



## Mediation as an Alternative Manner of Dispute Resolution in Kosovo

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**Abstract:** Mediation as an alternative manner of dispute resolution in Kosovo is a novelty. Kosovo is a new state which declared its independence in 2008, and in the same year the Law on Mediation has entered into force. This piece of legislation has been drafted in alignment with the laws of other European countries on mediation. The proper establishment and functioning of mediation in Kosovo has started only in 2011, and by looking at the practical effectiveness of the mediation, one can see that it had a positive start compared to other regional countries and considering the short timespan since it started being practiced. This scientific paper apart from presenting the establishment as well as resolved cases, is also important for readers as it presents principles of mediation and their importance in mediation procedure. Likewise it presents the advantages of parties in mediation in comparison to courts. At the end of this scientific paper, several conclusions and recommendations have been presented.

**Keywords:** mediation; dispute resolution; establishment; confidentiality; agreement

**JEL Classification:** K10

### 1. Introduction

Mediation as an alternative manner of dispute resolution in Kosovo has been regulated since 2008 by the Law on Mediation which has been drafted in alignment with laws of European countries on mediation. Since the time that the Law on Mediation has entered into force, other accompanying regulations, which helped mediation to be more functional and practical, have been promulgated. This has

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been conducted by the Ministry of Justice of the Republic of Kosovo, and jointly with the donor support they have functionalized the mediation process in the interest of parties. The principles of mediation, which indicate the value and importance of mediation to the country, are presented in this scientific paper. This is followed by a presentation of resolved cases by mediation as cases referred to mediation by judges, prosecutors as well as individually referred cases. These data are presented in tabular form and cover the period of five years, including the years 2012, 2013, 2014, 2015 and 2016. Through these information one can contemplate how important and how reliable the mediation process in Kosovo is. The presentation of referred cases by courts and prosecution should be always at the interest of the parties involved. Finally the paper presents several conclusions and recommendations concerning mediation.

## **2. The Process of Establishing Mediation in Kosovo**

Mediation in Kosovo has been regulated by the Law no. 03/L-057 on Mediation since 2008 when it entered into force. The Law in question has been drafted based on international practices, by taking into account similar laws of the European countries. Since the promulgation of the law, several steps towards establishment and functioning of mediation in Kosovo have been undertaken. Mediation has been established within the Ministry of Justice of the Republic of Kosovo. Article 17, paragraph 1 of the Law on Mediation in Kosovo (2008) states that the 'Mediation committee is established by the Ministry of Justice'. After the establishment of the mediation committee, the Code of Conduct for mediators in the Republic of Kosovo has entered into force in 2010. Likewise in 2011 a decision has been made (no. 02-1195) announcing public vacancy for selection of candidates that would undergo trainings on mediation. A month later, the Regulation no. 01-68 on Selection of Participants for training on mediation has been drafted and entered into force in 2011. Three months later, the Regulation no. 01-610 on Registration of Mediators entered into force in 2011. It is important to emphasize that in May 2011, the Notification on Amending the Regulation on the Registration of Mediators no. 01-609, as well as the Notification on Amending the Regulation on training and certification of mediators, has been made, which after the amendment have immediately entered into force the same year.

On the 20<sup>th</sup> of June 2011, the Regulation no. 01-849 on Disciplinary Procedure and Responsibility of Mediators in the Republic of Kosovo entered into force. On the 12<sup>th</sup> of September 2012, the Regulation No. 07/2011 on Licensing Mediators in the

Republic of Kosovo entered into force. After certification of mediators on the 11<sup>th</sup> of July 2013, the Register No. 06/2013 of mediators in the Republic of Kosovo has been created and published. The register of 2013 has been updated to include new mediators that have undergone training and certification. The new register (no. 01-1845/2016) has been established in 2016. Parties are able to select one of the mediators to mediate their dispute from official register of mediators published at the official website of the Ministry of Justice of the Republic of Kosovo.

### **3. The Principles of Mediation Procedure**

Principles of mediation procedure in Chapter II of the articles: 3, 4, 5, 6, 7 of the Law on Mediation in Kosovo (2008), have regulated: a) expression of the will; b) equality of parties in procedure; c) impartiality; and d) confidentiality and reliability.

#### **3.1. Expression of Will**

According to article 3 of the Law on Mediation in Kosovo, ‘for the beginning of mediation procedure, there must be full will of the parties’. In order to begin mediation as an alternative manner of dispute resolution, parties must first agree to mediation, otherwise mediation shall not commence. Within the principle of expression of the will there are two types of wills, as is the one at the moment of binding the contract between parties that in case of dispute to try to find the solution by mediation. If mediation is not successful then solution should be proceeded by other mechanisms such as arbitration and courts. If parties agree include in their contract the mediation clause a hypothetical example could be as follows: ‘In case of any dispute between us as parties, our dispute shall be resolved by mediation according to the Law on Mediation in Kosovo, and mediators shall be appointed by official register of mediators in Kosovo’. If parties have included this model of the clause in their contract and if one of parties violates the contract, then the case shall be directed to mediation, since parties agreed beforehand. In this case parties do not need to seek reconciliation again to one another due to the fact that that is already tried at the moment of binding the contract.

According to article 9 paragraph 5 of the Law on Mediation: ‘when the matter is in court or the prosecution and if they consider that a dispute can be resolved through mediation, they suggest the parties to the mediation procedure’. If judges and prosecutors want to orientate a case to mediation, first they must see if according to laws in force they are allowed to send the case to mediation, and if so, they must

also evaluate whether it is more convenient for the parties to send the case to mediation. However, they cannot send a case to mediation, in case when parties do not agree for such an action. If a judge or prosecutor refers a case to mediation without the consent of one party, in effect he/she is breaking the law and disciplinary procedure against him/her may be initiated. However, if parties agree to mediation, then judge or prosecutor, depending on the course of case, may interrupt the procedure concerning the case and send it to mediation. Then they ought to enable parties to contact to competent officer of mediation, such as manager or the head of mediation center, in order to provide parties the register of official mediators, so parties shall be able to appoint one mediator for their dispute from that register.

Finally, in regards to the principle of expression of will it is important to emphasize the fact that mediation has a great advantage for parties due to the fact that parties at any phase – since the inception till the final phase – may express their will, which shall be respected by mediators.

### **3.2. Equality of Parties**

Article 4 of the Law on Mediation states that: ‘in mediation procedure parties are equal and have equal rights and obligations in accordance with the law’. In mediation, parties enjoy equal rights, starting from the appointment of a mediator to the end of the procedure. Parties have equal right concerning the appointment of a mediator, setting rules as well as setting the time of mediation hearing, conversely to regular courts. In the regular courts the plaintiff does not ask the other party about the start of the procedure nor for the procedure rules and the appointment of judges, as these do not depend on parties but rather on courts’ decisions. Whereas in a mediation process, parties have this freedom and advantage. In a mediation procedure, parties at any phase must be equal. If such an equality is not ensured, then the displeased party interrupts the mediation procedure, by also providing reasons of interruption. By interrupting mediation procedure party does not lose anything and there is no sanction.

In case of the interruption of the mediation, the procedure recommences at the institution where procedure was initially interrupted and referred to mediation; for instance if a dispute has been referred by court to mediation, and after proving mediation the party which considers that has not been treated equally by mediation may interrupt mediation procedure and then that procedure takes place again at the court where it was interrupted in the first place.

### **3.3. Impartiality**

Impartiality has an important role not only in mediation. This principle is relevant in every legal science branch, and no legal procedure has a meaning without respecting the impartiality when given a competence for dispute resolution. According to article 5 of the Law on Mediation: “the mediator during the mediation procedure is fully impartial and independent of any influence”. A mediator, from the moment of the certification, should be aware that the mediators’ position is worthless and unsustainable if the impartiality principle is not respected. A mediator does not make a decision, he/she only reaches the agreement and afterwards the agreement shall be approved by referred institution such as a court or prosecution.

A mediator must avoid actions that display impartiality signs towards a specific party. According to article 4 paragraph 1 of Code of Conduct of Mediators in Kosovo of 2010, a mediator should help both parties, and not only one party, in reaching voluntary solution of their dispute. According to article 4 paragraph 2 of Code of Conduct of Mediators in Kosovo of 2010, a mediator provides its services, only in those cases where he/she could remain impartial; a mediator should reject mediation if he/she cannot perform it impartially.

### **3.4. Secrecy and Confidentiality**

In the article 6 paragraphs 1, 2 and 3 of the Law on Mediation the following is stated: ‘the mediation procedure is of a confidential nature’. All statements and other information regarding the mediation procedure cannot be used as evidence in any other proceedings without the consent of the parties. The mediator, parties and their representatives are obliged to keep the confidentiality of the mediation procedure, unless the parties agree otherwise. Only after the end of the mediation procedure with the consent of the parties involved, the agreement in accordance with applicable laws can be made public.

The principle of secrecy according to article 8 of the Model Law of UNICITRAL on International Trade Mediation and the Guideline for Implementation of its Use (2002), is named as a principle as disclosure of information. Specifically it is stated that: “When a mediator gets informed concerning a disagreement from any of parties, he shall notify to the other party the essence of this information. However, when any of the parties entrusts to a mediator any information, on condition to keep it secret the information shall not be made known to any of the other parties in mediation process”.

The principle of secrecy is also called the principle of confidentiality. This principle promotes commercial entities to be directed to mediation processes, because the mediation process itself shall be more attractive for parties, if the latter creates trust which is based on imperative norms that information made public during the process, shall be handled confidentially (Mëneri, 2012, p.117).

Point 61 of Guideline on Implementation and Usage of Model Law UNICITRAL on International Trade Mediation (2002) notes that ‘by trying to preserve the harmony with the article 14 of UNICITRAL Regulation on Mediation, incorporation of a general rule of confidentiality, which would be applicable to all participants in mediation process, is suggested in the preparation of the Model Law.

#### 4. Statistics of Referred Cases by the Courts, Prosecutions as Well as Self-Referral Cases to Mediation In Kosovo For The Period 2012-2016

Table 1 Cases of mediation in Kosovo (2012)

2012 <sup>1</sup>	Prishtina	Ferizaj	Gjakova	Peja	Gjilan	In Total
Cases referred by courts	/	14	14	57	70	155
Cases referred by prosecution	1	/	/	/	/	1
Self-referral cases	6	6	10	/	/	22
<b>In total referred to mediation</b>	<b>7</b>	<b>20</b>	<b>24</b>	<b>57</b>	<b>70</b>	<b>178</b>
In total resolved	3	6	16	22	36	83
In total unresolved	4	9	8	20	22	63
In the process (The total figure varies)	/	/	/	15	1	16

Source: Ministry of Justice of the Republic of Kosovo

In 2012, there were no referred cases by the Court in Prishtina, whereas in Ferizaj, Gjakova, Peja, Gjilan there were 155 cases referred in total. It is obvious that there were not many cases given that mediation is newly established practice, and parties

<sup>1</sup> Total cases referred to mediation in 2012 in the Republic of Kosovo in the following municipalities: Prishtina, Ferizaj, Gjakova, Peja and Gjilan. See more at official website of the Ministry of Justice of the Republic of Kosovo: <http://www.md-ks.net/?page=1,161>.

did not have sufficient knowledge for the mediation process as well as for its advantages in relation to other mechanisms of alternative dispute resolution. Table 1 indicates that only one case in total was referred by the prosecution. Whereas self-referral cases in total were 22. In total there are 178 cases, of which 83 have been resolved and 63 have not been resolved while 16 cases are still proceeding. Given that it is the first year that cases have been accepted for resolution, the data suggest that a considerable number of them had been resolved. This due to the fact the institution in general has been newly consolidated, and similarly mediators were beginners with limited professional experience. The lack of professional experience refers to the fact that they were not involved in resolving mediation cases in the past and their experience limits to their education, certification process and other attained trainings on mediation.

In 2013, referred cases by courts of the following municipalities, Prishtina, Ferizaj, Gjakova, Peja, Gjilani, Mitrovica, in total were 431; by prosecution 80 cases, whereas 19 were self-referral cases. In total there were 530 cases of which 305 have been resolved whereas 86 cases have not been resolved and 57 are still proceeding.<sup>1</sup> By analyzing the table it is clear that in 2013 parties as well as referring institutions have presented more cases for resolution to mediation in comparison to 2012. Similarly, more agreements between parties have been reached. This is due to the fact that parties as well as referring institutions have been more aware about the role, importance and advantages of mediation.

In 2014, cases referred by courts, prosecution as well as self-referral cases, were 1076 in total, of which 792 cases have been resolved, 154 of them remained unresolved when parties did not reach an agreement and 66 cases are in proceeding.<sup>2</sup> There is a noticeable increase in 2014 compared to 2012 and 2013. This is a very positive indicator of mediation in the country. The Ministry of Justice and the donor community has played an important role which have helped mediation by organizing trainings, be that with prosecutors, judges and mediators, among others. Joint and continuous trainings should be organized in the future as well. Also mediators, besides their previous work experience, have also gained valuable experience through cases entrusted to them for resolution.

In 2015, referred cases for mediation by courts retrieved from the Ministry of Justice, prosecutions and self-referral, are significantly higher compared to the

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<sup>1</sup> See mediation cases in Kosovo at official website of Ministry of Justice of the Republic of Kosovo: <http://www.md-ks.net/?page=1,161>.

<sup>2</sup> Ibid.

years 2012, 2013, 2014. A total number of presented cases for resolution through mediation are 1511, of which 1282 have been resolved by mediation, whereas only 118 have not been resolved by mediation. The remaining 57 cases are still in proceeding. It is important to emphasize the fact that development of mediation concerning dispute resolution in Kosovo has increased from year to year. This indicates that in the future mediation in Kosovo may be a model for the regional states and beyond.

**Table 2. Mediation cases in Kosovo (years 2012-2015)**

Total number 2012-2013-2014-2015	Prishtina	Ferizaj	Gjakova	Peja	Gjilan	Mitrovica	Prizren	Total
Cases referred by courts	610	191	151	305	476	114	118	1965
Cases referred by prosecution	430	181	202	56	16	129	122	1136
Self-referral cases	31	21	21	4	18	99	3	197
<i>In total cases referred to mediation</i>	<b>1071</b>	<b>393</b>	<b>374</b>	<b>365</b>	<b>511</b>	<b>338</b>	<b>243</b>	<b>3295</b>
In total resolved	1009	232	280	224	408	285	24	2462
In total unresolved	28	51	79	127	62	56	18	421

*Source: Ministry of Justice of the Republic of Kosovo*

Table number 2 indicates the results of dispute resolution by mediation for the years 2012, 2013, 2014 and 2015. In all these years, the total number of cases presented for resolution is 3295, of which 2462 cases have been resolved whereas only 421 cases have not been resolved. Looking at the total the number of resolved cases, one can see that the mediation in Kosovo, despite being a novelty, had a great initial success. Evidently, in the coming years increased success is expected and the number of dispute resolutions by mediation shall be increased.



**Table 3. Mediation cases in Kosovo (January-April 2016)**

<b>Total number January - April 2016</b>	<b>Prishtina</b>	<b>Ferizaj</b>	<b>Gjakova</b>	<b>Peja</b>	<b>Gjilan</b>	<b>Mitrovica</b>	<b>Prizren</b>	<b>Total</b>
Cases referred by courts	115		26	17	76	6	1	241
Cases referred by prosecution	236	22	46	4	25	18	18	369
Self-referral cases	3		1		1	11	1	17
<b><i>In total cases referred to mediation</i></b>	<b>354</b>	<b>22</b>	<b>73</b>	<b>21</b>	<b>102</b>	<b>35</b>	<b>20</b>	<b>627</b>
In total resolved	173	22	57	21	91	34	13	411
In total unresolved	5		5	4	8	1	2	25

*Source: Ministry of Justice of the Republic of Kosovo*

Table number 3 indicates the number of cases of mediation in Kosovo for the period between January and April 2016. During these four months, 627 cases are presented in total of which 411 have been resolved by mediation, whereas 25 cases have not been resolved. Starting from 2012 until April of 2016 one can see that the number of mediated cases has increased in each year and so is the number of resolved cases.

## 5. Conclusion and Recommendations

Mediation is one of the alternative manners of dispute resolution, alongside arbitration, among others. Mediation is a facilitation of local courts' and prosecutions' work as it expedites their operation. Both theoretically and practically, mediation is not considered as a competitor to courts and prosecution; it rather supports their work. The Law on Mediation should be amended as some things remain unregulated. The current law, despite being aligned to the legislation of selected European countries, still remains incomplete and as a consequence not all the details are clear to the mediators in the mediation procedure. It is also recommended that the working group in charge of legal amendments, ought to demand the participation of mediators who can point out obstacles and difficulties based on their practical knowledge from mediation proceedings of the cases they

handled. The current practice of drafting legislation by people that have theoretical knowledge but lack the practical experience should be rendered as ineffective.

The new law should anticipate that within courts and prosecution and administrative bodies there should be a mediation office with at least one employee in order to serve as a bridge with referring institutions. The mediation office would coordinate the work between mediation and referring institution, as well as help parties to communicate easier to mediators. The establishment of such offices is not foreseen within the current legislation. The mediators usually have a primary job and the mediation remains as a secondary one. Therefore they do not invest significantly on professional knowledge advancement. In order to improve these institutions, managers should establish mechanisms which develop professional mediators on annual basis. The fees and payment of mediators in Kosovo remain very low, standing at around 25 euro per session. In order to ensure that the role of the mediators does not fade away, the fees ought to be and this should change in the future otherwise the role of a mediator fades away. So far the mediators' work have been largely advance due to their intrinsic motivation and passion for the profession rather than because of a financial benefit.

The Mediation Committee, which operates under the auspices of the Ministry of Justice of the Republic of Kosovo, jointly with donors should organize roundtables, joint training of judges, prosecutors and mediators, in order to eliminate existing communication dilemmas. In the beginning judges hesitated referring cases to mediation due to lack of information about the way in which mediation functions and the state of development of the mediation process in the country. Regional mediation centers, which operate within certain regions, should be trained to get to the same level so that there is no significant differences among them due to diverse training programs provided by different donors. Having such differences would make it very difficult to have a unique functioning. The official documents, through which mediators communicate with parties and referring institutions, should be unique and contain at least a minimum amount of mandatory data without which the official documents would not have any value.

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