatori" is thought to have spread across Georgia from early periods since it is denoted in the dialects of all parts of the country. The term "mediator" comes from the word "median" which is Latin and means "middle." It is not known exactly when this term became an inherent part of the Georgian language. Sulkhan-Saba Orbeliani did not include it in his dictionary, perhaps due to its foreign origin. In Georgian explanatory[10] and Mengrelian[11] dictionaries, it has the meaning of a conciliator or intermediary.[12]

Bche – In Old Georgian, any person considering a dispute, whether ecclesiastic or secular and whether chosen by the parties or appointed by a state authority, was referred to as a "msajuli" (juror) or "bche" and a bit later – as "mosamartle" (judge). These terms were even used in the same context interchangeably. In Western Georgia, the term "bche" maintained the meaning of a judge appointed by state authorities while in Eastern Georgia from the 18th century on, the term "bche" departed from this meaning and shifted to customary law with the meaning of a mediator.[13] Ivane Surguladze deems that the term "bche" has a twofold meaning: with its general meaning, it indicates a judge or a juror and with a narrower meaning – an intermediary or a mediator. According to Surguladze, "bche" is used within the context of a mediator in the *Law Book of Vakhtang VI*.[14]

[10] *Explanatory Dictionary of the Georgian Language, V*, Tbilisi, 1958, p. 151; cited in: S. Bakhia-Okruashvili, *Customary Law of the Abkhaz People,* Tbilisi, 2014, p. 130.

[11] O. Kajaia, *Mengrelian-Georgian Dictionary, II*, Tbilisi, 2002, 2040; cited in: S. Bakhia-Okruashvili, *Customary Law of the Abkhaz People,* Tbilisi, 2014, p. 130.

[12] S. Bakhia-Okruashvili, *Customary Law of the Abkhaz People*, Tbilisi, 2014, p.130.

[13] M. Kekelia, "For the Meaning of the Term "Bche" in Georgian Law Books", Herald of the Georgian Soviet Socialist Republic Academy of Sciences, #4, Tbilisi, 1973, pp. 169-170.

[14] Iv. Surguladze, *For the History of the Georgian State and Law,* Tbilisi 1952, p. 347.

Rjulis Kaci (Man of Denomination) – This refers to a mediator judge in Khevsureti. It should be noted that the term "rjuli" in Khevsureti referred to a mediation court as well as the consolidation of the norms of Khevsur customary law.[15]

Morevi/Morvili/Moruali – Mediator in Svaneti.

Intermediary/Middleman – In Old Georgian, a person selected by the parties to consider a case.[16] Later on, this term was used to refer to those persons who were persuading and expostulating the parties on the process of mediation.

Metskulari/Motsikuli/Nemsgamzdeli – An intermediary or middleman in Svanetian who tried to the convince parties on the process of reconciliation and pursued their reconciliation prior to the start of the mediation process.[17]

Lepkhuli/Lepkhvil – A co-oath giver named by the aggrieved party whose engagement was to be ensured by the offender. Pursuant to one source, the amount of compensation to be given by the offender to the aggrieved party was defined using "lepkhvils."[18] Pursuant to my informer, the "lepkhul" had the role of a surety co-oath giver. For example, if there were no witness to the offence and the suspect denied that he committed the offence, the family of the aggrieved would ask the suspect to give an oath and to ensure giving oath by "lepkhvils" named by the aggrieved side. The aggrieved side would select persons whom they regarded to be highly trusted to be their "lepkhvils".[19]

Makhvshi – Head person, chief in Svaneti. The head of the family was called "kora makhvshi." "Sopeli makvshiob" was the head or the chief of the village.[20] The "makhvshi" were respected people and played a significant role in getting parties to agree on the process of reconciliation.

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[15] G. Davitashvili, *Mediation Court or "Rjuli" in Khevsureti,* Tbilisi, 2001, pp. 14, 16.

[16] M. Kekelia, "For the Meaning of the Term "Bche" in Georgian Law Books", Herald of the Georgian Soviet Socialist Republic Academy of Sciences, #4, Tbilisi, 1973, p. 169.

[17] S. Bakhia-Okruashvili, *Customary Law of the Abkhaz People*, Tbilisi, 2014, p. 131.

[18] B. Nizharadze, *Free Svan,* Publication of Tbilisi University, 1962, p. 101.

[19] This information was provided by mediator Karim (Bachuki) Phaliani with whom I spoke in Mestia.

[20] Kh. Akhabegov, "Egnate Gabliani and Svanetian Customary Law", cited in: *Georgian Customary Law* edited by M. Kekelia, Tbilisi, 1990, p. 87, 89.

Mediation is the initial method of dispute resolution in the field of justice. It is the oldest means of exercising jurisdiction that also existed in the times of redemption through blood; that is, the killing of a murderer or a member of his family for the purposes of revenge. Mediation belongs to the period of development of humans and society referred to as the pre-statehood era.[21] As noted by Alexander Vacheishvili, "mediation proceedings […] prove that certain forces are born within belligerently minded, independent social groups which aim to remove and restrict the indefinite, never-ending and rampant revenge and somehow limit the destructive custom of redemption through blood."[22]

Following the disappearance of community regimes and in parallel to mediation proceedings, public/state methods of exercising justice started to appear. "The judge[23] is introduced once community regimes disappeared and other forms of government were established. For this reason, a judge is elected by the government and not by the complainant or the respondent. In contrast, the government has nothing to do with a mediator. Since the performance of justice initially depends on the free will of the complainants and the respondents, the institute of the mediator is born earlier than the notion of the judge. The same happened in Georgia."[24]

Thus, the mediation court was a part of Georgian legal culture (as well as the cultures of other peoples in the world) at an early stage of society's development. This institute continued to exist even after the state methods of exercising justice were developed in Georgia. This is also evidenced by monuments in Georgian law. Several sources of Georgian law providing

[21] Al. Vacheishvili, *Findings from Georgian Law History,* Volume I, 1946, p. 11.

[22] Al. Vacheishvili, *Findings from Georgian Law History,* Volume I, 1946, pp. 8-9.

[23] "Judge" means a judge appointed by the government and not the mediator who is chosen by the parties.

[24] N. Urbneli, *The Rulers ("Atabagi") Beka and Aghbuga and Their Law Code*, Meskhiev and Poletaev printing-lithography, Tbilisi, 1890, p. 69.

information about mediation courts are noted below.

Beka Aghbuga's *Law Book*[25] refers to "deliberation by mediators" which should mean the reaching of an agreement and reconciliation with the assistance of intermediaries. Phrases such as "placed as mediators," "intervening as mediators" and "under the supervision of mediators" refer not to individuals who express the will of the monarchy but, rather, to the individuals who have no court functions but are chosen by the parties for resolution of a specific dispute.[26]

Ivane Surguladze also considers that the terms "judge" and "mediator"[27] have different meanings under the *Law Book of Vakhtang VI*.[28] The author refers to Article 3 of the *Law Book* which addresses the judge and Article 215 which refers to the mediator. According to Surguladze, the legislator refers to the mediator under Article 215 and describes his activities differently from the activities of the judge. The author further concludes: "Therefore, the mediator is hereby understood as an intermediary."[29] However, according to the *Law Book of Vakhtang VI,* the mediator should be appointed by the King. Although the mediator is perceived as the appointed official in this case, Surguladze still considers that the mediator is an intermediary who carries out the functions of the conciliator. To prove this, the author resorts to the Deed of 1657. A certain individual, named Khizana, committed a murder and writes that he was tried in front of the King's court. He deserved the death penalty; however, as a result of the intervention of judges and mediators, he avoided such a punishment. Therefore, apart from the King's court, the mediator also participated in the proceedings and served as an intermediary and a conciliator.[30]

The Georgian version of the Greek law included in the Law Book of Vakhtang VI also refers to the concept of the mediator: "Where two individuals have a dispute, it should be submitted to the judge; however, if they do

[25] *Beka and Aghbuga Law, Monument of Old Georgian Legislation.* Compiled in the XIII—XIV centuries. Is included as Chapter 6 of the *Compilation of the Law Codes of King Vakhtang VI,* entitled "Aghbuga Law."

[26] S. Oniani, "For the Purposes of the Term "Judge" in the Old Law of Georgia", TSU Law Faculty Law Journal, #2, 2013, p. 16.

[27] In this case, the "mediator" appears as the mediator and not as a judge.

[28] The compilation of laws created in 1705-1708 by the codification commission on the basis of the order from Vakhtang Batonishvili. Chapter 7 of the compilation is the "Law of Vakhtang Batonishvili" which comprises an introduction and 270 Articles. The main source of the Law Code of Vakhtang is the customary law of Georgia.

[29] Iv. Surguladze, *For the History of the State and Law of Georgia*, Tbilisi, 1952, pp. 346-347.

[30] Ibid., p. 348.

not wish to approach the King, the Patriarch, the Metropolitan or the judge for justice, then such individuals may select one person. They should approach this person and inform him about the dispute while declaring that they will accept his decision. Such a person will be referred to as the mediator (Article 136)."[31]

The chapter entitled "Selection of the Mediator" in the *Bill of Davit Batonishvili*[32] is also noteworthy. According to the *Bill*, the mediators may be appointed by the King and may also be chosen by the parties. If the mediator fails to consider the case, then the party has to refer to the "initial justice;" that is, the King's court.[33] In his later works,[34] Davit Batonishvili writes that mediation was mostly held for complicated and trade related cases. The mediators took an oath that they would consider the case impartially. He further notes that the members of the royal family could also serve as mediators in certain disputes if they so wished.

The Deed of 1789, referred to in Ivane Surguladze's book, is of interest in this respect. According to the Deed, there was a dispute between the sons of Zaal and the Berukashvili family which was not resolved even by the King's courts. The parties in the dispute addressed the Queen regarding the mediation court and received her approval. The Deed provides that: "These both parties, the sons of Zaal, selected me, Begtabegishvili, secretary Begtabeg and Zaal Gabashvili, and the Berukashvili family selected me, Ioane Turkistanishvili, and the priest, Father Shio. After being selected by the parties and based on their voluntary choice, we, the above mentioned people, considered the case, reviewed the complaint and examined the letters that they had received from the Kings as well as other old or new letters. We read and examined all of these materials." As a result of this consideration, they made a decision that was accepted by the parties. The decision was signed by all four of the chosen persons and endorsed by the King, the Queen, the Catholicos and the princes. The princes referred to this decision as the "deal book" whereas the Queen called it a "fair set-

[31] Cited S. Oniani, "For the Purposes of the Term "Judge" in the Old Law of Georgia", Law Journal of TSU Law Faculty, #2, 2013, pp. 16-17.

[32] Law of Davit Batonishvili, the Draft of Code of the Laws of Georgia, which was compiled by Davit Batonishvili at the beginning of the 19th century.

[33] Iv. Surguladze, *For the History of the State and Law of Georgia,* Tbilisi, 1952, p. 349.

[34] David Batonishvili, *Review of the Laws and Legislation of Georgia,* 1813, pp. 254-258, cited in: Iv. Surguladze, *For the History of the State and Law of Georgia*, Tbilisi, 1952, pp. 354-356.

tlement." [35]

Isidore Dolidze, who researched "customary law,"[36] notes that Article 60 refers to the different categories of judges: the mediator, "bche" and the judge. The mediators were selected by the parties. The judges were appointed by the order of the King.[37]

In 1868, judicial reform was carried out in Caucasia. We know this period as the time when Ilia Chavchavadze was practicing in Dusheti. He initially served as conciliator (as intermediary, as he states himself) and, further, he carried out the function of judge-conciliator after the judicial reform. [38] It is in this period that serfdom was abolished in Georgia and one of the obligations of the intermediary was to regulate the relations between the released peasants and the landlords (the functions of the intermediary included drawing up deeds, determining the space of the land plots and fixing the amount of payment for land, and executing and certifying voluntary settlements between landlords and peasants, etc.). He was also authorized to consider complaints related to the violation of village administration rules although the role of the "judge" prevailed over the role of the "conciliator" or the "judge-conciliator" in this case. By the regulation which entered into force on November 22, 1866, the judge-conciliator was granted personal judicial powers over his district. He was competent to decide civil cases as well as criminal actions and infractions determined by the statutes on civil and criminal law proceedings.[39]

Although Ilia Chavchavadze himself carried out his duties impartially and in good faith and was distinguished by his fairness, the entire reform was still very painful for the Georgian people. As a result of the reform, Russian laws were implemented in the country, the appointment of the conciliator from the pool of local candidates was limited and proceedings were carried out in the Russian language. Chavchavadze criticized the reform, asking if

[35] Iv. Surguladze, *For the History of the State and Law of Georgia*, Tbilisi, 1952, p. 351.

[36] Handwritten Note of Old Laws and Customary Laws Adopted by the Kings of Georgia which was discovered by Professor P. Gugushvili. It is assumed that this compilation of customary laws was prepared in 1813, see. https://ka.wikipedia.org/, seen on: 10.11.2016.

[37] I. Dolidze, *Customary Laws of Georgia*, Tbilisi, 1960, pp. 133-134.

[38] "Civic-Literature Movement in the 1960-1970s", p. 39, available at: http://dspace.nplg.gov.ge/bitstream/1234/3003/1/KartuliLiteraturisIstoria_Tomi_IV.pdf, seen on: 09.11.2016.

[39] See blog, "Ilia Chavchavadze as a Lawyer", available at: http://www.tabula.ge/ge/tablog/93203-iuristi-ilia-chavchavadze, seen on: 09.11.2016.

it was easier to find "a man in Jaroslav for the office of judge-conciliator in Georgia or in Georgia itself?"[40] The Russian legal system was particularly unacceptable for the people in the mountains. They found it extremely difficult to adapt to the foreign laws. The contradictions between the customary laws in the mountains and the Russian laws were also addressed by Vazha Pshavela several times. "If all cases of Khevsureti were subject to the new laws, Khevsureti would be based in Kamchatka by now," he noted. Pshavela saw that foreign law corrupted and morally diminished the people in the mountains and they were losing their faith in justice which was measured by the amount of vodka delivered to the Russian courts as a bribe.[41]

It is the unacceptance of the foreign laws on the part of the people in the mountains and the constancy of customary law that led to the existence of the practice of mediation for the longest period of time. The following section provides a more detailed description of the mediation processes in several regions of Georgia, some of which are still being practiced.

[40] Ibid.

[41] G. Davitashvili, "Vazha Pshavela and Georgian Customary Law", cited in: *Customary Law of Georgia* edited by M. Kekelia, Tbilisi, 1990, p. 38.

Form – Mediation was not a permanent institution. Mediators were chosen by the parties for each individual case.

Purpose – The primary objective of mediation was a peaceful settlement between the parties. Mediators would render a decision on the basis of which the guilty party was normally obliged to compensate the damage to the aggrieved party. The decision was to be satisfactory for the aggrieved party in order to preclude any future hostility or revenge.[42] It should also be noted that compensation lost its essential role in later periods. Even in earlier periods, it had an important although secondary importance. The imposition of compensation was only a means to achieve a settlement between the parties. It often happened that the aggrieved party would refuse to accept the awarded compensation. Mikhako Kekelia, when describing the customary law of Pshavi, notes that the acceptance of an awarded amount of compensation by the aggrieved party has almost vanished today; people are more hesitant to accept it.[43] At all times, the primary purpose of mediation was a settlement between the parties.

Agreement to Mediate – "To achieve settlement, first there is **factorship** and then mediation."[44] The preliminary stage of mediation was the persuasion of the parties on the process of settlement. This was for the intermediaries: people close to the family, sometimes village chiefs. These intermediaries would assure the parties of the lack of prospects of hostility and appeal to them to entrust the resolution of the dispute to persons well versed in customary law and come to a final settlement as a result of the enforcement of a just decision.[45] In some parts of Georgia, the convention

[42] A. Makharadze, "Essence of Conflict and the Institution of Mediation in the Historical Aspect", Shota Rustaveli State University, Works III, publication "Universali" Tbilisi, 2011, p. 44.

[43] M. Kekelia, *Georgian Customary Law*, 1993, p. 197-198.

[44] M. Kekelia, *Materials of the Customary Law of Pshavi,* notebook 1986, p. 8, cited in: *Georgian Customary Law*, edited by M. Kekelia, Tbilisi 1993, p. 189.

[45] G. Davitashvili, *Mediation Court or "Rjuli" in Khevsureti,* Tbilisi, 2001, pp. 37-38.

of a local community might also have intervened in the process of the persuasion of the parties vis-à-vis the process of settlement. For example, in Svaneti and Khevsureti, if the hostility between feuding families lasted for a long period of time and the engagement of intermediaries was not successful, the convention of the local community would advise the parties to agree on the process of settlement; otherwise, they were threatened with both the ire and the wrath of the entire community.[46]

Number of Mediators – The number of mediators was dependent on the complexity of the offence. In simple disputes, the number of mediators could be from two to four. In complex cases, such as murder, their number could reach as many as 12.

Method of Selection/Appointment – As a rule, mediators were chosen by the parties. Mediators could have been named by the intermediaries as well. Usually, the parties would nominate equal numbers of mediators although there were exceptions to this rule. For example, in the cases of murder the claimant in some communities could have the right to appoint more mediators.[47] If the mediator nominated by one party was unacceptable for the other, the latter could request his replacement in which case a new mediator would be appointed. Irrespective of who made the appointment, the mediator was required to be impartial in the process of the consideration of the dispute.

Characteristics of the Mediator – People chosen to be mediators were distinguished by their integrity, authority, wisdom, ability for calm and their piety. The mediator required good communication skills and to be able to "find the proper words in a critical situation."[48] As a rule, only men were to serve as mediators; it was particularly so in the mountains. Only in exceptional cases and in later periods could there be occasions when a woman was appointed as a mediator. Ekaterine Jorjoliani, who was a mediator in Svaneti at the beginning of the 20th century, is an example.[49] In the 20th century, we start to meet more women as mediators; in particular, in the

[46] G. Davitashvili, "Main Aspects Related to Court Organization and Process in Georgian Customary Law", *History of Georgian Law*, assembled by B. Kantaria, World of Lawyers 2014, pp. 88-89.

[47] Kh. Aghabegov, "Egnate Gabliani and the Customary Law of Svaneti", cited in: *Georgian Customary Law* edited by M. Kekelia, Tbilisi, 1990, p. 98.

[48] G. Davitashvili, *Mediation Court or "Rjuli" in Khevsureti,* Tbilisi, 2001, p. 38.

[49] Information and her photo is available in the archives of the National Library of Parliament of Georgia available at: http://http://www.dspace.nplg.gov.ge/browse?type=subject&order=ASC&rpp=20&value=მედიატორი, seen on 10.11.2016.

lowlands.

Rendering of an Award/Decision – The process of mediation ended with the mediators' decision. The decision was adopted not by the majority but, rather, by the unanimity of the mediators.[50] If a unanimous decision could not be reached, then the "rjuli" would be dismissed and the parties were advised to appoint new mediators. The reasons for the non-agreement and the position of each mediator remained secret.[51] The decision was announced orally.[52] Today, the main essence of the decision in Svaneti is formulated in a written form and signed by all of the mediators.[53]

Mechanism of Enforcement – Normally, prior to the commencement of mediation, the parties gave an oath that they would voluntarily accept the decision of the mediators. The enforcement of the mediators' decision was to a large extent guaranteed by the belief that perjury would result in severe calamity for the person who did not honor the oath.[54] The acceptance of the mediators' decision was up to the will of the parties. On occasions, society itself guaranteed its acceptance: "If the offender would not obey the community and not accept the decision, the community members themselves would take his cattle and slaughter it in a sacred place."[55] However, if one of the parties deemed the decision as unfair, he could demand a new process of mediation with different mediators. In this way, therefore, mediation might have been conducted several times.

Remuneration of Mediators – Information related to the remuneration of mediators is diverse. In Khevsureti, the men of "rjuli" were compensated for their work. Pursuant to Niko Khizanishvili (Urbneli), the amount of remuneration depended on the decision rendered as well as on the economic condition of the parties. The more "drama" the accused had to pay, the more compensation the mediators were entitled to receive from the parties. As a rule, the party which had to pay "drama" would pay less than the party who was to receive the "drama." However, if one or both of the parties

[50] G. Davitashvili, *Mediation Court or "Rjuli"* in Khevsureti, Tbilisi, 2001, p. 45.

[51] Ibid., p. 60.

[52] Ibid., p. 87.

[53] This information has been provided to me by Karim (Bachuki) Phaliani with whom I spoke in Mestia.

[54] D. Jabaladze, "The Issues of Georgian Customary Law in the Works of Historian Dimitry Bakradze", cited in: *Georgian Customary Law*, edited by M. Kekelia, Tbilisi, 1988, p. 60.

[55] M. Kekelia, *Georgian Customary Law,* Tbilisi, 1993, p. 199.

were poor, the mediators would cut their payment or waive it altogether.[56] According to Besarion Nizharadze, in Svaneti mediators were given the remuneration of one "lerkvash" (an item equal in value to three rubles).[57] However, both mediators to whom I spoke in Svaneti stated that mediators do not receive remuneration for their service today. It is considered noble and holy work which they perform gratis. In Abkhazia, mediators did not initially receive remuneration. Payment for their service was introduced during the administration of the Russian Empire and only later, in the second half of the 19th century.[58]

Subject of Mediation – In the mountains, both criminal and civil disputes were subject to resolution by mediation courts. In the lowlands, mediators dealt mainly with the resolution of family (division of the family) and neighborhood disputes.

Time Frame for Commencement of Settlement – Each part or community had its own rules as to when the settlement process could commence. These rules particularly concerned cases of murder. For example, in Pshavi, the process of settlement could not be started earlier than three years from the time of the murder.[59] However, in Abkhazia, where mediation was introduced a bit later and developed relatively slowly (due to a stronger tradition of blood-revenge), the community's distinguished members would contact close relatives of the aggrieved party immediately after the murder and try to negotiate the choice of mediators and their agreement on a peaceful settlement of the conflict.[60]

[56] G. Davitashvili, *Mediation Court or "Rjuli" in Khevsureti,* Tbilisi, 2001, pp. 74-76.

[57] M. Kekelia, "The Observations of Sulkhan-Saba of Svaneti – Besarion Nizharadze – on the Customary Law of Svaneti", cited in: *Georgian Customary Law* edited by M. Kekelia, Tbilisi, 1988, p. 89.

[58] S. Bakhia-Okruashvili, *Customary Law of the Abkhaz People,* Tbilisi, 2014, p. 131.

[59] M. Kekelia, *Georgian Customary Law,* Tbilisi, 1993, p. 189.

[60] S. Bakhia-Okruashvili, *Customary Law of the Abkhaz People,* Tbilisi, 2014, p. 130.

This section provides a brief review of the tradition of mediation in four selected parts of Georgia – Svaneti, Khevsureti, Pshavi and Abkhazia – which will give us a better understanding of the process and peculiarities of each region.

SVANETI

In Svaneti, the reconciliation of disputing parties was carried out by mediators who were also called "morvals."[61] Before "morvals" took on a case, the involved parties first had to agree on the process of reconciliation. This was the responsibility of the "matskhulars": (that is, the intermediaries). The role of an intermediary could also be carried out by the "makhvshi."[62] Frequently, less severe cases could also be mediated by the "makhvshi." In complex cases, the attitude of the guilty party was decisive in obtaining the aggrieved party's consent on reconciliation. In particular, Karim Phaliani, a mediator with whom I spoke in Mestia, notes that: "The guilty party should say in front of an icon whether or not he would have reconciled with the aggrieved party had he himself been aggrieved by the injured party in the same way as he aggrieved the other party. If the guilty party says that he would have reconciled, then they are deemed 'equal' to each other and it is easier to obtain the consent of the injured party on the reconciliation process. If the guilty party does not say so, then, normally, the reconciliation would not take place."[63]

Once the consent of both parties on the reconciliation process was obtained, then it was time for the mediators to step in. The Svanetians typ-

[61] J. Merabishvili, "Contribution of Rusudan Kharadze in Studying the Customary Law of Georgia, cited in: Customary Law of Georgia", edited by Mikhako Kekelia, 1990. p. 110.

[62] B. Nizharadze, *Free Svan*, historic-ethnographic letters, vol. I, Tbilisi, 1962, p. 95.

[63] This information was provided by mediator, Karim (Bachuki) Phaliani, with whom I spoke in Mestia.

ically say that "'morvals' are born by God."[64] The "morvals" themselves embraced this trust in them with great responsibility. They were afraid of accidentally breaking an oath made during the consideration of a case.[65] For this reason, the "morvals" did not consent easily to taking on the role of mediators. Egnate Gabliani refers to an interesting method for obtaining a mediator's consent: the party would take some religious item and follow the person who hesitated to act as a mediator. When this person entered his house, the party would follow him inside and make him touch the religious item while at the same time saying an oath after which the individual had no right to refuse serving as a mediator.[66]

The number of "morvals" required for simple civil cases was from three to five whereas for complex cases, such as heavy wounding or the abandoning of a spouse by another spouse, it would be from five to seven. The number of "morvals" for murder cases could reach 12 to 24.[67]

Ordinarily, the parties would name an equal number of mediators. However, a different rule could also apply. For example, in the Kali community (located in Upper Bal in Svaneti), a different rule was implemented in the middle of the 20th century. According to this rule, the full composition of mediator-judges was named by the injured party and each of them would be "attained" by the guilty party.[68] The "morvals" could not have been an enemy or a friend of any of the parties.[69]

Generally, the process of mediation would start by visiting the family of the complainant and listening to the factual circumstances of the case. After that, a visit would take place with the family of the respondent where the

[64] B. Nizharadze, *Free Svan*, historic-ethnographic letters, vol. I, Tbilisi, 1962, p. 94.

[65] Mediator Vaso Kvanchiani, with whom I spoke in the village of Latali, noted that today some of the mediators make an oath not necessarily regarding the making of a rightful decision but, rather, on making as rightful a decision as his mind and abilities would allow. This form of oath is not as strong. This way, it is ensured that if the mediator reaches an incorrect decision, even if not willfully but due to his inattentiveness or the false testimonies of the parties, for example, the mediator would not be considered to have broken his oath.

[66] K. Aghabegov provides the citation by Egnate Gabliani, "Egnate Gabliani and the Customary Law of Svaneti", cited in: *Customary Law of Georgia,* edited by M. Kekelia, Tbilisi, 1990, p. 98.

[67] K. Aghabegov, "Egnate Gabliani and the Customary Law of Svaneti", cited in: *Customary Law of Georgia*, edited by M. Kekelia, Tbilisi, 1990, p. 98.

[68] G. Davitashvili, *Main Aspects of Court Organization and Process in Georgian Customary Law*, cited in: *History of Georgian Law,* assembled by B. Kantaria, World of Lawyers 2014, p. 93.

[69] Eg. Gabliani, *Free Svaneti,* Tbilisi, 1927, cited in: K. Aghabegov, *Egnate Gabliani and the Customary Law of Svaneti,* cited in: *Customary Law of Georgia,* edited by M. Kekelia, Tbilisi, 1990, p. 98.

mediators would pass on the complaint in details to the respondent and listen to his response. Both families would be hospitable to the "morvals;" the hearing sessions were carried out at the dinner table (also referred to as the "supra"). Usually, this process of hearing and passing on information would last for several days. In complex cases, it would last longer. Besarion Nizharadze notes that: "The complaint was passed on to the respondent and the position of the respondent was passed on to the complainant in such a sweet and soft manner that both parties would appear in each other's eyes as suppliant, repenting and searching for the sole truth."[70] It appears that this kind of approach by the mediators together with their communication skills and psychological wisdom was a precondition for the reconciliation of the parties.[71]

The oath had a particular significance in the process of mediation. The mediators with whom I spoke in Mestia and Latali as well as the sources I consulted highlight the importance of an oath at all stages of the mediation process. In the first place, the mediators themselves would give an oath that they would consider the case impartially and correctly. Furthermore, the mediators would request that the parties give an oath that they would only say the truth with respect to the case.[72] The same oath was given by the witnesses and other participants in the process. The parties would also give an oath in advance that they would fully comply with the judgement rendered by the mediators as a result of hearing the case. Lastly, in the case of the reconciliation of the parties, the mediators would yet again request that the parties give an oath that they would not renew the hostility in the same matter. This "loyalty oath" was the guarantee of the future peacefulness between the reconciled families.[73] Generally, the oath was made in the churchyard. An oath in front of an icon would only be done in more complex cases; the church was not involved and the oath was given without the presence of an icon for considerably simple cases.[74]

After examination of the facts of the particular case, the "morvals" would

[70] B. Nizharadze, *Free Svan*, Tbilisi University Publishing 1962, pp. 96-97.

[71] The same approach exists in Khevsureti.

[72] Fraud on the part of the parties could lead to an inaccurate decision of the mediators which (irrespective of the fact that this happened independently from the mediators) would in turn put the mediators in the position of oath breakers.

[73] R. Kharadze, *Remnants of Big Families in Svaneti,* Tbilisi, 1939, cited in: J. Merabishvili, "Contribution of Rusudan Kharadze in Studying the Customary Law of Georgia", cited in: *Customary Law of Georgia*, edited by Mikhako Kekelia, 1990. p.110.

[74] This information was provided by mediator, Karim (Bachuki) Phaliani, with whom I spoke in Mestia.

isolate themselves, typically at the outskirts of the village, to discuss the case. At this time, the mediators would ask the "makhvshi," the most trustworthy person among them, to be first one to express his opinion on the amount of remuneration to be imposed on the respondent in favor of the complainant. The "makhvshi" would recollect the circumstances of the case and the rules established under customary laws as well as similar cases from the past and then state his conclusion. After the "makhvshi," next to speak would be the eldest person and then each of the "morvals" would express their opinion separately. Finally, all of them would arrive at a common conclusion. As a sign of reaching a decision, one of the mediators would take a little stone (also referred to as "bacha lildjeni"), dig a hole in the ground and then bury this stone in front of the mediator-judges. The meaning of this action was twofold: firstly, it indicated the conclusion of the case and secondly, it affirmed that the decision made would be held secret until the mediators jointly declared their decision to the parties. As for the declaration of the decision, it could be made after months or even years in light of the particular circumstances of the case.[75]

The decision of the mediators mostly concerned the amount of compensation (so-called "tsori' for the purposes of criminal cases).[76] However, apart from determining the compensation, the main essence of the mediation process was the reconciliation of the parties. The ritual of reconciliation accompanied the process of the declaration of the decision to the parties and the subsequent enforcement (as described below) indicate that the rationale behind the process was to terminate the hostility between the parties and for the guilty party to redeem its wrongdoing. The rituals were different for murder and non-murder cases.

Besarion Nizharadze describes the process of the notification of the decision to the parties on non-murder cases as follows: "The mediators visit the church where they inform the complainant and the respondent that they must come and give an oath of loyalty. The icon is placed in the churchyard. The judges stand by the fence and in front of the icon with their hats removed. The complainant and the respondent stand separately from each other with their male relatives. The complainant and the respondent speak separately. They curse the mediators if the latter dare to make

[75] B. Nizharadze, *Free Svan*, Tbilisi University Publishing, Tbilisi, 1962, pp. 98-99.

[76] J. Merabishvili, "Contribution of Rusudan Kharadze in Studying the Customary Law of Georgia", cited in: *Customary Law of Georgia*, edited by Mikhako Kekelia, 1990. p.110.

an unfair decision concerning one of the parties. After this, the 'makhvshi' appears and tells the parties that the mediators have made their decision which each of the judges considers just. Further, the remaining mediators declare unanimously as follows: 'We swear that to the best of our understanding, we have performed true justice.' Afterwards, the 'makhvshi' takes oaths from both parties, the judges are separated in two groups with half of them going to the complainant and the other half going to the respondent for the purposes of declaring the judgement. Neither of the parties had the right to reject the decision. The enforcement of the decision was not the responsibility of the judge-mediators. Usually, the guilty party would deliver the allocated amount to the injured party in a short time through the 'makhvshi' or one of his relatives."[77]

According to Rusudan Kharadze, the reconciliation process in a murder case was as follows: a feast would be held by the family of the murderer at a set date which was attended by the relatives of both parties. Before sitting at the table, one of the relatives of the murder victim would enter the home of the family of the murderer, open a "nicha," take it out and pour water on the fire. This symbolized the disappearance of the hearth and, therefore, implied a symbolic destruction of the family. Afterwards, they would sit at the table. The murderer and his relatives had no right to join those at the table until three main toasts were made (for the family who arranged and made the reconciliation, for Archangel Michael and for Saint George). Before that, one of the selected "morvals" would tell everyone about the committed murder and the terms of the reconciliation and inform them of the decision made by the "morvals." Afterwards, the murderer would enter the room, kneel and cross his little fingers as a sign of obedience. Following this, an exchange of mugs would take place and all was considered to have been reconciled. Frequently, the enemies would become like relatives or swear to be each other's brothers. Therefore, the process of reconciliation demanded the personal humiliation of the murderer apart from a monetary compensation.[78]

Civil as well as criminal cases were subject to the law of the "morvals."

Svanetian rules and traditions, apart from reconciliation through the intervention of the "morvals," also knew other methods of amicable dispute

[77] B. Nizharadze, *Free Svan,* Tbilisi University Publishing, Tbilisi, 1962, pp. 99-101.

[78] R. Kharadze, *Remnants of Big Families in Svaneti*, Tbilisi, 1939, cited in: J. Merabishvili, "Contribution of Rusudan Kharadze in Studying the Customary Law of Georgia", cited in: *Customary Law of Georgia*, edited by Mikhako Kekelia, 1990, pp. 111-112.

resolution such as, for example, entering the house with "lepkhuls," without "lepkhuls" and settlement by means of an oath by relatives and peers, among others. These three particular methods were only used for relatively simple offences. A more detailed description of these processes is outside of the scope of this research.

The Svanetian "lupkhvil" means a finger (pkhule) picked co-oath giver who could only be chosen by the injured party. Its essence was for the injured party to name the "lepkhulis" (1-20 individuals) which were to be procured by the guilty party; that is, the guilty party had to ensure their consent. Afterwards, negotiations would be held between the "lepkhulis" and the guilty party through the intermediaries in terms of the compensation to be paid to the injured party. Once the guilty party and the "lepkhulis" agreed among themselves, the "lepkhulis" would invite the complainant to the church where they also brought the guilty party. Following several ceremonies of oath taking, the "makhvshi" would tell the complainant the amount of compensation to be imposed on the guilty party. The guilty party would either deliver the compensation to the injured party right away through the "lepkhuli" or make the delivery in a short period of time through the "makhvshi." The guilty party would use the process of settlement through the "lepkhulis" in cases where he had caused great insult or injury to the other party for no reason and without legal justification. When the perpetrator notified the injured party about a settlement through the "lepkhulis," the injured party could not refuse the request unless he had an act of retaliation in mind.[79]

KHEVSURETI

The most common term for the mediator-judge in Khevsureti is the "rjulis kaci."[80] The use of the term "bche" is also found.[81]

In Khevsureti, a certain circle of people was formed based on their integrity, authority, reason and familiarity with the "rjuli" (laws) of the region. They often participated in law-related matters. The "rjulis kaci" (men of denom-

[79] B. Nizharadze, *Free Svan,* Tbilisi University Publishing, Tbilisi, 1962, pp. 101-103.

[80] G. Davitashvili, *Mediator Court or the Law Process in Khevsureti*, Tbilisi, 2001, p. 16; the literal meaning of "rjulis kaci" in English is "man of denomination."

[81] Ibid., p. 15. The literal meaning of "bche" in English is "debater."

ination)[82] could also be invited from other communities. Even Kist people could be sought to participate in complex cases.[83]

The amount of "rjulis kaci" depended on the severity of the case. For simple cases (payment of a loan, minor theft), three to six would be considered sufficient. For complex cases, up to 12 men would gather.[84] The "rjulis kaci" were selected by the parties or intermediaries. The parties were entitled to request the intermediaries themselves in order to fulfill the functions of the mediators in which case the intermediary could become a "rjulis kaci."[85]

The process of the consideration of a case was as follows: the "rjulis kaci" would study the case. For this purpose, they could also ask the intermediaries about the circumstances of the case since they were well familiar with the details. The mediators would first visit one party and ask detailed questions about the case. Further, they would visit the second party and pass on the position of the first party, word for word. The second party could refute the position of the counter-party. The mediators visited each of the parties several times in order to pass on the responses as necessary. If one of the parties threatened or referred to the other party with insulting words, the mediators would not, of course, disclose this information to the other party. They would soften harsh statements as possible since they tried to get the parties to seek favor and respect each other as a means of contributing to the spirit of reconciliation between them.[86] The witnesses could also be questioned at the hearing. If the accused party denied the crime or the witness made a decisive testimony, they could be asked to make an oath in front of a cross.[87]

The hearings were held in places of convenience, mostly outdoors. The disputing parties would select a place where they could neither see nor hear each other. When the hearing was held in front of a cross, the mediators could request that one of the parties appear in that location while the mediators would themselves visit the other party at their home. The main point was for the parties not to meet each other and not to hear each

[82] A woman could not be selected as the judge. Ibid., p. 40.

[83] Ibid., pp. 38-39.

[84] Ibid., p. 44.

[85] Ibid., pp. 40-41.

[86] Ibid., p. 52.

[87] The witness who was not the main witness giving a non-essential testimony would not be required to give an oath.

other's conversations.[88]

The second stage in the form of making the judgement started next. The determinative role in the decision-making was played by the precedent; that is, the "andrez."[89] The mediators would recollect the way in which similar cases had been resolved in the past. In the first place, they would ask each other to describe the "andrez" they heard concerning similar cases. The "andrezes" had a decisive importance for the outcome of the case. Therefore, individuals who were older and had the experience of serving as a "rjulis kaci" would invite young, clever people to attend the process so that they could remember the rules for conducting the process and the "andrezes" and be able to continue the practice further.[90] The decision was made unanimously. If the "rjulis kaci" was not able to come up with a judgement which would be acceptable for everyone, then the process would be cancelled and the parties advised to choose new mediators. However, such cases were rare. The mediators well understood that if they did not reach a unanimous decision, the parties would remain enemies and the chance for reconciliation, which was in their hands and whose fate was entrusted to them by the parties, could be lost.[91]

The decision would first be announced to the party responsible for paying the "drama" (a piece of money). After his consent, the same would be announced to the other party. The "rjulis kaci" would explain the decision and the reasons behind it in details to the parties. They might even have had to convince the parties that their decision was justified and that, for example, the decrease in the amount of "drami" was caused by necessity.[92] In certain cases, the "rjulis kaci" would even beg the parties to accept the ruling made: "The 'rjulis kaci' take off their hats, kneel, hang upon the trousers of the injured party and try to convince the party with appropriate words that the party accepts the ruling."[93]

If one of the parties considered the decision to be unfair, it could request a reconsideration of the case; it was therefore possible for the process to be

[88] Ibid., p. 48.

[89] Ibid., p. 57.

[90] Ibid., pp. 39-40.

[91] Ibid., p. 60.

[92] Ibid., pp. 62-63.

[93] Ibid., p. 71.

held for a second, third, fourth or more times.[94] If someone did not agree with the decision of the mediator in Khevsureti and approached official authorities with a complaint, the whole village and the community would confront such individual and turn him back, noting: "Are not you ashamed to put us in the hands of others?"[95]

The enforcement of the judgement was carried out in a short period of time after being declared. The judges participated directly in this process and visited the guilty party to receive the "drama." The mediators would take the guilty party to deliver the "drama" to the injured party. The guilty party would also carry one bottle of vodka as a sign of reconciliation. The guilty party would apologize to the injured party, the table would be set and the parties would finally reconcile.[96]

The "rjuli" (mediation process) was most often carried out for wounding, theft, divorce cases and disputes over property ownership, among others.[97] Murder cases would be subject to such a process if the murderer had yet to be identified or in complex murder cases where there was a dispute on the amount of "drama" to be paid.[98] If the party was found guilty (or admitted guilt), a long process called "rigis keneba" (setting a line) would begin for the purposes of reconciliation and with the assistance of intermediaries.[99]

Setting a line is a separate process from the "rjuli" (mediation) described above since it is managed by third parties, the intermediaries, who aim to reconcile the parties in the dispute. Nevertheless, it is important enough to describe briefly as follows.

Setting a line consisted of several stages. Before starting the process, the intermediaries had to receive consent from the relatives and friends of the murder victim. For this purpose, the "amamtekhlo" cattle for slaughter was required at the expense of the murderer which was delivered to the injured party by the intermediaries at the beginning of each negotiation round. They would also deliver "mitsadshei" cattle for slaughter for honor-

[94] Some sources say that the consideration of the same case could have been conducted a maximum of nine times. Ibid., p. 64.

[95] G. Davitashvili, "Vazha Pshavela and the Customary Law of Georgia", cited in: *Customary Law of Georgia*, edited by M. Kekelia, Tbilisi, 1990, p. 38.

[96] G. Davitashvili, *Mediator Court or the Law Process in Khevsureti,* Tbilisi University Publishing, 2001, p. 73.

[97] Ibid., p. 20.

[98] Ibid., p. 29.

[99] Ibid., p. 56.

ing the soul of the murdered person which was sent by the family of the murderer to the injured party before the burial through the intervention of the intermediaries. After that, the complicated process of reconciliation would start: firstly, the representatives of the family (name/blood) would agree with the other family (reconciliation of families); at the second stage, the friends would reconcile with each other (reconciliation of friends) as well as the reconciliation of maternal relatives would take place (reconciliation of maternal families). Further stages included reconciliation of homes, women, sisters (reconciliation of sisters), aunts and, lastly, it was the turn of the "samakhnao rigi" during which the descendants of the guilty party would deliver one sheep to the injured party once a year - a process which could last for centuries. These main payments were called "tavsiskhli", in addition to which numerious restrictions were being imposed which represented endless obligations for the disputed parties and were transferred from generation to generation. At the end of the 19th century, the so-called "tavis gataveba" (ending of oneself) was introduced in Khevsureti which implied a final reconciliation of the parties. It was formalized by putting feet on the knot made of grass straw.[100] The ceremony of the "ending of oneself" was as follows: grass straw would be knotted three times, formed into a round shape and placed on the ground after which the intermediaries and the involved parties would step on it. A certain prayer ritual would also be carried out.[101]

Apart from payment for blood, the so-called repayment of respect was an important obligation in Khevsureti. It was the demonstration of the permanent obedience and expression of moral satisfaction of the relatives of the murder victim.[102] This element once again indicates the main purpose behind the mediation process and the imposition of the compensation: the termination of hostility and the reparation of relations between the perpetrator and the injured.

[100] R. Kharadze, *Law of Khevsureti,* Analebi, vol. 1, TBS. 1947, cited in: J. Merabishvili, "Contribution of Rusudan Kharadze in Studying the Customary Law of Georgia", cited in: *Customary Law of Georgia,* edited by Mikhako Kekelia, 1990. pp. 107-108.

[101] This process of reconciliation is reflected in the documentary entitled *Khevsurebi*, starting at 00:49, see https://www.youtube.com/watch?v=Qd5PWPZK32c, accessed on: 10.11.2016.

[102] R. Kharadze, *Law of Khevsureti,* Analebi, vol. 1, TBS. 1947, cited in: J. Merabishvili, "Contribution of Rusudan Kharadze in Studying the Customary Law of Georgia", cited in: *Customary Law of Georgia,* edited by Mikhako Kekelia, 1990. p. 109.

PSHAVI

"When justice is done, we become brothers again."[103] The view of the Pshavs on the law was that the law does not separate the disputing parties from each other; rather it assists their reconciliation.

The reconciliation of disputing parties was carried out by intermediaries who were referred to as "bche" or mediator.[104] As in other places, the parties had to first agree on the process of reconciliation itself before selecting the mediator. The person who carried out visits for the purposes of persuading the parties to reconcile (in the Pshav language, this is the "khidedo-odedo") was called an intermediary.[105] The persons chosen as intermediaries had to have authority as well as be acceptable for the aggrieved party. The intermediaries were mostly selected for serious cases. Oftentimes, the intermediaries sent to the family of the aggrieved were people who had in the past been forgiven for the same offence. "It is even more respectable to send such people to the family of the murder victim by the family of the murderer who themselves have forgiven the murder to the family of the murdered. In this case, the party of the murder victim would rarely refuse."[106]

Sometimes, the disputed matter could be resolved solely by the intermediary. If by visits of the intermediaries the case was not resolved, then the parties would name their mediators. The number of mediators would depend on the type of offence committed, the circumstances and the attitude of the parties towards reconciliation.[107] Mikhako Kekelia brings an example by the head of the community in Middle Pshavi, Nikoloz Tvarelishvili (nicknamed "Ugemura" which means "tasteless") according to whom murder cases were considered by seven men in front of an icon with each of the parties selecting three individuals with the seventh being the head of the community.[108] Apart from the presence of the icon, the case could also

[103] G. Tcholikashvili, village Sakobiano, proverb, referred to in the report on Materials on Customary Law of Georgia, cited in: *Customary Law of Georgia*, edited by M. Kekelia, Tbilisi, 1990, p. 147.

[104] Report on Field Ethnographic Works, cited in: *Customary Law of Georgia*, edited by M. Kekelia, Tbilisi, 1990, p. 149.

[105] M. Kekelia, *Customary Law of Georgia,* Tbilisi, 1993, p. 191.

[106] M. Kekelia, "Materials on Customary Law in Pshavi (Pankisi Valley)", notebook, p. 42., cited in: M. Kekelia, *Customary Law of Georgia,* Tbilisi, 1993, p. 191.

[107] M. Kekelia, *Customary Law of Georgia,* Tbilisi, 1993, p. 192.

[108] D. Jalabadze, "Materials on Customary Law in Pshavi", 1986, Notebook. p. 1, cited in: M. Kekelia, *Customary Law of Georgia,* Tbilisi, 1993, p. 192.

be heard at a special square designated in the village. Kekelia refers to the note of one individual, who was from Tianeti, according to which: "There is a place in the Arteni Valley, with stone chairs, and there is also a tile to stand on. It is said that men with decision-making power would gather here and consider the cases."[109] Cases could also be considered at more remote places in the village (meadow, plateau, uninhabited highway).[110]

The mediators would determine the circumstances of the case by visiting both the guilty and injured parties; they would also hear their information under the open sky. An oath in front of an icon would be given by the parties as well as by the witnesses. If the case was considered in the village, women would attend as well; their presence, however, was excluded in front of the icon.[111]

There were different ways for the announcement of the decision and the reconciliation of the parties. The mediators could be divided into two parts; the ones chosen by the injured party would visit the family of the injured to announce the decision whereas the ones chosen by the guilty party would visit the family of the guilty party.

Sometimes, the parties would not meet even once during the consideration of the case. This was common in especially complex cases.[112] Only after the lapse of a certain amount of time would the two parties confront each other (in front of the icon or away from it) and reconcile. As a sign of the strength of the reconciliation of the parties, the head of the community would put a "saman," or a long stone, on the icon, slaughter livestock and bless the complainant and the defendant.[113] The meeting ceremony was always followed by a feast.[114]

Mikhako Kekelia refers to the story told by one mediator regarding the announcement of the reconciliation and its enforcement: each of the parties selected two persons as mediators. The mediators went to the parties who selected them and declared their judgement. The mediators decided that

[109] J. Merabishvili, "Materials on the Customary Law of Pshavi and Kisteti", 1987, notebook. p. 97, cited in: *Customary Law of Georgia*, edited by M. Kekelia, Tbilisi, 1993, p. 193.

[110] M. Kekelia, *Customary Law of Georgia,* Tbilisi, 1993, p. 194.

[111] Ibid., p. 194.

[112] Ibid., p. 194.

[113] S. Makalatia, *Pshavi*, Nakaduli Publishing, Tbilisi, 1985, p. 78.

[114] M. Kekelia, *Customary Law of Georgia*, Tbilisi, 1993, p. 196.

the guilty party would pay the family of the murder victim a compensation in the form of cattle and money. On the set date, in the afternoon, the father of the murderer together with the mediators, his two sons, cousins and other close people went to the family of the murder victim and stood in the yard in front of their house. Immediately upon their arrival, the father of the murder victim came out of his house, accompanied by the mediators, as well as the two sons of the murder victim, his cousins, women relatives and other men. They approached the visitors and shook hands with everyone without saying any words. The father of the murder victim and the father of the murderer hugged each other and cried. We were invited into the house. The elderly people were sitting in one room; the second room was occupied by the young people. In both rooms, the toast maker was chosen by the head of the family… The fathers of the murderer and the murder victim addressed each other with toasts. In the first place, the father of the murderer spoke of his regret regarding the fact. The response speech was also made by the father of the murder victim. Afterwards, they toasted for peace in both families. The toasts for the murder victim and the murderer were not said explicitly to avoid additional tension. During the meal, the father of the murderer stood up and gave the money to the mediator, as he requested, who in turn gave the money to the father of the murder victim. During the meal, we the mediators made the brothers, cousins and relatives of the murderer and the murder victim kiss each other. The cousins of the murderer and the murder victim were sworn into brotherhood by means of an exchange of silver. Both sworn parties placed silver pieces in each other's drinking glasses and swore in public with the following words: "Your mother shall be my mother, your father shall be my father, your sister shall be my sister, your wife shall be my sister-in-law. From now on, we shall never betray each other" and then drunk a toast to these words. According to the rules, there was to be no inebriation and so people abstained from drinking. The reconciliation dinner was prepared by the family of the murder victim where the guilty party brought the animals for slaughter. The dinner would be made at the expense of the relatives and friends of the murderer.[115]

[115] Ibid., pp. 196-197.

ABKHAZIA

The mediation court was established in the customary law of Abkhazia in the 18th century. At this time, Abkhaz society was seriously affected by the grave results of the institute of revenge and so it sought to confront this issue with the enforceable institution of conciliation of the parties; that is, mediation court. It is noteworthy that the mediation court only resolved criminal cases.[116] Civil law disputes, complaints, property ownership matters and petty crimes were considered by the public meeting or the Council of Elders.[117]

In Abkhazia, similar to other regions of Georgia, the first step for the settlement of the parties was to convince them to engage in a peaceful settlement of the dispute. This was often complicated by the desire of the victim to carry out revenge. In such cases, distinguished persons of the village tried carefully to convince the parties to agree on the mediation process.[118]

The custom of "blood for blood, tooth for tooth" was strongly established in Abkhaz society and impeded consent to mediation, especially at the early stages of development of mediation. When the person who wanted revenge refused to engage in conciliation, the murderer could only escape such revenge by means of "akhnadara." It is known that the custom of redemption through blood was prohibited among close relatives and within the family line. In such cases, the murderer would be punished by being cut off from society. "Akhnadara" aimed at terminating the redemption through blood and was an artificial way for becoming relatives. When the conciliation of the enemies was unsuccessful, the murderer, encouraged by traditional hospitality, could intrude upon the family of the victim and place his teeth on the breast of the mother, sister or wife of the murder victim. Similarly, the mother, sister or wife of the murderer could visit the family of the victim and take his first child in their hands and put their breast into the mouth of the child. In this way, the enemies became relatives and the traditional rule for redemption through blood was no longer applicable. After becoming relatives in such an artificial manner, both parties had certain rights and obligations.[119] Yet another the types of "akhnadara" was the custom of child adoption. Under this rule, the murderer would,

[116] These were wounding, rape, murder and other cases that would most likely be followed by killings.

[117] S. Bakhia-Okruashvili, *Customary Law of the Abkhaz People,* Tbilisi, 2014, p. 121.

[118] Ibid., p. 131.

[119] Ibid., p. 133.

with the assistance of the relatives, sneak into the house of the victim and kidnap a male child lying in the cradle or another young child and bring the child to his house to be raised. The family of the murderer would raise the kidnapped boy. Once the boy turned 17 years old, the foster father[120] would have to return him to his family with expensive gifts. By becoming relatives in such an artificial way, the rule of revenge was terminated.[121]

After consenting to mediation, the parties would choose judges-mediators. The number of mediators was subject to negotiation. According to certain sources,[122] the number of mediators depended on the social level and relevance of the case. In any case, however, the number of mediators could not be less than five or more than 12 and always comprised of an odd number. The injured party had the right to choose one more mediator than the guilty party. If any of the mediators raised doubts in one of the parties, he would have to be replaced.[123]

The selection of at least five mediators was required since all of them had specific functions and, therefore, had special names:[124]

- Apkhiaglav – leader, chairman
- Avaglav – deputy
- Bche – judge
- Alapkhiara – mediator responsible for notifying the parties
- Azhvakhaza – speechmaker who would present the case orally. This mediator was distinguished by his good memory and presentation skills.[125]

Similar to other regions in the mountains of Georgia, the mediators would only start studying the case after the giving of an oath. The oath was also given by the counter-parties. Among other matters, the parties also gave an oath that they would comply with the decision and not resort to revenge. Together with the parties, the sworn representatives of the parties[126] would also take an oath; the number of such representatives could

[120] The author assumed that this person would be the caregiver of the stolen child.

[121] S. Bakhia-Okruashvili, *Customary Law of the Abkhaz People,* Tbilisi, 2014, pp. 128-129.

[122] Salome Bakhia-Okruashvili refers to the materials of Sh. Inal-Ifa, Ibid., p.131.

[123] Ibid., p. 131.

[124] The majority of these names coincided with the names of the members of the Council of Elders, however, as noted by Salome Bakhia-Okruashvili, these terms were still different by their meaning and functions in the context of mediation.

[125] S. Bakhia-Okruashvili, *Customary Law of the Abkhaz People,* Tbilisi, 2014, p. 134.

[126] As a rule, these were close relatives of the parties from their father's side. One or two relatives of the mother and wife could also be present.

sometimes reach 32.[127] The oath was not given on Wednesdays or Fridays. The hills, valleys, smithies and anvils or sacred pagan places erupted on the remains of Christian monuments were used by the Abkhaz people for the oath ceremony. In the Ochamchire district, Abkhaz people used the miraculous icon of Saint George of Ilori for taking the oath.[128]

As for the process itself, it was held in an open place outdoors and far from the village. Pursuant to ethnographic materials, the place selected for mediation was called "ausharta"[129] in the Abkhaz language which literally meant "the place for presenting the case." Both parties would gather in front of each other but at a distance apart.

The speechmaker mediator would deliver the position of the parties to one another and notify them of the responses. The mediators would listen to both parties, question the witnesses and, lastly, try to establish the moral-material damage and the price of blood – "ashapsa," for which they resorted to custom. At this stage, they took into account the social, material and other conditions of the guilty party and the injured party.[130]

In Abkhazia, the price of blood was divided among the relatives. The closer the relative was to the perpetrator, the more this relative had to contribute. This rule was controlled by the mediators who sought to ensure that the payment of the compensation was made on time so that the injured party would not start considering revenge. The payment of the designated amount was mandatory. If the payment was not made after one year, the outstanding amount would be doubled. Non-payment could result in the resettlement of the family of the perpetrator from the village as well as further payments since non-payment could lead the population back to revenge.[131]

Notably, the religious difference was not important for the purposes of redemption through blood; both followers of the Christian and Muslim religions were tried based on customary law. These matters were not subject to the rules of sharia.[132]

[127] S. Bakhia-Okruashvili, *Customary Law of the Abkhaz People,* Tbilisi, 2014, p. 136.

[128] Ibid., p. 135.

[129] aus = case, ahara = say, retell, -r-ta = place suffix.

[130] Ibid., p. 145.

[131] Ibid., p. 153.

[132] Ibid., p. 153.

Mediation was mainly related to the division of a family in Georgia's lowland areas. Numerous historical records[133] indicate that in all parts of Georgia, the division of family property with the assistance of mediators was a widely used practice. Even more so, the engagement of mediators in family matters lasted up to the 20th century. Gulnara Tsetskhladze notes that in 20th century Guria, two women named Kato Asatiani and Aneta Mgaloblishvili were famous mediators (Ozurgeti region, Bakhvi village).[134]

The mediator's duty was to make an inventory of the whole property of the family (movable and immovable) and compile a document of family division and distribution of family property ("division paper,""resolution on the division of the property," etc.). This document was made in as many copies as there were participants in the division process. One copy was made up for the mediator's records.[135] In all cases, the mediator took into account the interests of all of the family members and acted in accordance with the rules of customary law.[136] In Ajara, an established way for the division of property was the "drawing of lots" (in the local dialect, this was "pishkesh"). Mediators would divide the whole property into equal parts and designate a specific sign for each part. They would then put as many small sticks into a hat as there were participants. Each stick was designative of a specific pre-determined part of the property which was known only to the mediators. They would then mix up the sticks and let each person draw one stick based upon which they would become the owners of the respective part of the property.[137]

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[133] Numerous such agreements are noted in the work of Gulnara Tsetskhladze, *Materials for the Social-Economic Study of Guria,* Tbilisi, 2003.

[134] G. Tsetskhladze, *Family Life of the People of Guria,* Tbilisi, 1991, p. 88.

[135] Ibid., p. 89.

[136] M. Khoperia, "Role of the Mediator in the Division of the Family According to Georgian Customary Law", Law Journal, Law Faculty of TSU, Tbilisi, 2011, 1987-76-68 #1, p. 47.

[137] T. Achugba, *Family and Family Life in Ajara*, Tbilisi, 1990, p. 102.

The mediator was chosen by the family; often, they were people close to the family, neighbors or distinguished people of the village. Frequently, maternal uncles played the role of a mediator.[138] The number of mediators could be one or three in which case one was given a leading role and called an ober-mediator.[139] The mediator was to be clever and experienced, literate and able to measure land. The authority of the mediator determined how often he was selected. For example, mediators from Martkopi enjoyed such a good reputation that they were often called up for the division of property in neighboring villages.[140]

In exceptional cases, mediators might also have been called in to observe and attest facts. Mikhako Kekelia notes that in Imereti, when brothers would come to agreement on the division of property, mediators would legally attest the fact of the division as witnesses of the same process.[141]

[138] Ibid., pp. 101-102.

[139] G. TsetskhIadze, *Family Life of the People of Guria,* Tbilisi, 1991, p. 88.

[140] M. Khoperia, "Role of the Mediator in the Division of the Family According to Georgian Customary Law", Law Journal, Law Faculty of TSU, Tbilisi, 2011, 1987-76-68 #1, p. 48.

[141] M. Kekelia, "Materials on the Customary Law of Imereti", ethnographic notebook, Tbilisi, 1989 11, referred to in G. Davitashvili, *Court Organization and Main Aspects Related to Process under Customary Law of Georgia*, Tbilisi, 2004, p. 61.

The emergence and establishment of mediation as a method of dispute resolution in our culture was triggered by specific needs which derived from both the political and social order of the respective times. On the one hand, the tradition of blood revenge, which was especially prevalent in the mountains, led to endless discord between families and communities and so a mechanism was needed to stop this devastating process. On the other hand, the Georgian people, especially in the mountains, distrusted the justice systems which were put in place by state institutions. Mediation responded to both of these important needs. With the effort of mediators, many Georgian families survived extinction. Mediation courts also ensured a system of access to justice which was acceptable and trusted by the people.

Today, Georgia faces different challenges. Georgia (as well as the rest of the world) is dealing with massive urbanization.[142] This means that more people will gather in a limited space and fight for limited resources which, by default, increases the likelihood of conflict. Additionally, in the fast pace of modern times and against the background of technological innovation, meaningful and sincere communication between people is being decreased. Deficiency in communication is a significant factor triggering conflict. There are many other local and global problems which also serve as a basis for conflict. Consequently, the number of disputes is increasing. The legal community is well aware that the resources of the judiciary cannot handle this scale of disputes. Consideration of cases in the courts can take years and this is something which seriously harms both the social and business environment. In the long run, unresolved disputes make society more aggressive, they freeze the economy and make for a tense and negative spirit for all of those involved. Today's need is to put in place an ef-

[142] At the beginning of the 19th century, only 3% of the world's population lived in cities. Currently, this index exceeds 50%. This is when the total number of cities on the planet does not exceed 1% of the land cover. See "Dynamics of Population – Types of Settlement and Urbanization," available at: http://can.ge/ seen: 12.11.2016.

fective system of dispute management and resolution. Mediation directly serves this need.

A wide-scale introduction and popularization of mediation in our country will first of all ensure a much faster resolution of disputes than can be accomplished in the courts or even in the cases of arbitration. The process of mediation may last several days, weeks or months. As already mentioned above, the effect of the settlement of disputes through mediation is not just their one-time resolution; rather, there is a high likelihood for sustainable peace and future cooperation between parties. Settlement by mediation in itself supposes that the agreement was reached due to the willingness of the parties and is based on the decision of the parties themselves (rather than on the decision of a different third person); consequently, the likelihood for enforcement by the parties is very high, given that the agreement is what they desired.[143] Of course, not all disputes end in settlement. However, for the beginning, the decrease in the caseload of courts by at least 30%[144] would be a significant relief for judges and give them opportunity to better and more quickly deal with other cases. In the end, the process of mediation oriented on the interests of the parties may have yet another positive side effect. It contributes to the empowerment of the parties and unintentionally teaches them that the resolution of their conflicts is within their own capability. I believe and hope that in the long run this will lead to a change in the culture of society on how we listen to each other, how we interact with each other and how we deal with our disagreements.

[143] There are certainly circumstances when a settlement reached as a result of mediation is not enforced by a party who changes his mind later and considers that the resolution is no longer attractive for him. In such a case, the possibility of compulsory enforcement is dependent on the format and rules or law in the framework in which mediation was conducted; legislation regulating mediation (and the agreement of the parties themselves when the parties have the opportunity of such an agreement) determines, among others, whether the mediated settlement will have the force of a contract or the force of a court decision.

[144] According to the 2013-2016 data of the pilot project at Tbilisi City Court, of 51 cases which were subject to mediation, 31% (16 cases) ended with a settlement of the parties. It would be reasonable to assume that this index may increase in parallel with the experience of the mediators and the raising of awareness on mediation.

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QUESTIONS FOR ANALYSIS

- In your opinion, what are the common features that the mediator possessed in the past and what should they have in the present?
- What are the common features that were characteristic of mediation in different parts of Georgia?
- What methods did intermediaries use to assist the parties to agree on mediation?
- What method can judges use today to persuade the parties to subject their dispute to mediation?
- What was determinative of the fact that in the past, in the process and for the purposes of the settlement of the parties, the mediator rendered the decision?
- What advantages do you see in mediation today as compared to arbitration?
- What are the advantages of the process where a third party (arbitrator or judge) renders a decision as compared to the process of mediation?
- What was the factor which ensured the enforceability of the decision of a mediator by the parties? What factors contribute to the enforceability of the settlement achieved as a result of mediation by the parties today?
- In terms of the responsibility of the mediator, do you think that his role carried a higher responsibility in the past or in the present? Why?
- What challenges does mediation face today on the way to being established as a primary method for dispute resolution in Georgia?

TBILISI, 2017