

Mediation in Kosovo

OVERVIEW AND RECOMMENDATIONS



Alternative Dispute Resolution Center
Mediation Center Mitrovica

Mediation in Kosovo: Overview and Recommendations

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About the publisher

Alternative Dispute Resolution Center is a Mitrovicë/Mitrovica region - based multiethnic organization the work of which is focused on building and fostering a culture of mutual understanding, peaceful engagement, and social cohesion across communities. The ADRC seeks to provide a framework for joint inter-ethnic engagement and to contribute to community development.

The organization also works to support the strengthening of the justice system in particular in Mitrovicë/Mitrovica region. It has achieved to assist access to justice efforts and the work of the Basic Court and Basic Prosecution in Mitrovicë/Mitrovica exponentially by providing expedited, efficient, and low-cost mediation services and it is committed to continue fostering the work of the justice structures in the region (of Mitrovicë/Mitrovica).

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INTRODUCTION

The roots of the term “*mediation*” can be traced back to Greek language, and to the interventions of *mesitis* and *mesitae* in disputes.¹ Latin speakers will also be familiar with *mediare* or *medius*, which means “*standing in between*”.² Over time, these historical antecedents evolved into the formal practice of mediation in which a third party (mediator/s), with the consent of two or more parties, helps to prevent, manage or resolve a dispute/conflict and develop mutually acceptable agreements.³

Contemporary mediation today is part of the family of Alternative Dispute Resolution (ADR) Mechanisms. ADR refers to any means of settling disputes or conflicts that is applied outside of the courtroom and it includes Arbitration, Conciliation, Early Neutral Evaluation, Mediation and Negotiation.⁴

Mediation is simultaneously a *social (applied at the inter-personal and community levels to resolve disputes and conflicts between family members, friends, colleagues, and communities), political (applied to mitigate and mediate high-level relations and disputes between stakeholders and/or states), and legal (applied within legal and institutional frameworks as an alternative to court) procedure.*

This overview focuses on the final category. On 18 September 2008, Kosovo adopted its first Law on Mediation (No. 03/L-057), which established a dispute resolution framework of mediation that would operate outside the courtroom, help to resolve a wide range of disputes and legal matters and ultimately enhance the efficiency of the justice system. On 23 July 2018, a new Law (No. 06/L-009), which is currently in force, was passed.

This overview considers both laws and their practical implementation, with the aim to provide potentially legislative and non-legislative recommendations that could improve the current legal framework on mediation and strengthen the existing procedure. The international development of mediation, its background in Kosovo, relevant statistics, and the contribution of the Alternative Dispute Resolution Center (ADRC) to the procedure are also provided. This document is intended to benefit a general and selected readership. It will enhance the general

¹ Respectively ‘female’ and ‘male’ mediator; B Bahtiri & I Qerimi, ‘Mediation as a Way of Alternative Resolution of Disputes in Kosovo’ (2014) MWARDK 291, p. 293; Available at: https://www.researchgate.net/publication/306527279_Mediation_as_a_Way_of_Alternative_Resolution_of_Disputes_in_Kosovo

² Ibid. p. 293

³ United Nations Guidance for Effective Mediation, 2012

⁴ Legal Information Institute, ‘Alternative Dispute Resolution’ (law.cornell.edu 2017) <https://www.law.cornell.edu/wex/alternative_dispute_resolution> accessed May 1, 2020

reader's understanding of mediation and its development in Kosovo and will also help stakeholders identify existing flaws and problems in the related legislation and its implementation, while providing insight into how they can be overcome.

METHODOLOGY

This overview has been developed over a five-month period (January-May 2020) within the project "*Strengthening Mediation in Kosovo: A New Approach*" implemented by Alternative Dispute Resolution Center and supported by UNMIK. It is based on ADRC's experiences, observations, and desk and qualitative research.

The desk research consisted of:

- ✚ Reviewing, analyzing, and interpreting the primary legal framework of mediation in Kosovo.
- ✚ Consulting mediation-focused publications, studies and other materials produced by Kosovan academics and non-governmental organizations (NGOs).
- ✚ Engaging international publications on mediation.

The qualitative research consisted of:

- ✚ Meetings with the Ministry of Justice and the Chamber of Mediators President.
- ✚ Interviews and communications with mediators, civil society actors,⁵ representatives of international organizations and agencies,⁶ representatives of the justice system,⁷ and representatives of Kosovo's former Mediation Committee/Commission.
- ✚ Working meetings, each involving five participants closely related to the field: representatives of the Basic Court of Mitrovicë/Mitrovica, Basic Prosecution of Mitrovicë/Mitrovica, Basic Court of Pristina, and Ministry of Justice participated, and so did eight mediators,⁸ lawyers and a representative of the Free Legal Aid Agency.

This document was informed by the contributions and insights of 41 participants (20 women and 21 men) from a diverse range of ethnic and professional backgrounds.

⁵ NGO Partners Kosova - Center for Conflict Management (PK) and NGO Advocacy Center for Democratic Culture (ACDC)

⁶ CSSP Berlin Center for Integrative Mediation (CSSP), United Nations Development Programme (UNDP), USAID

⁷ Representatives of six Basic Courts and Prosecutions from across the country and also Besim Kelmendi, State Prosecutor/Mediation Expert.

⁸ Each mediator was from one of Kosovo's seven main regions. A mediator from the northernmost municipalities of Kosovo also participated in the working meetings.

INTERNATIONAL DEVELOPMENT OF MEDIATION AND ITS HISTORY

Mediation was pioneered in the United States of America as a response to the unrests derived from labour and racial discrimination complaints, as well as the growing number of minor criminal cases between relatives, acquaintances, and neighbors.⁹

Various forms of union-management negotiations paved the way for the institutionalization of mediation as a litigation alternative, while the recognition of the mechanism as a tool to avoid civil unrests and strikes dates back to late 19th century.¹⁰

Mediation-related legislation in the USA started to develop in the 1960 when, according to Judith Saul, a prosecutor from Ohio developed a program that offered mediation as an alternative to a judicial hearing. This was followed by the establishment of Neighborhood Justice Centers, the federal Law Enforcement Assistance Initiative which made available federal funding for Alternative Dispute Resolution (ADR) initiatives and so on until, finally, in 1990, the US Congress passed the Civil Justice Reform Act, that recommended the use of ADR processes as one possible remedy to the backlogs.¹¹

From USA the contemporary mediation movement expanded to Europe, Australia, Canada, and New Zealand in the 1980s.

In Europe, however, mediation “skipped” the social aspect of dispute resolution and was immediately recognized as a means to fight the long backlog of court actions and to lower the expenses of litigation in early 2000s.¹² It started with the encouragements of the Council of Europe for member states to clarify the mediation procedure within their legal systems in 2002 until a binding Directive for cross-border mediation entered force in June 2008.

As it will later be elaborated, mediation regulation in Kosovo leaned on the European young tradition and was a part of wider process related to European Union agenda. It also coincides with the adoption of the aforementioned “Directive 2008/52/EC of the European Parliament and the Council on Certain Aspects of Mediation in Civil and Commercial Matters” which according to Dr Felix Staffek¹³ was a strong regulatory impetus for the development of

⁹ J Saul, ‘The Legal and Cultural Roots of Mediation in the United States’ (Opinio Juris in Comparatione, No. 1/2012), Paper No. 8; Available at:

https://www.researchgate.net/publication/256030033_The_Legal_and_Cultural_Roots_of_Mediation_in_the_United_States

¹⁰ M McManus and Brianna S, ‘Brief History of Alternative Dispute Resolution in the United States’ (Cadmus Journal 2011); Available at: <https://www.cadmusjournal.org/article/issue-3/brief-history-alternative-dispute-resolution-united-states>

¹¹ J Saul, ‘The Legal and Cultural Roots of Mediation in the United States’ (Opinio Juris in Comparatione, No. 1/2012), Paper No. 8; Available at:

https://www.researchgate.net/publication/256030033_The_Legal_and_Cultural_Roots_of_Mediation_in_the_United_States

¹² R Rewald, ‘Mediation in Europe: the most misunderstood method of alternative dispute resolution’ (2014); Available at:

<https://www.lexology.com/library/detail.aspx?g=59084c8a-49b8-4b45-9f82-5a69ae7dfe57>

¹³ F Staffek, Mediation in the European Union: An Introduction (2012)

mediation in the EU member states in which institutionalization of mediation as a mechanism of dispute resolution dates back only a few decades.

And while the legal mediation as a procedure is relatively young, ADR as a principle is as old as conflict among humans. Hence, the theory of mediation is a rich academic field where numerous authors discuss the role of the mediators, basis of authority of the mediator, what constitutes a successful mediation, whether mediation should be norm-generating, norm-educating or norm-advocating and many other issues related to the process including the possibility of exerting pressure and the use of force by mediators in international mediation as a form of preventive diplomacy or humanitarian intervention.

However, when it comes to the mediation as an alternative to courtroom, each country defines its principles in their legislation. Nevertheless, impartiality, confidentiality, voluntariness, and equality are its universal principles. Kosovo's first Law on Mediation also recognizes urgency (of the procedure).

THE HISTORICAL BACKGROUND OF MEDIATION IN KOSOVO

When mediation is defined broadly as a way of resolving disputes and conflicts in a society, it is seen to have an extensive and varied history that extends across almost all cultures and countries,¹⁴ including Kosovo. Here it is possible to identify prototypes of informal conflict resolution practices that resemble mediation and that involved intermediaries or trusted third parties. Although they only roughly approximate to the contemporary practice, they preceded it in many respects and anticipated a number of its features.

It is therefore possible to identify a tradition and culture of "mediation" in Kosovo applied by all communities that helped to resolve conflicts and disagreements. In such instances, third parties (authoritative community figures and/or groups of elders) were invited to intervene and provide their experience and wisdom, and they then helped the parties to resolve their conflict/s. In Kosovo, peaceful resolution of conflicts was valued both because of its benefits for the individual parties and also for its wider social benefits. When a legal tradition and associated practices and structures had not been developed or were otherwise absent or resisted by the community, it filled an existing gap that governed the life of the peoples' and contributed to the social cohesion. It developed over time and became part of the customary law.

¹⁴ Ch. W. Moore, *The Mediation Process* (4th, Jossey-Bass, A Wiley Brand, United States of America 2014), p. 61

For example the Code of Highlands (*Kanuni i Lekë Dukagjinit* or *Kanuni i Malësisë*) widely practiced and respected by the Kosovo Albanian community, recognized and established conflict resolution practices that resemble “mediation” and instituted them as part of Albanian’s legal culture. The Code of Highlands is a collection of orally transmitted principles, norms and rules that governed the life of Albanians for centuries.¹⁵ Although there were other Kanuns, *Kanuni i Lekë Dukagjinit* is considered to be the most important and widely applied. It regulated social relations and made it possible to manage and resolve both very serious (e.g. those that could produce blood feuds)¹⁶ and less serious conflicts, such as family, marriage and property disputes.¹⁷ When the Kanun was codified¹⁸ between 1897 and 1899, it included a specific section on conflict resolution and “mediation”.¹⁹

In Kosovo, traditional “mediation” involved an arrangement in which the perpetrator or his (they were mainly men) family asked the elder, notable and wise members of the community to jointly intervene and close the conflict between the parties and, in so doing, offset the threat of further conflict.²⁰ “Mediation” occurred in neutral settings and the resolution of the conflict was based on the institution of “*Besa*” (faith, or “the word given”).²¹ It, and the participation of the elder, notable and wise were viewed as guaranteeing that the outcome would be respected.²² The main feature that distinguishes this antecedent from contemporary mediation is that intermediaries retained a strong and exclusive decision-making power.

This background only seeks to situate contemporary mediation in its historical context, and it will not therefore proceed to provide an extensive or exhaustive account of the traditional “mediation” or the different stages of its development. It is instead content to observe that mediation was a distinctive social practice with its own history that was informal and became increasingly structured over time in Kosovo and beyond.

¹⁵ R Muharremi & A Buçaj, 'Alternative Dispute Resolution and the Kanun' (2016) ADRK 5, p. 9; Available at: https://issuu.com/amchamkosovo/docs/journal_of_alternative_dispute_reso_c401a90b08fbd8

¹⁶ A self-administered form of justice, in which the killing of another person is intended to avenge a crime or violation of personal and/or family honor; R Muharremi & A Buçaj, 'Alternative Dispute Resolution and the Kanun' (2016) ADRK 5, p. 10

¹⁷ R Muharremi & A Buçaj, 'Alternative Dispute Resolution and the Kanun' (2016) ADRK 5, p. 11

¹⁸ Put into writing, collected in a single place, and made coherent.

¹⁹ R Muharremi & A Buçaj, 'Alternative Dispute Resolution and the Kanun' (2016) ADRK 5, p. 9

²⁰ Ibid. p. 12

²¹ M Krasniqi, 'Several Characteristics of Mediation in Criminal Field in the Republic of Kosovo' (2019) SCHMCFRK 190, p. 191; Available at: <https://www3.mruni.eu/ojs/international-comparative-jurisprudence/article/view/5219/4621>

²² Ibid. p. 191

CONTEMPORARY MEDIATION IN KOSOVO

It is possible to identify three key phases in the development of contemporary mediation in Kosovo.

2001 – 2008

Efforts were made to promote a professionalized form of mediation that could be applied in different sectors. Legislative initiatives and activities to place mediation into a legal existence were undertaken. A Law on Mediation was jointly prepared by civil society actors, members of the international community and organizations, Kosovo's Ministry of Justice, and other institutional actors. Their joint efforts and collaborations established the first Law on Mediation (No. 03/L-057), which the Kosovan Parliament adopted on 18 September 2008.

2008 – 2018

Kosovo's first Law on Mediation (No. 03/L-057) is adopted,²³ and implemented. It is supplemented and guided by sub-legal acts and capacity-building work. Mediation Centers that provide mediation services in all seven regions of Kosovo are opened. Civil society and international community and organizations are pre-eminent at each point. Insufficient institutional support, issues related to sustainability and uncertainties around the legal effect of private/out-of-court mediation are some of the challenges that confront the mechanism over the decade. The first law remained in force until September 2018.

2018 – onwards

The Ministry of Justice, relevant institutions, and actors concerned with mediation sought to address gaps and problems in the law by subjecting the mechanism to legal reform. An around three-year work and drafting process produced a new Law on Mediation (No. 06/L-009), which was passed on 23 July 2018.²⁴ It contains a number of amendments and changes that seek to develop the mechanism, promote its sustainability and enable its increased use.

²³ Law No. 03/L-057 on Mediation 2008

²⁴ Law No .06/L-009 on Mediation 2018

Contemporary Mediation in Kosovo: Phase I

After the country's 1998-1999 armed conflict, a vast amount of international aid and investment was committed to Kosovo's reconstruction and its economic, institutional and social development. The international community views civil society actors as being ideally positioned, and they therefore seek to establish and/or empower partner organisations. They duly invest into a wide number of areas, including conflict resolution and mediation.

Partners Kosova – Center for Conflict Management was established in 2001 as part of the Partners Global (Partners for Democratic Change International). Its work was, *inter alia*, focused on increasing the mediation capacities of different actors (including representatives of institutions, political parties, court and police personnel, civil society and councils for the reconciliation of blood feuds²⁵).²⁶ In 2005, it developed a mediation-focused training program.²⁷ Partners Kosova made an important, and arguably its most important, contribution to mediation in 2002, when it initiated discussions that sought to pass mediation into law, in anticipation of the later production of a draft document.²⁸

Two years later, its advocacy to establish a Law on Mediation gained the support of the National Center for State Courts (NCSC) and the United States Agency for International Development (USAID).²⁹ In the next two years, both organizations worked with representatives of the Organization for Security and Co-operation in Europe in Kosovo (OSCE) and the United Nations Interim Administration Mission in Kosovo (UNMIK) to complete the draft Law on Mediation, that is then opened up to wider consultations that sees the involvement of Kosovo's Cabinet of Prime Minister, the Ministries of Justice, Economy and Finances, and Labour and Social Welfare, representatives of the justice system, professors of the Faculty of Law, the United Nations Development Programme in Kosovo (UNDP), the CSSP Berlin Center for Integrative Mediation (CSSP) and other actors.³⁰

In the following period, the Ministry of Justice being the competent body for drafting legislation in the field of justice assumes the responsibility for the process; UNDP assists it to organize further drafting, which is undertaken in anticipation of completion.³¹ The aforementioned actors continue to engage with the draft law and contribute with their experience

²⁵ These were remnants of the Kanun that sought to resolve conflict on the basis of customary law.

²⁶ Interview with Shukrije Gashi, Executive Director/Partners Kosova – Center for Conflict Management

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid.

³¹ Interview with Virgjina Dumnica, Mediation Expert/UNDP Rule of Law Advisor

and expertise. A Law on Mediation (No. 03/L-057) is presented to the Parliament of Kosovo and is then adopted on 18 September 2008. It is part of a package of laws and it is voted without a budget to ensure its implementation.³² Kosovo's first Law on Mediation enters into force in November 2008.

The drafting of the Law on Mediation and its adaption is undertaken with the intention of:

- ✚ Giving mediation a legal existence and promoting the resolution of disputes and cases outside of the courtroom.
- ✚ Contributing to the establishment of a modern and efficient legal and justice system.
- ✚ Meeting international standards.

Contemporary Mediation in Kosovo: Phase II

The second phase of the development of contemporary mediation in Kosovo is considered the one that extends between 2008 and 2018; it begins with the adoption of Law No. 03/L-057 on Mediation and lasts until 2018, when a new law is introduced. In this decade, mediation is governed and applied on the basis of Law No. 03/L-057³³ and other relevant acts, specially:

- ✚ Criminal No. 04/L-123 Procedure Code³⁴
- ✚ Juvenile No. 03/L-193 Justice Code³⁵
- ✚ A set of sub-legal acts issued by the Kosovo Judicial Council, Kosovo Prosecutorial Council and Ministry of Justice³⁶

Mediation is also referenced in other laws (including those on contentious procedure, copyrights and related rights and obligatory relations) that contain provisions that relate to it as a mechanism for the resolution of disputes.³⁷

³² Interview with Bekim Ismaili, Mediator/Project Manager, CSSP Berlin Center for Integrative Mediation

³³ Law No. 03/L-057 on Mediation 2008

³⁴ Criminal No. 04/L-123 Procedure Code 2012, Article 232

³⁵ Juvenile No. 03/L-193 Justice Code 2010, Articles 14-15

³⁶ B Bahtiri & I Qerimi, 'Mediation as a Way of Alternative Resolution of Disputes in Kosovo' (2014) MWARDK 291, p. 297; Available at: https://www.researchgate.net/publication/306527279_Mediation_as_a_Way_of_Alternative_Resolution_of_Disputes_in_Kosovo

³⁷ Ibid.

Mediation “in law”³⁸

Law No. 03/L-057 defines mediation as “extra judicial activities carried out by a third party (mediator) for the purpose of resolving by conciliation disagreements between parties subject to law”.³⁹ Articles 1 and 9 establish that mediation parties may be natural and legal persons while Article 2 clarifies that a “dispute” arises between parties subject to the law.

- ✚ The first Chapter of the Law establishes that mediation may be applied in a number of fields of law (administrative, commercial, contentious, criminal,⁴⁰ family, labour, ownership and property matters, in addition to other civil matters) and in instances when a specific law does not assign the exclusive responsibility to a court or any other competent body. Article 232 of the Criminal (No. 04/L-123) Procedure Code establishes that mediation is only applied to cases/criminal offences that are punished by fine *or* imprisonment of up to 3 years; in addition, it can only be applied after a thorough assessment establishes that it is suitable.

In 2016, the Office of the Chief State Prosecutor issued a directive that clearly stipulated that mediation should not be applied to cases/offences that involve domestic violence.⁴¹

Mediation, in common with any other procedure, is governed by its principles, as Chapter II of the Law (No. 03/L-057) on Mediation acknowledges. It lists five important and common principles as safeguards for an efficient, fair, and legitimate mediation procedure in the country. They are:

- ✚ Expression of Will. The parties freely choose to initiate and engage the mediation procedure and on this basis they select the mediator/s, agree on the pace and outcome.⁴² The mediator/s are also entitled to agree or disagree on the mediation of a certain matter or dispute, although the law does not explicitly state this.
- ✚ Equality. Each party has equal rights and duties and is entitled to expect equal treatment by the mediator/s.⁴³
- ✚ Impartiality. The mediator/s must be impartial and independent of third parties and/or influences when they mediate.⁴⁴

³⁸ This section engages the currently inactive/previous Law on Mediation with the aim of highlighting its key features, placing its practical implementation into a context, and situating the current Law on Mediation in comparative perspective.

³⁹ Law No. 03/L-057 on Mediation 2008, Article 2

⁴⁰ Victim-Accused/Offender Mediation

⁴¹ Office of the Chief State Prosecutor, Directive A.no. 360/16 (2016)

⁴² Law No. 03/L-057 on Mediation 2008, Articles 3, 9, 10, 12, 14

⁴³ Ibid. Articles 4 and 11

⁴⁴ Ibid. Articles 5, 11, 14

- ✚ Confidentiality and Credibility. All aspects of the mediation procedure must remain confidential, including the information that is obtained. The testimonies of the parties can only be used elsewhere if the parties provide their consent. This also applies to any third parties in attendance.⁴⁵ Although “credibility” is also a cited principle, the lawmaker does not define its meaning in a mediation context.
- ✚ Urgency. The mediation procedure is urgent and must be completed within 90 days of the start date.⁴⁶

Principle 1 clearly establishes that mediation only begins after the parties in dispute/case consent to it. Article 9 establishes that a consensus (to initiate and engage in mediation) must be achieved within 15 days after one of the parties invites their counterpart to participate. If they do not agree, the procedure cannot begin. If the parties agree, they and the mediator/s,⁴⁷ must sign a document (“Agreement for the Commencement of Mediation”⁴⁸). The mediator/s is/are responsible for ensuring that the parties are appropriately informed before the start of the procedure and when it begins.⁴⁹ When the parties sign the “Agreement for the Commencement of Mediation”, this does not mean that they are then obliged to resolve their dispute/case through mediation, as the document only indicates their willingness to engage on this basis. After initiating the procedure, the parties are responsible for its details and subsequent development⁵⁰ and the mediator/s is/are obliged to assist with the arrangements of the procedure and provide support and facilitation to the best of their abilities.

The Law provides the framework but is not intended to set the pace of the procedure, and this is entirely consistent with the precept that mediation should be guided and developed by the parties and their expressed will/s. As at the point of initiation, the outcome of the mediation procedure must be indicated in writing. If there is a successful outcome and a resolution is forthcoming, then the mediator/s draft/s a document (“The Mediation Agreement”) that contains the technical and substantive details of the mediated outcome. It is then signed by the parties and the mediator/s.⁵¹ If there is no agreement, the mediator/s draft/s a report that explains the conditions and circumstances of failure.

⁴⁵ Ibid. Articles 6 and 10

⁴⁶ Ibid. Articles 7 and 13

⁴⁷ Although there is a preference for mediation to be performed by a single mediator, the law also permits co-mediation.

⁴⁸ ‘The Agreement for the Commencement of Mediation’ should contain data about the parties involved in the procedure; their legal representatives (if they exist); the subject of dispute; and a statement that indicates acceptance of mediation principles. The procedure costs, including the mediator’s fee, should also be indicated.

⁴⁹ Law No. 03/L-057 on Mediation 2008, Articles 9-10

⁵⁰ Ibid. Article 10

⁵¹ Ibid. Article 12

The Law's provisions apply to three types of (recognized) mediation:

- ✚ [Court-connected Mediation](#). A form of mediation whereby the cases brought before the courts might be referred to mediation for potential settlement at any point of the procedure, however, before a final judgment is issued.
- ✚ [Prosecution-connected Mediation](#). A form of mediation whereby upon the receipt of a criminal report/case it might be referred to mediation.
- ✚ [Private Mediation/Out-of-Court Mediation](#). A form of mediation whereby the parties agree to use mediation privately and without any other involvements.

Court-connected Mediation

The initiation of court-connected mediation is governed by Articles 9 and 10 of the Law No.03/L-057 on Mediation. In 2012, the Kosovo Judicial Council⁵² issued a protocol that regulated this form of mediation and the referral of court cases to the procedure. The court judges have the authority to refer cases to mediation before a final judgment is issued, and it is also expected that this (“case-referral”) process will take place in consultation with the relevant parties. The parties decide on the initiation and the development of the procedure and also retain the right to withdraw at any point. In court-connected mediation, the mediator/s and parties have additional responsibilities that are separate from those previously engaged, and these include informing the court about key developments of the mediation procedure in the respective court case.⁵³ The agreement reached in the court-connected mediation gains an executive title after court approval.⁵⁴

Court-connected mediation is one of the most important forms of the procedure that is established in the expectation that will produce court cost savings, increase the efficiency of the court, contribute to quicker case processing and closure, and decrease backlog cases.

Prosecution-connected Mediation

Prosecution-connected mediation resembles court-connected mediation. It is based on Articles 9 and 14 of the Law on Mediation and Article 232 of the Criminal Procedure Code. The state prosecutor is the competent authority that refers criminal reports/offences to mediation.

In general, if a case/criminal offence is to be accepted as suitable for mediation, it must meet two criteria:

⁵² The KJC oversees the administration of justice, ensures the independence and impartiality of the judicial system, is the competent authority to decide on policies, staff, and capacity-building and addresses the recommendations related to the judicial system.

⁵³ Law No. 03/L-057 on Mediation 2008, Article 10

⁵⁴ Ibid. Article 12

1. The case/criminal offence must be punishable by a fine *or* imprisonment of up to 3 years.
2. A number of factors must be taken into account before the case/criminal offence is referred to mediation. These include the circumstances of the act; the degree of the perpetrator's criminal liability; the perpetrator's personality (including previous criminal history); and the type and nature of the act.⁵⁵

In the criminal field, the procedure is mainly applied to cases/criminal offences that have a lower degree of social risk and occur frequently.⁵⁶ In 2013, the Kosovo Prosecutorial Council⁵⁷ adopted and issued a protocol that organized prosecution-connected mediation/the referral of prosecution cases to mediation.⁵⁸ The organization and the procedure of prosecution-connected mediation resembles court-connected mediation and when it produces a mediation agreement, the respective criminal report/offence is dismissed. The agreement has legal effect after the prosecution approves it.⁵⁹

The importance of prosecution-connected mediation and of mediation in the criminal field in general is that it dismisses the criminal report/offence and the need for further proceedings. This reduces the expenditure of the parties and institutions and helps to promote restorative justice. There are numerous benefits, which include (for the parties) the avoidance of a criminal record.

In both forms of mediation, the court and prosecution can dismiss the outcome/Mediation Agreement if they observe procedural irregularities or if they notice that the interests and the rights of the parties have not been sufficiently or proportionally upheld.⁶⁰ This enables both actors to ensure that the process is fair and it also upholds the principle of equality.

Private Mediation/Out-of-Court Mediation

Private/out-of-court mediation is also implemented in a similar way, although it is detached from the court and/or prosecution. Parties are entitled to all the rights that the law guarantees, but the procedure is conducted independently (i.e. without the involvement of other actors). This is one of the forms of mediation that remains slightly unclear. This is mainly because the lawmaker does not clearly define the legal effect and the enforcement of the private/out-of-court mediation agreements. It is also attributable to the fact that no specific sub-legal act that comprehensively regulates its administration and reporting is issued.

⁵⁵ Criminal No. 04/L-123 Procedure Code 2012, Article 232

⁵⁶ M Krasniqi, 'Several Characteristics of Mediation in Criminal Field in the Republic of Kosovo' (2019) SchMCFRK 190, p. 192; Available at: <https://www3.mruni.eu/ojs/international-comparative-jurisprudence/article/view/5219/4621>

⁵⁷ The KPC is the highest body tasked with ensuring the impartiality, independence, and professionalism of Kosovo's prosecutorial system.

⁵⁸ Kosovo Prosecutorial Council, Decision/Protocol No.80/2013 on the Referral of Prosecution Cases to Mediation 2013

⁵⁹ Law No. 03/L-057 on Mediation 2008, Article 14; Criminal No. 04/L-123 Procedure Code 2012, Article 232

⁶⁰ Law No. 03/L-057 on Mediation 2008, Article 14

Article 12 of the Law on Mediation establishes that the agreement of private/out-of-court mediation has the force of a final and enforceable document. The 2008 Law No. 03/L-008 on Executive Procedure does not place an executive title on out-of-court settlements and the 2013 Law No. 04/L-139 on Enforcement Procedure does not clearly indicate which form of mediation (court or private/out-of-court) it is addressing when it refers to the enforcement of the mediation agreement; furthermore, when it appears to be only referring to private/out-of-court mediation, it does not clarify if the agreements that are produced require a judicial procedure (or any other) in order to be considered an enforcement document.⁶¹

In all three forms of mediation, the procedure may last up to 90 days.⁶² In addition to alluding to the successful/unsuccessful completion of the procedure, Article 14 of the Law on Mediation recognizes two other instances when the procedure may be terminated: first, when the 90-day timeframe of the mediation procedure expires; and second when the mediator/s and parties agree there is no reasonable basis for believing that mediation can be continued.

The law does not regulate the mediation procedure for juveniles and commercial arbitration, and it establishes that these two should be regulated by other separate laws.⁶³

The mediation procedure also accounts for costs and the law mainly refers to those associated with mediator/s services. The Law obliges the parties to bear their proportion, although this does not apply if they have reached a different agreement.⁶⁴ In 2011, the Ministry of Justice released an administrative directive⁶⁵ that established a €25 basic rate compensation fee for a single mediation case (although it made provision for a higher rate of compensation, subject to the agreement of the parties and the mediator/s). In 2012, the Kosovo Judicial Council issued an administrative directive that relieved the parties of the responsibility to bear the basic expenses of the mediator/s services in court-connected mediation and reallocated them to this institution.⁶⁶ The Kosovo Prosecutorial Council adopted a similar position when it committed to cover the basic expenses of mediator/s services in prosecution-connected mediation. Both, KJC and KPC brought the measures with the purpose of supporting and promoting the development and use of mediation.

⁶¹ M Tutuli, 'Journal of Alternative Dispute Resolution in Kosovo' (2016) JADRK 5, p. 45; Available at: https://issuu.com/amchamkosovo/docs/journal_of_alternative_dispute_reso_f7c6caa079a86e

⁶² Law No. 03/L-057 on Mediation 2008, Article 13

⁶³ Ibid. Article 28

⁶⁴ Ibid. Article 16

⁶⁵ Ministry of Justice, Administrative Directive No. 05/2011 on Mediators Fee 2011

⁶⁶ Kosovo Judicial Council, Administrative Directive No. 02/2012 on the Payment of Mediators for the Court Cases Referred to Mediation 2012

The Law on Mediation does not only outline a framework that governs mediation but also establishes a Mediation Committee,⁶⁷ which is responsible for developing the procedure and mediators in Kosovo, supervising mediation services, maintaining the mediators' network and registry, and promoting mediation.⁶⁸ The Committee shall have five members – the Ministry of Justice, Kosovo Judicial Council, Kosovo Prosecutorial Council, the Kosovo Chamber of Advocates and the Ministry of Labour and Social Welfare.⁶⁹ The Committee, which officially began operating in 2009,⁷⁰ adopts its decisions by a simple majority of votes.⁷¹

In 2011 the Mediation Committee registered, and Ministry of Justice licensed the country's first mediators.⁷² Law No. 03/L-057 defines a "*mediator*" as a third neutral party, who is authorized to mediate between two parties. They should aim to resolve disputes and should act in accordance with mediation principles.⁷³ The Law lists a number of mediator requirements. They should complete mediation-focused training; possess a university diploma; have strong moral qualities; not been convicted of a criminal act punishable with imprisonment of more than six months; perform six mediation sessions while being supervised and register in the mediators' registry.⁷⁴

The Law establishes that the Committee leads the mediator training, provides certificates to mediators, and retains the right to propose⁷⁵ the suspension or revocation of mediator licenses awarded by the Ministry of Justice.⁷⁶

Although Article 1 of the Law on Mediation states that it regulates, *inter alia*, the rights of mediators, it should be noted that the law does not make related provisions. Indeed, only Article 25 makes any reference to mediator rights and even then this is within the specific context of the mediation procedure (it states that the rights of the mediator are established in agreement with the parties before the procedure is initiated). In other words, it does not outline specific provisions that vest general rights or protect mediators' interests.

⁶⁷ This body is referred as the "Mediation Committee" in the Law on Mediation and "Mediation Commission" in the sub-legal acts. The first has been employed as the referring term in this overview.

⁶⁸ Law No. 03/L-057 on Mediation 2008, Articles 17 and 19

⁶⁹ Ibid. Article 18

⁷⁰ Interview with Lindita Ademi, Chairwomen of the Former Mediation Committee 2013 – 2017

⁷¹ Law No. 03/L-057 on Mediation 2008, Article 21

⁷² Mediation Committee, Registry of the Mediators of Kosovo 2017

⁷³ Law No. 03/L-057 on Mediation 2008, Article 2

⁷⁴ Ibid. Article 22

⁷⁵ To the Ministry of Justice.

⁷⁶ Law No. 03/L-057 on Mediation 2008, Articles 22-23

The next article of the Law (Article 26) recognizes foreign mediators and their service in Kosovo. However, it only applies to individual cases, requires reciprocity and is subject to the consent of the Ministry of Justice.

At the end of 2010 and in 2011, the Mediation Committee and Ministry of Justice issued seven acts (one administrative directive,⁷⁷ one code and five regulations⁷⁸) that addressed mediators fee, training, certification, licensing, registration, appropriate conduct, and the responsibilities and disciplinary liability of mediators.

- 🚩 Code of Conduct for the Mediators of the Republic of Kosovo (2010)
- 🚩 Regulation on the Selection of Participants in the Mediation Training (2011)
- 🚩 Regulation on the Registration of Mediators (2011)
- 🚩 Regulation on the Responsibility and Disciplinary Procedure for Mediators in the Republic of Kosovo (2011)
- 🚩 Regulation on Training and Certification of the Mediators (2011)
- 🚩 Regulation on Licensing of Mediators in the Republic of Kosovo (2011)

Kosovo's first Law on Mediation draws on regional (Albania and Bosnia and Herzegovina) and European (Austria and Germany) models.⁷⁹ The Mediation Committee was active until 2018.

Mediation under Juvenile No. 03/L-193 Justice Code⁸⁰

The mediation procedure in instances involving juveniles is regulated by Juvenile No. 03/L-193 Justice Code and Chapters III and XV of the Code. The basis for the initiation of the mediation procedure in such instances resemble those that apply to cases/criminal offences. The procedure only begins when the parties (the juvenile offender and the damaged party's) consent to it and it lasts up to 90 days.⁸¹ In contrast to other applications, in the mediation procedure for juveniles, it is the prosecutor or the panel for juveniles who are responsible for appointing the mediator.⁸² The Code also establishes that the mediator/s fee for the mediation procedure for juveniles is covered by the Kosovo Judicial Council (when the case/criminal offence involving

⁷⁷ Ministry of Justice, Administrative Directive No. 05/2011 on Mediators Fee 2011

⁷⁸ Available at: <http://www.kontrata.net/?cid=2,95>

⁷⁹ Interview with Shukrije Gashi, Executive Director/Partners Kosova – Center for Conflict Management; B Bahtiri & I Qerimi, 'Mediation as a Way of Alternative Resolution of Disputes in Kosovo' (2014) MWARDK 291, p. 298; Available at: https://www.researchgate.net/publication/306527279_Mediation_as_a_Way_of_Alternative_Resolution_of_Disputes_in_Kosovo

⁸⁰ Juvenile No. 03/L-193 Justice Code 2010; The Code regulates the procedure of imposed and execution of measures and sentence against the juveniles, court procedure and mediation procedure for the juvenile.

⁸¹ Juvenile No. 03/L-193 Justice Code 2010, Articles 14 and 81

⁸² Ibid. Article 81

juveniles is referred by court) and Kosovo Prosecutorial Council (when the case/criminal offence involving juveniles is referred by prosecution).⁸³

Mediation “in practice”

Law No. 03/L-057 on Mediation was adopted in 2008, but the supporting infrastructure and measures that were required to initiate its practical implementation were put in place only around 3 years later. Bekim Ismaili, a mediator and CSSP Project Manager, observes: “The progress of mediation between 2008 and 2011 was slow in large because the subsidiary legal framework on mediation was developing and the relevant actors had yet to acquire a comprehensive understanding of the law and the procedure of mediation.”⁸⁴

The Mediation Committee began its work in 2009⁸⁵ and the CSSP, European Union,⁸⁶ UNDP, USAID, and Partners Kosova provided support, which included assisting the development of the mediation-related sub-legal acts,⁸⁷ drafting a professional mediation-focused training manual,⁸⁸ organizing conferences and events that informed stakeholders (decision-makers, the legal community, and the general public) about mediation,⁸⁹ preparing mediator certification material⁹⁰ and offering professional trainings on mediation.

A framework for the preparation of mediators and implementation of the law was developed at the end of 2010 and in 2011 when the Mediation Committee and Ministry of Justice issued sub-legal acts that addressed aspects of mediation related to mediators (see p. 15).

These acts guided the selection, training, certification, licensing, and registration of the country’s first mediators and created an environment amenable to mediation activities. In 2011, the Mediation Committee and Ministry of Justice, in implementing the law and the aforementioned acts registered and licensed 87 mediators.⁹¹ CSSP, EU, UNDP, USAID and Partners Kosova provided resources (expert and financial support) and helped to direct and implement the trainings for the mediators and associated processes.⁹² The country’s first licensed mediators (mostly Kosovo Albanian) were drawn from the Ferizaj/Uroševac, Gjakovë/Đakovica,

⁸³ Ibid. Article 81

⁸⁴ Interview with Bekim Ismaili, Mediator/Project Manager, CSSP Berlin Center for Integrative Mediation

⁸⁵ Interview with Lindita Ademi, Chairwomen of the Former Mediation Committee 2013 – 2017

⁸⁶ Twinning project of EU

⁸⁷ Interview with Virgjina Dumnica, Mediation Expert/UNDP Rule of Law Advisor

⁸⁸ Interview with Bekim Ismaili, Mediator/Project Manager, CSSP Berlin Center for Integrative Mediation

⁸⁹ Interview with Shukrije Gashi, Executive Director/Partners Kosova – Center for Conflict Management

⁹⁰ Ibid.

⁹¹ Mediation Committee, Registry of the Mediators of Kosovo 2017

⁹² Conclusion from the interviews with Lindita Ademi, Chairwomen of the Former Mediation Committee 2013 – 2017 and Bekim Ismaili, Mediator/Project Manager, CSSP Berlin Center for Integrative Mediation

Gjilan/Gnjilane, Pejë/Peć and Pristina regions.⁹³ The Ministry of Justice had insufficient resources to establish comprehensive mechanisms or structures to organize and administer “case-referrals” and the mediation procedure, and it therefore established agreements with CSSP,⁹⁴ UNDP and USAID that would enable Mediation Centers to be opened in some of the country’s regions.⁹⁵

These Centers are mechanisms or structures that provide mediation, organize, and administer case referrals by courts and prosecutions and put accompanying arrangements in place; they enable private/out-of-court mediation and convene mediators under regional umbrellas. The institutions did not have sufficient capacity to uphold the principles of the law in practice and functionalize it. The Centers, with the support of external actors and in cooperation of the Mediation Committee,⁹⁶ committed to fill these insufficiencies. The first Centers were opened in 2011 and 2012 in Ferizaj/Uroševac, Gjakovë/Đakovica,⁹⁷ Pejë/Peć, Gjilan/Gnjilane⁹⁸ and then Pristina followed in 2013.⁹⁹

A group of 12 mediators, which included Kosovo Albanians and Kosovo Bosniaks coming mainly from the Pristina and Mitrovicë/Mitrovica regions, were licensed in 2013. The group was developed by CSSP.¹⁰⁰ The CSSP also opened a Mediation Center in the Mitrovicë/Mitrovica region in March 2013. The Center has two branches (one in the north, and one in the south) of the divided city of Mitrovicë/Mitrovica and a multiethnic staff. Then in 2016 it merges into one and the multiethnic area known as Bosnjacka Mahala in Mitrovicë/Mitrovica becomes the base of its operations. Its work it is not narrowly related to mediation as recognized by the law, and it also had and has a peacebuilding element, which is shown in the ongoing commitment of its successor, the ADRC - which focuses on improving the relations between Kosovo Albanians and Serbs¹⁰¹ who (predominantly) live on opposite sides of the Ibër/Ibar River that runs through the heart of Mitrovicë/Mitrovica. The last Center opened in Prizren in 2014,¹⁰² and in the same year 71 mediators were added to the registry of the country’s mediators.¹⁰³

⁹³ Interview with Lindita Ademi, Chairwomen of the Former Mediation Committee 2013 – 2017

⁹⁴ Interview with Bekim Ismaili, Mediator/Project Manager, CSSP Berlin Center for Integrative Mediation

⁹⁵ Interview with Virgjina Dumnica, Mediation Expert/UNDP Rule of Law Advisor

⁹⁶ Ibid.

⁹⁷ Opened by Partners Kosova and UNDP. Supported by UNDP; Interview with Shukrije Gashi, Executive Director/Partners Kosova – Center for Conflict Management

⁹⁸ Supported by USAID; Interview with Hasie Abdullahu, Mediation Expert/USAID Project

⁹⁹ Supported by UNDP; Ministry of Justice, 'Mediation Centre opens in Prishtina' (md.rks-gov.net 2013) <<https://md.rks-gov.net/page.aspx?id=2,15,1093>> accessed May 25, 2020

¹⁰⁰ Mediation Committee, Registry of the Mediators of Kosovo 2017; Interview with Bekim Ismaili, Mediator/Project Manager, CSSP Berlin Center for Integrative Mediation

¹⁰¹ Through mediation as recognized by the law, community mediation, and reconciliation and development-centered projects.

¹⁰² Supported by USAID; Interview with Hasie Abdullahu, Mediation Expert/USAID Project

¹⁰³ Mediation Committee, Registry of the Mediators of Kosovo 2017

By 2014 Kosovo's main seven regions had the required and needed infrastructure and capacities to provide court-connected, prosecution-connected, and private/out-of-court mediation. External actors cooperated with the Mediation Committee to open the Centers, which were supervised by the Committee.¹⁰⁴ Each Center had its own internal strategy, which was developed by the founding organizations, in accordance with the mediation legislation and in cooperation with the Committee. While each Center is unique (and this is attributable to factors that include donor funding, local developments, and the regional context), the Committee's involvement and commitment is a single, unifying thread that runs through each one.

The last group of (predominantly Kosovo Serb) mediators from Mitrovicë/Mitrovica region¹⁰⁵ were trained by the CSSP and Mediation Center Mitrovica in 2016 and received their licenses from the Ministry of Justice one year later. The licensing process was accompanied by notable difficulties as their diplomas were not initially recognized by the Kosovan institutions. An administrative instruction issued by the Kosovo Government later removed this obstacle, and the CSSP and Mediation Center Mitrovica supported mediators in the process of verifying their diplomas.

There were and continue to be also broader issues around the participation of Kosovo's non-majority communities in mediation – for example, Kosovo Serb mediators from the Mitrovicë/Mitrovica region are the only members of this community who work in this area.¹⁰⁶ This suggests that it was and continues to be difficult for members of this community living in the south of Mitrovicë/Mitrovica region to access and engage services of mediators of their own community and whose mother tongue is Serbian.

In 2017 there were 189 registered mediators,¹⁰⁷ whose training was mainly supported by local and international actors (CSSP and Mediation Center Mitrovica, EU, UNDP, USAID, and Partners Kosova) in cooperation with the Mediation Committee. They were certified by the Committee and licensed by the Ministry of Justice, and their details were then added to the mediator registry¹⁰⁸ before being circulated to Mediation Centers and relevant institutions, such as courts and prosecutions. The registry however only provides basic information and does not indicate the mediator's ethnicity, residence, or area of specialty.¹⁰⁹

¹⁰⁴ Interview with Virgjina Dumnica, Mediation Expert/UNDP Rule of Law Advisor

¹⁰⁵ Mainly from the northernmost municipalities of Kosovo.

¹⁰⁶ Alternative Dispute Resolution Center (ADRC - MCM); Interview with Lindita Ademi, Chairwoman of the Former Mediation Committee 2013 – 2017; Interview with Dusan Radaković, Mediator/Executive Director of NGO Advocacy Center for Democratic Culture

¹⁰⁷ Mediation Committee, Registry of the Mediators of Kosovo 2017

¹⁰⁸ Ministry of Justice, Regulation on the Registration of Mediators 2011

¹⁰⁹ Related to mediation.

Licensed and registered mediators do not always and frequently practice mediation, and this is attributable to a number of factors that include death, withdrawals, or occupations and/or functions that do not allow them to apply it, etc. According to the registry of Kosovo's mediators maintained by the Mediation Committee, no new mediators were licensed after 2017.¹¹⁰ Although the law allows mediators to provide their services across Kosovo, the majority work in their home location or near their "regional" center. A significant number also practice mediation as a secondary occupation.¹¹¹ The mediators who participated in the ADRC's meetings and interviews¹¹² often said that they became mediators due to strong commitment to promoting community peace and development and to helping disputing parties to close grievances, but also to gain skills that may increase their opportunities in the labour market. Some also mentioned that they were influenced by their family members, who engaged in traditional mediation.¹¹³

In June 2018, Kosovo Prosecutorial Council issued a decision (No. 268/2018) that clarified it will no longer cover the basic €25 fee for the services of mediators engaged in prosecution-connected mediation. As a result, the burden for paying mediators fee fell on the parties. This created a new and unclear situation on how the payment arrangements should proceed. Different regions and/or mediators put in place different arrangements and modalities in response to this development (including opening individual businesses¹¹⁴ or fiscal numbers),¹¹⁵ with the intention of aligning with Kosovo's legislation on tax related to personal incomes.¹¹⁶ After June 2018, there was no harmonized arrangement or procedure that related to the payment of the mediators fee in prosecution-connected mediation. This also meant that further burdens, expenses, and responsibilities were imposed on mediators, who only receive a modest standard fee for their services.

Seven main challenges confronted the development and implementation of mediation in the period 2008-18. Although some were evidenced at an early stage and then overcome, others remained and affected the development and implementation of mediation throughout the second phase. They are the following:

- ✚ Institutionalized mediation is new and not widely known, hence there is no comprehensive understanding of its entire aspects or features and this presents a

¹¹⁰ Mediation Committee, Registry of the Mediators of Kosovo 2017

¹¹¹ Working meetings on mediation organized for the purposes of this overview.

¹¹² Convened for the purposes of this overview.

¹¹³ Working meetings on mediation organized for the purposes of this overview.

¹¹⁴ Suggested by the Secretariat of the Mediation Committee 2017.

¹¹⁵ Or other.

¹¹⁶ Working meetings on mediation organized for the purposes of this overview.

challenge in terms of drafting and adoption of the subsidiary legislation.¹¹⁷ In addition, it is not a priority for institutional actors. This results in fewer or no resources being allocated to its implementation and the Mediation Committee, which impedes its development and ability to work across the country.¹¹⁸

- ✚ Kosovo's institutions do not sufficiently invest in mediation, and this means that it is highly dependent on external actors/donors, the wider community of which is not strongly interested in investing in this area.¹¹⁹
- ✚ Insufficient resources create external dependencies, which are particularly pronounced in the recruitment and training of mediators¹²⁰ and provision of mediation.
- ✚ The fact that judges and prosecutors in some regions are not generally aware of mediation implies that they do not frequently refer cases to the Mediation Centers. As a result, neither benefits from reduced caseload, fewer cases that enter judicial proceedings and the upholding of the right (of natural and legal persons) to due process.
- ✚ Citizens and parties in dispute are not always familiar with mediation, and this may mean that they are less willing to engage with it.
- ✚ The enforcement of the private/out-of-court mediation agreements is ambiguous, and this may discourage the use of mediation.
- ✚ The low number of mediations means that mediators lack opportunities to develop their skills and experience.

Although some of the challenges were present since the establishment and functionalization of mediation in the country, one interviewee (Lindita Ademi) states that a number were overcome through joint work and commitment of local and international partners. These external actors/partners supporting mediation contributed to the development of the subsidiary legal infrastructure and they also directly engaged in the recruitment, training, certification, and licensing of mediators. The participation of the Kosovo Judicial Council and Kosovo Prosecutorial Council in the Mediation Committee also made it possible for them to encourage judges and prosecutors to refer cases and use court and prosecution-connected mediation.¹²¹

Mediation-focused events and trainings helped judges and prosecutors to gain an improved understanding of mediation. Joint conferences, meetings and roundtables proactively engaged stakeholders (heads of courts/prosecutions, judges, prosecutors, police, and representatives of

¹¹⁷ Interview with Bekim Ismaili, Mediator/Project Manager, CSSP Berlin Center for Integrative Mediation; Interview with Lindita Ademi, Chairwoman of the Former Mediation Committee 2013 – 2017

¹¹⁸ Interview with Lindita Ademi, Chairwoman of the Former Mediation Committee 2013 – 2017

¹¹⁹ Interview with Dusan Radakovic, Mediator/Executive Director of the NGO Advocacy Center for Democratic Culture

¹²⁰ Interview with Lindita Ademi, Chairwomen of the Former Mediation Committee 2013 – 2017

¹²¹ Ibid.

the legal community) and communicated the benefits of mediation to them. This helped to build positive perceptions vis-à-vis mediation, establish linkages and partnerships between Mediation Centers and courts/prosecutions and also increased the court and prosecution case referrals to the Centers. Mediators developed experiences and judges and prosecutors gained a heightened appreciation of the value of their work/Mediation Centers' work, and this in turn produced a higher number of court and prosecution cases delegated to mediation. Public awareness campaigns also stimulated the general public to engage and understand the procedure.¹²²

However, while mediation in Kosovo showed clear evidence of an ongoing progression and development, there were still a number of challenges that remained as insufficient institutional support, reliance on external actors and the instability accompanying that,¹²³ and ambiguities about the enforcement of private/out-of-court mediation agreements, etc. In 2015, both Ministry of Justice and local and international actors sought to address these and other challenges when they committed themselves to reforming Kosovo's Law on Mediation.

Overview of the Mediation Statistics: 2008 - 2018¹²⁴

	Ferizaj/ Uroševa c ¹²⁵	Gjakovë / Đakovica ¹²⁶	Gjilan/ Gnjilane 127	Mitrovicë / Mitrovica 128	Pejë/Peć 129	Pristina 130	Prizren ¹³¹	Total
REFERRED TO MEDIATION	903	499	1100	1194	745	1945	1065	7451
SUCCESSFUL MEDIATION	721	374	930	1106	543	1899	827	6400
UNSUCCESSFUL MEDIATION	68	92	128	88	157	46	37	616

¹²² The interviews conducted with the representatives of the Former Mediation Committee, CSSP, UNDP, Partners Kosova.

¹²³ By the end of 2016, the three regional Centers supported by USAID reduced their functions and in these regions for a certain period mediation was only available to a limited extent (Interview with Hasie Abdullahu, Mediation Expert/USAID Project; CSSP/ADRC-MCM 'Mediation Practice in the Business Sector of Northern Kosovo' (2016) MPBSNK 1, p. 5; Available at: www.mediation-mitrovica.org/publications). In mid-2017 the Kosovo Judicial Council responded to this situation and the impending new Law on Mediation, by inviting courts to assign court personnel to engage with the "case-referral" process and court-connected mediation. In the end of 2017, the Kosovo Prosecutorial Council then invited the prosecutions to undertake similar steps. Mediation then became the responsibility of an existing court and/or prosecution official and they assumed responsibility for its administration. This was mainly applied in the regions with no active Mediation Centers. It may be argued that private/out-of-court mediation was particularly affected by these developments. In 2018, three other Mediation Centers supported by UNDP closed (Interview with Virgjina Dumnica, Mediation Expert/UNDP Rule of Law Advisor). The Alternative Dispute Resolution – Mediation Center Mitrovica is the only one that continued to operate.

¹²⁴ The statistics for all the regions except Mitrovicë/Mitrovica were obtained by the Ministry of Justice. The Ministry does not possess the statistics of 2016 for three regions. The statistics of Mitrovicë/Mitrovica region are of the ADRC – MCM.

¹²⁵ 2012 – 2018 (excluding 2016)

¹²⁶ 2012 – 2018 (excluding 2016)

¹²⁷ 2012 – 2018

¹²⁸ 2013 - 2018

¹²⁹ 2012 - 2018

¹³⁰ 2012/13 – 2018 (excluding 2016)

¹³¹ 2014 – 2018

Contemporary Mediation in Kosovo: Phase III

On 23 July 2018, the Parliament of Kosovo adopted a new Law on Mediation (No. 06/L – 009) that entered into force less than two months later. From this point onwards, “contemporary” mediation is primarily governed in accordance with:

- ✚ Law No. 06/L –009 on Mediation¹³²
- ✚ Criminal No. 04/L-123 Procedure Code¹³³
- ✚ Juvenile No. 06/L –006 Justice Code¹³⁴
- ✚ A set of sub-legal acts issued by the Kosovo Judicial Council, Kosovo Prosecutorial Council and Ministry of Justice.

Gaps and challenges in the country’s first Law on Mediation and its implementation highlighted the need for further changes. The European Union (EU) also required/es the strengthening of mediation in Kosovo and changing or drafting a new Law was seen as one of the avenues how this can be achieved.¹³⁵ The Ministry of Justice took the lead in developing a reform agenda, which began to assume form and consolidate in 2015. Besim Kelmendi observes that the Mediation Committee, mediators and those supporting mediation informed the Ministry of Justice of the problems, who then began the processes to draft a new law.¹³⁶ The drafting process was led by the Ministry and supported by representatives.¹³⁷ There was a disagreement between participants, most notably on the application of mediation to cases of domestic violence.¹³⁸ A Draft Law on Mediation was approved in 2017¹³⁹ and the Law, which draws on the mediation legislation of Albania, Austria, Croatia and slightly of Slovenia,¹⁴⁰ was then adopted in July 2018.

Mediation “in law”

The new Law defines mediation as “an extra-judicial procedure for settling contests and disputes between the subjects of law”, and the definition accords with the previous body of law.¹⁴¹ Article 1 establishes that it complies with Directive 2008/52/EC of the European Parliament and the Council on Certain Aspects of Mediation in Civil and Commercial Matters. The

¹³² Law No. 06/L–009 on Mediation 2018

¹³³ Criminal No. 04/L-123 Procedure Code 2012, Article 232

¹³⁴ Juvenile No. 06/L –006 Justice Code 2018, Articles 9-11

¹³⁵ Interview with Hasie Abdullahu, Mediation Expert/USAID Project

¹³⁶ Interview with Besim Kelmendi, State Prosecutor/Mediation Expert

¹³⁷ Representatives of the CSSP including ADRC – MCM, EU Office in Kosovo, Mediation Committee, Prime Minister’s Legal Office, the mediator community, UNDP, and USAID, etc.; Interview with Hasie Abdullahu, Mediation Expert/USAID Project

¹³⁸ Interviews conducted for the purposes of this overview.

¹³⁹ Kosovo Government, Draft Law on Mediation 2017; Available at: https://kryeministri-ks.net/wp-content/uploads/docs/PROJEKTLIGJL_P%C3%8BR_ND%C3%8BRMJET%C3%8BSIM.pdf

¹⁴⁰ Interview with the Besim Kelmendi, State Prosecutor/Mediation Expert

¹⁴¹ The lawmaker phrases mediation in slightly different terms to the previous law; however, in all other respects it remains completely faithful to the definition of its predecessor.

new Law retains a number of its predecessor's aspects and procedures and introduces other changes. The main changes that it introduces are:

The new Law broadens the application of mediation in the criminal field.

Whereas the previous law only allowed mediation to be applied to cases where the punishment was alternative (by fine *or* imprisonment of up to 3 years), it now extends the scope to cases where the punishment is cumulative (punishment by both fine *and* imprisonment of up to 3 years).¹⁴² This means that mediation now potentially applies to around 200 criminal offences,¹⁴³ although public interest considerations and other limitations may reduce this number.¹⁴⁴

Article 2 of the new Law also establishes that mediation may not be applied to cases of domestic violence. Besim Kelmendi states that he did not fully agree with this and claims that all parties should have an equal right to seek mediation. He also notes that the new Law initially upholds the right to mediation and then withdraws it (in cases of domestic violence). He observes that mediation should be available to all, regardless of their status, and adds that if it is available to those who harass and attack others, or steal from them, the same should apply to those in family relations who may have had single or isolated disagreements. Upon repetition, this opportunity is not allowed by the legislation anyway.¹⁴⁵ Hasie Abdullahu makes the opposite argument. She observes that domestic violence is widespread in Kosovo and adds that if such cases are referred to mediation, the victim's rights and interests may not be reflected in the outcome. She observes: "Domestic violence is a complex relation, and it is possible that unspoken or understated acts that are part of a pattern of violence may be overlooked and it is difficult to apply mediation and obtain balance if one party feels intimidated and hesitates to assert his/her position considering that the parties return to their previous setting after mediation".¹⁴⁶

The new Law introduces "Mandatory Mediation".

Articles 3 and 9 introduce a new feature called "Mandatory Mediation", which imposes requirements on the competent judge (to delegate certain cases to mediation) and on the parties (to try mediation). This form of the procedure applies to cases that pertain to family relations

¹⁴² Law No. 06/L-009 on Mediation 2018, Article 2; This does not apply if a special law has established the exclusive responsibility of a court, prosecution, or other competent body.

¹⁴³ M Krasniqi, 'Several Characteristics of Mediation in Criminal Field in the Republic of Kosovo' (2019) SchMCFRK 190, p. 192; Available at: <https://www3.mruni.eu/ojs/international-comparative-jurisprudence/article/view/5219/4621>

¹⁴⁴ A number of factors must be taken into account before the case/criminal offence is delegated to mediation, including the circumstances of the act, the personality of the perpetrator (including prior criminal history), the degree of the perpetrator's criminal liability and the type and nature of the act; M Krasniqi, 'Several Characteristics of Mediation in Criminal Field in the Republic of Kosovo' (2019) SchMCFRK 190, p. 193

¹⁴⁵ Interview with Besim Kelmendi, State Prosecutor/Mediation Expert

¹⁴⁶ Interview with Hasie Abdullahu, Mediation Expert/USAID Project

(such as: alimony, child support, custody, visitation rights and the division of marital property) and ownership contests related to rights and obligations that derive from the rights of servitudes and compensation of expropriated properties.¹⁴⁷ The parties are not obliged to enter mediation and/or reach a mediation agreement; however, they are obliged to try mediation and convene with a mediator within 30 days the judge obliges the parties to try mediation.¹⁴⁸ If the agreement to enter the mediation procedure is not reached, written evidence must be submitted to the court; the parties may then pursue the case to the court or employ the arbitration procedure.¹⁴⁹

The new Law integrates mediation services within courts and prosecutions.

The lawmaker sought to make mediation sustainable by integrating it into the work of the courts and prosecutions. Article 3 of the Law refers to the mediation clerks¹⁵⁰ and working area.¹⁵¹ These provisions establish a framework that places mediation inside courts and prosecutions and obliges them to provide mediation services. This is one of the key changes in the law that makes it possible to assume and/or continue the work of the Mediation Centers.

The publisher however anticipates that a number of challenges may emerge. The most important is the fact that mediation involves coordination with mediators and parties, communication about the case-referral process (with judges/prosecutors), administration of cases, arranging and scheduling of mediation sessions, monthly reporting, and a range of administrative and logistical tasks, which present a formidable workload that could jeopardize the time efficiency and quality of the mediation; both highly important and distinctive features of the mechanism. It therefore may be challenging for a single mediation clerk (as projected) to assume responsibility for all the aforementioned aspects and activities. The mediator Nebojsa Djokić also observes that in multiethnic regions such as Mitrovicë/Mitrovica, the appointment of one mediation clerk might be insufficient since he/she will be Kosovo Albanian or Serb. This may make it difficult for him/her to communicate with parties and mediators from the other community (or vice-versa) and also to manage the entire process.¹⁵²

But the new Law does not limit the number of clerks, and this at least raises the prospect that more clerks may eventually be appointed in proportion to with the workload and needs. But mediation has not been a priority for the country's institutions since its inception, and so there are no strong grounds for assuming this will necessarily occur.

¹⁴⁷ Law No. 06/L-009 on Mediation 2018, Article 9

¹⁴⁸ Ibid. Article 9

¹⁴⁹ Ibid. Article 9

¹⁵⁰ The court/prosecution official that administers the "case-referral process" and organizes the court/prosecution-connected mediation procedure.

¹⁵¹ An office or suitable environment that is located within the court or prosecution where the procedure and mediation sessions shall be held. The relevant sub-legal acts also allow the procedure to be applied outside court/prosecution and in appropriate settings.

¹⁵² Interview with Mediator Nebojsa Djokić

The new Law clarifies the enforcement of private/out-of-court mediation.

The new Law observes a clear improvement in private/out-of-court mediation. Whereas its predecessor was not clear on its enforcement, the new Law invests clear enforcement powers to the private/out-of-court mediation. Article 15 establishes that private/out-of-court mediation agreement which contains a clause on validity and enforceability has, in accordance with the Law on Enforcement Procedure, the power of an enforcement document. This development is expected to increase the use of private/out-of-court mediation, and it is also expected that this will reduce the pressure on the courts and prosecutions.¹⁵³

The new Law extends the timeframe of the mediation procedure.

The new Law retains the standard 90-days of mediation procedure, however, it also allows to prolong it by additional 30 days, although this is subject to the agreement of the parties, mediator/s and judge/prosecutor (in court/prosecution-connected mediation). In private/out-of-court mediation, the parties and the mediator can sign an agreement that permits the mediation procedure to be prolonged. In both cases (court/prosecution-connected and private/out of court mediation) it is not forthcoming if it produces legal consequences such as the loss of rights or the acquisition of rights by one party over time.¹⁵⁴

The new Law allows for technology to be used for mediation purposes.

Article 11 of the Law also permits technology to be used for mediation purposes, and this helps those subject to potential movement restrictions or who are located outside the country. But it is unclear whether this relates to the mediation sessions or the entire procedure. There are also practical issues – the procedure only begins after the parties give their oral and written agreement and it may be difficult for them to provide this, especially if they are abroad at the time. Participants in the working meetings organized for the purposes of this overview and one of the interviewees¹⁵⁵ agree that this practice has yet to be fully clarified. The publisher notes that it is very important for the relevant institutions to provide clear instructions about this new practice, as this will help to avoid inconsistencies in implementation and will also reduce the likelihood that the outcome becomes a source of dispute.

On 30 April 2020, Kosovo Judicial Council issued a decision and allowed to use a platform and link for the court-connected mediation procedure online, although this was made subject to

¹⁵³ B Kelmendi , 'Analizë Ligjore' (2018) AL 1, p. 1; Available at: <https://prokuroria-rks.org/assets/cms/uploads/files/Dokumente%20Publikime/KPK/Raporte/Analiza%20ligjore%20p%C3%ABr%20nd%C3%ABr mjet%C3%ABsim.pdf>

¹⁵⁴ Law No. 06/L-009 on Mediation 2018, Article 16

¹⁵⁵ Besim Kelmendi, State Prosecutor/Mediation Expert

the agreement of the respective case parties and mediator/s.¹⁵⁶ This step was taken as a mitigating measure amidst the COVID-19 outbreak, and it is intended to ease communication and hold mediation sessions during this period but not only.¹⁵⁷

The new Law foresees the establishment of a Chamber of Mediators.

The Mediation Committee stopped operating before the new Law was in place,¹⁵⁸ and it is now the Ministry of Justice that is responsible for untangling the surrounding politics and also to engage in promoting mediation.¹⁵⁹ The Ministry's Free Professions Department oversees the legality of the work mediators¹⁶⁰ and collects mediation statistics.

The new Law also sets forth provisions related to a Chamber of Mediators which shall be an independent non-profit legal entity¹⁶¹ that seeks to bring mediators under one umbrella, protect the interests of mediators, assist private/out-of-court mediation and promote the overall development of the mediators and mediation. Article 21 stipulates that the Chamber is formed on and functions on the basis of a statute adopted by the General Assembly of Mediators and approved by the Ministry of Justice. The Chamber was established on 2 November 2019,¹⁶² and its main bodies are: *the General Assembly of the Mediators composed by the Kosovo's licensed mediators*;¹⁶³ *the Board of the Chamber comprised by seven mediators representing each of the Kosovo's seven regions*; and *the President of the Chamber*.

In one of the interviews, the mediator Nebojsa Djokić observes that the process through which the Chamber was established was too politicized ("The voting of the bodies and the representation in these bodies were elected as if based on party membership"). He also registers skepticism about the ability of the Chamber to support the future development of the procedure.¹⁶⁴

The Chamber is expected to be primarily sustained by the compulsory contributions of its members. Not all mediators are active, and it is therefore open to question if the Chamber will

¹⁵⁶ Kosovo Judicial Council, Decision No. 82/2020 (2020)

¹⁵⁷ Interview with Hasie Abdullahu, Mediation Expert/USAID Project

¹⁵⁸ Interview with Bekim Ismaili, Mediator/Project Manager, CSSP Berlin Center for Integrative Mediation

¹⁵⁹ Law No. 06/L-009 on Mediation 2018, Article 20

¹⁶⁰ Division for Supervision of the Legality of the Work of Free Professions (that includes Mediators); Ministry of Justice, 'Free Professions Department' (md.rks-gov.net) <<https://md.rks-gov.net/page.aspx?id=2,27>> accessed May 25, 2020

¹⁶¹ Law No. 06/L-009 on Mediation 2018, Article 21

¹⁶² koha.net, 'Themelohet Oda e Ndërmjetësuesve, synohet zgjidhje më e lehtë e kontesteve mes qytetarëve' (koha.net 2019) <<https://www.koha.net/arberi/192010/themelohet-oda-e-ndermjetesuesve-synohet-zgjidhje-me-e-lehte-e-kontesteve-mes-qytetareve/>> accessed May 20, 2020

¹⁶³ The Statute of the Chamber of Mediators establishes that all of Kosovo's mediators who hold an active license must be members of the Chamber.

¹⁶⁴ Interview with Mediator Nebojsa Djokić

achieve to be sustained by its membership considering its potential needs for infrastructural and human capacities to organize the work and the administration of the Chamber.¹⁶⁵

Article 21 of the Law establishes that the Chamber and its acts must be approved by the Ministry of Justice, but this has not yet occurred.¹⁶⁶

The development of the new mediators is the responsibility of the Ministry of Justice, which is the competent authority tasked with the training, certifying¹⁶⁷ and licensing of mediators. The conditions to become mediator resemble those of the previous legislation.

The new Law obliges the issuing of sub-legal acts.

The new Law on Mediation obliges the preparation and adoption of sub-legal acts to guide its subsequent implementation.

Article 8 obliges the Kosovo Judicial Council to issue a sub-legal act defining the referral of court cases to mediation and court-connected mediation. On 8 May 2019, the KJC issued the relevant regulation and the mediation agreement form is included.¹⁶⁸ The regulation is in the function of the new Law and it contains adequate provisions on the referral of the court cases to mediation and the administration of court-connected mediation. However, its utility is undermined by the fact that, to a substantial extent, it repeats the provisions of the own new Law; this is not supposed to be the norm, as sub-legal acts are intended to provide necessary details that clarify implementation and are not, by definition, meant to reiterate the articles of the law.¹⁶⁹

The same Article obliges the Kosovo Prosecutorial Council to prepare and adopt a sub-legal act that relates to the referral of prosecution cases to mediation and prosecution-connected mediation, and this regulation was issued on 3 June 2019.¹⁷⁰ In a similar manner to the KJC regulation, it provides relevant details about the referral of prosecution cases to mediation and the administration of prosecution-connected mediation and, also in common with the KJC regulation, repeats a number of elements that are already present in the primary legislation (the Law on Mediation and the Criminal Procedure Code).¹⁷¹ Chapter III of this regulation also refers to the referral of juvenile-related mediation procedure.

¹⁶⁵ Interview with Hasie Avdullahi, Mediation Expert/USAID Project

¹⁶⁶ Working meetings on mediation organized for the purposes of this overview.

¹⁶⁷ The previous Law primarily assigned this responsibility (for training and certifying) to the Mediation Committee.

¹⁶⁸ Kosovo Judicial Council, Regulation No. 04/2019 for the Mediation Procedure for Court Cases 2019

¹⁶⁹ G Shala/Kosovo Law Institute, 'Progresi dhe regresi i Keshillave' (2019) PRK 2, p. 12

¹⁷⁰ Kosovo Prosecutorial Council, Regulation No.04/2019 on the Mediation Procedure for Prosecution Cases 2019

¹⁷¹ G Shala/Kosovo Law Institute, 'Progresi dhe regresi i Keshillave' (2019) PRK 2, p. 33

Whereas the same-purpose preceding sub-legal acts defined the procedure and case-referral from courts/prosecution to Mediation Centers, the current regulations (respectively) define the procedure and case-referral of courts/prosecutions inside both these institutions.

Article 8 of the new Law also obliges the Ministry of Justice to issue a sub-legal act defining private/out-of-court mediation. This act has not yet been issued. Ministry of Justice representatives declared that the act is currently waiting to be signed by the Minister, and that this is the limit of their current knowledge.¹⁷² Almost 20 months after the new Law entered into force, a crucial act is still missing. The implementation of private/out-of-court mediation is therefore still ambiguous – although the new Law clearly identifies the mechanisms and procedures of the court/prosecution-connected mediation, it does not sufficiently explain, in particular, private/out-of-court mediation procedure, administration, and reporting.¹⁷³

The sub-legal act that refers to mediator fees presents a similar conundrum. The Ministry of Justice reports that, in common with the aforementioned sub-legal act, this act is yet to be signed by the responsible minister. The new Law establishes that the new fee for mediators' services will equate with, or approximate to, the service fees of other free professions.¹⁷⁴ In the lack of the relevant sub-legal act, the €25 -basic fee of the previous administrative directive continues to apply.

For as long the subsidiary legislation remains incomplete, mediation will not realize its full potential and its broad benefits will be elusive.

Although the Ministry of Justice has not yet signed the sub-legal acts referred above, it has issued those that relate to Article 27 of the new Law.¹⁷⁵ These sub-legal acts (a total of 5) were signed on 27 November 2019, around 7 months after the period set forth by the new Law.¹⁷⁶ This belated confirmation and the lack of other sub-legal acts are concerning and appear to attest to insufficient institutional engagement and/or prioritization of mediation. Although the reforms were justified and undertaken on the basis that they will strengthen mediation, this will not happen in a comprehensive manner if the institutions overlook essential preconditions, such as the completion of sub-legal acts. While political instability and changes in government were and

¹⁷² Working meetings on mediation organized for the purposes of this overview.

¹⁷³ It should be remembered that, in the period 2008-2018, sub-legal acts that regulated private/out-of-court mediation were not referred by the law and nor were they issued.

¹⁷⁴ Law No. 06/L –009 on Mediation 2018, Article 19

¹⁷⁵ These sub-legal acts relate to 1. The training and certification of mediators; 2. The licensing of mediators; 3. Mediators' supervision, liability and disciplinary proceedings; 4. The mediator registry; 5. The Code of Conduct of Mediators.

¹⁷⁶ 'Six (6) months after this law enters into force, the Ministry of Justice shall issue sub-legal acts...'

will inevitably be cited by the responsible actors as mitigating factors, it should be remembered that it is actually the Ministry of Justice that engaged the reform of mediation. To the same extent, it should also be recalled that the drafting of the sub-legal acts was not transparent and/or inclusive. The ADRC's experiences confirm this, as its efforts to be engaged and contribute to the drafting process were not reciprocated.

Mediation under Juvenile No. 06/L-006 Justice Code¹⁷⁷

On 14 September 2018, a new Juvenile Justice Code (No. 06/L-006) was adopted. Chapter II refers to mediation and Articles 9, 10 and 11 regulate the mediation procedure for juveniles and also the selection of the mediator/s (among other).¹⁷⁸ Article 9 clearly establishes that the State Prosecutor for Juveniles may propose mediation if he/she considers it to be appropriate, although he/she must first take a number of factors into account.¹⁷⁹

One of the main changes to the previous Code¹⁸⁰ in relation to mediation is that the appointment of the mediator/s is/are now left to the parties.¹⁸¹ If they are unable to agree, the mediator/s is/are appointed by the Juvenile State Prosecutor.¹⁸² Whereas the previous Code and the current Law on Mediation establish/ed a 90-day period for the mediation procedure, the new Code stipulates that the mediation procedure for juveniles must not last for longer than 30 days.¹⁸³

Mediator/s who intend to mediate cases that involve juveniles must meet additional criteria. They must have at least five years' experience of working with juveniles; not have been banned from practicing the profession or duty; not have been punished for a criminal offence that indicates a lack of fitness for the role; and possess a certificate issued by a competent body that confirms they have completed the training for mediators in juvenile cases.¹⁸⁴

¹⁷⁷ Juvenile No. 06/L-006 Justice Code 2018; The Code regulates the action against the juvenile as a person committing a criminal act, children involved and juveniles as participants in the procedure, bodies that implement criminal procedure and execution of measures and sentence against the juvenile offender, as well as protection of juveniles and children that are victims of and harmed by criminal act.

¹⁷⁸ Juvenile No. 06/L-006 Justice Code 2018

¹⁷⁹ Including the nature of the case/criminal offence; the circumstances of the criminal offence; the juvenile's past history; the possibility of a normalization of relations between the juvenile and the injured party; the possibility that the juvenile can be rehabilitated and reintegrated into society; the possibility that the damages of the injured party can be reduced.

¹⁸⁰ Juvenile No. 03/L-193 Justice Code 2010

¹⁸¹ The juvenile and the injured party.

¹⁸² Juvenile No. 06/L-006 Justice Code 2018, Article 9

¹⁸³ Ibid. Article 9

¹⁸⁴ B Kelmendi, 'Analizë Ligjore' (2018) AL 1, p. 5-6; Available at: <https://prokuroria-rks.org/assets/cms/uploads/files/Dokumente%20Publikime/KPK/Raporte/Analiza%20ligjore%20p%20p%20nd%20mjet%20sim.pdf>

Mediation “in practice”

Since September 2018 onwards, mediation in Kosovo is applied on the basis of the new Law No. 06/L-009 on Mediation. The participants in the activities of this overview and the research highlight a number of challenges and difficulties that undermine the full-fledged operationalization and efficiency of the new Law.

Mandatory Mediation is yet to be applied at the needed levels by the judges of the Basic Courts of Kosovo. Besim Kelmendi notes that this is one of the aspects of the law that is not currently implemented at adequate levels. This form of mediation was introduced to boost the application of the procedure in certain cases of courts,¹⁸⁵ in the expectation this would reduce the number of such cases. However, adjudicating judges have not yet begun to fully respect the provisions of the new Law in relation to the referred obligation. On the basis of the ADRC’s experience, it may be stated that in general the cases that fall under the ambit of mandatory mediation are less subject to the mediation procedure than for e.g. criminal cases. This can be attributed to the fact that judges of the civil divisions of the courts traditionally refer fewer cases to mediation and are slightly more hesitant to engage the procedure. Participants in the mediation-focused working meetings organized for this overview assign the generally lower referral of civil cases to mediation to these cases’ complexities and implications and observe that in certain civil cases it is difficult to conclude the mediation procedure in its timeframe. In citing this as one reason for the lower application of mediation in civil cases and the continued insufficient recognition of mandatory mediation, they also acknowledge that other factors may come into play.¹⁸⁶

The interviews and meetings conducted for the purposes of this overview and desk research reveal that **the integration of mediation within courts and prosecutions has yet to be adequately achieved and is short of full compliance** with the new legislation. The latter clearly implies the following:

1. The appointment of a mediation clerk in the court/prosecution who will be tasked with receiving the referred cases, administrating the process of the referral, and arranging the related court/prosecution-connected mediation procedures.

¹⁸⁵ Cases that pertain to family relations (such as: alimony, child support, custody, visitation rights and the division of marital property) and ownership contests related to rights and obligations that derive from the rights of servitudes and compensation of expropriated properties.

¹⁸⁶ Working meetings organized for the purposes of this overview.

2. The arrangement and dedication of working areas within the court/prosecution that shall be used for the work of the mediation clerk and administration and the development of the sessions and procedure in court/prosecution-connected mediation.

However, the country's Basic Courts and Prosecutions have yet to accommodate these requirements adequately and entirely in practice.

The seven Basic Courts of Kosovo currently have mediation clerks in name. Namely, with the exception of the Basic Court of Pristina,¹⁸⁷ the mediation clerks in the other courts are in fact officials who engage mediation as a secondary duty that is subordinate to primary roles and tasks.¹⁸⁸ The Basic Court of Mitrovicë/Mitrovica has assigned the mediation-related roles and tasks to two of its officials in addition to their primary responsibilities.

With regard to working areas, only the Basic Court of Pristina and Basic Court of Gjilan/Gnjilane have sufficient facilities for mediation (2 spaces: 1 for the mediation clerk and administrative activities and a separate space for the conduct of mediation sessions and procedures). The Basic Courts of Ferizaj/Uroševac and Mitrovicë/Mitrovica¹⁸⁹ have one space inside that is committed to mediation, while the Basic Court of Prizren, Peja/Peć, and Gjakova/Đakovica do not have spaces dedicated solely to mediation.¹⁹⁰

Hasie Abdullahu confirms that not all Basic Courts have managed to provide sufficient infrastructure for the integration and provision of mediation services. She observes that one of the reasons is the lack of free spaces in general inside the courts that can be committed to mediation.¹⁹¹

The Kosovo Judicial Council is yet to initiate the process and allocate resources for positions of mediation clerks whose main responsibility shall be the process of case-referral to mediation and administration of the court-connected mediation.¹⁹² Although this institution has committed to work in this regard (to create specific positions and appoint mediation clerks) concrete measures have not been taken.¹⁹³

¹⁸⁷ Basic Court of Pristina has a mediation clerk whose primary task is mediation.

¹⁸⁸ Based on the interviewing and communications with the assigned mediation clerks of six Basic Courts.

¹⁸⁹ The Basic Court of Mitrovicë/Mitrovica attended one space to mediation and only in the building of the court in North Mitrovicë/Mitrovica which makes the procedure less accessible for those from the South Mitrovicë/Mitrovica, Vushtrri/Vučitrn, Skenderaj/Srbica.

¹⁹⁰ Based on the interviewing and communications with the assigned mediation clerks of six Basic Courts.

¹⁹¹ Interview with Hasie Abdullahu, Mediation Expert/USAID Project

¹⁹² Interview with the Virgjina Dumnica, Mediation Expert/UNDP Rule of Law Advisor

¹⁹³ Ibid.

The situation of the Basic Prosecutions is more positive as 5 of them (in Mitrovicë/Mitrovica, Prizren, Gjakova/Đakovica, Gjilan/Gnjilane, Peja/Peć) have assigned mediation to one member, who is only tasked with this responsibility and the Basic Prosecution of Pristina has 2 mediation clerks at present.¹⁹⁴ On the other hand, Basic Prosecution of Ferizaj/Uroševac has one person who engages mediation in addition to other primary tasks and roles.¹⁹⁵

In terms of working areas, the Basic Prosecutions of Pristina and Peja/Peć are the only two that have the required infrastructure for mediation. These two prosecutions established two working spaces for mediation – 1 used by the mediation clerks (for the referral and administration of cases and other related activities) and 1 for hosting mediation sessions and procedures. The remaining prosecutions accommodated mediation into only one working space, and it is here that both the administration of cases and related activities on one hand and the mediation sessions and procedures on the other hand take place.¹⁹⁶

Mediation clerks have yet to be firmly appointed in a number of the country's Basic Courts and Prosecutions. In contrast to the Kosovo Judicial Council, the 2020 budget of the Kosovo Prosecutorial Council includes seven mediation clerks, who are also depicted in its institutional organogram.¹⁹⁷

If the integration of mediation inside courts and prosecutions is to be up to par and adequate, efficient and qualitative mediation services are to be provided in court/prosecution cases, then at least 1 mediation clerk who is primarily focused on mediation must be appointed and 2 particular spaces (1 for the administration of the referred cases and related activities and 1 for the mediation sessions and procedures) are the preconditions. But these preconditions are not yet, as noted above, met in the needed and demanded level by a number of courts and prosecutions across the country. Virgjina Dumnica, one of the interviewees, relates these issues to the fact that the judicial system was not sufficiently prepared to assume mediation responsibilities.

The relevant regulation of the Kosovo Judicial Council defining the court referral of cases to mediation and court-connected mediation also refers to informative materials on mediation to be distributed to parties who access courts.¹⁹⁸ However, research and interviewing and

¹⁹⁴ Based on the interviewing and communications with the assigned mediation clerks of six Basic Prosecutions.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid.

¹⁹⁷ Interview with Virgjina Dumnica, Mediation Expert/UNDP Rule of Law Advisor

¹⁹⁸ Kosovo Judicial Council, Regulation No. 04/2019 for the Mediation Procedure for Court Cases 2019, Article 4

communications with the assigned mediation clerks inside courts reveal that only 2 Basic Courts (in Mitrovicë/Mitrovica and Ferizaj/Uroševac) possess such materials while the Basic Court of Pristina has, nevertheless, not in sufficient amount.

Besim Kelmendi agrees that the situation in this regard must improve and that courts and prosecutions must endeavor to ensure that mediation is not neglected. Kelmendi observes that a number of courts and prosecutions have assigned mediation-related responsibilities and activities to professional collaborators or legal associates or other members of staff and notes that there is a need for improvements, while he is also adds that he is engaged and advocates for an environment fully-conducive to mediation to be created.¹⁹⁹

Some of the participants in the mediation-focused meetings organized for this overview, see the aspect of the new Law that relates to the integration of mediation inside courts and prosecutions as a positive step that will reduce reliance on external funding and increase the number of court/prosecution case referrals to mediation in Kosovo-level. However, they also recognize that it could negatively impact the principle of free will, as parties could perceive the court/prosecution, the atmosphere and the presence of police there to be different from the Mediation Centers and pressurizing, which then may impact their decision and compel them to engage the procedure despite the fact they may not be convinced and fully-willing to do so.²⁰⁰

Another issue are **the missing sub-legal acts** that regulate the administration and procedure of private/out-of-court mediation and mediators fee. Both need to be signed by the Minister of the Ministry of Justice before they can enter into force. This is yet to happen.

The lack of the sub-legal act on private/out-of-court mediation impedes the development of this form of the mechanism and makes the procedure difficult to pursue because, with the exception of the Mitrovicë/Mitrovica region where the ADRC – Mediation Center Mitrovica has been active, there were and are no structures that enable comprehensive access to this form of mediation and then reporting to the Ministry of Justice. The continued absence of this relevant sub-legal act is an ongoing concern that limits the availability and the potentials of the private/out-of-court mediation.

On the other hand, the absence of the sub-legal act that regulates the mediators fee and the payment or reimbursement arrangement is also problematic because, after the 2018 decision of

¹⁹⁹ Interview with the Besim Kelmendi, State Prosecutor/Mediation Expert

²⁰⁰ Working meetings on mediation organized for the purposes of this overview.

the Kosovo Prosecutorial Council (see p. 19: to discontinue with the payment of the fees of mediator services for the prosecution cases), different arrangements were put in place across the country, with the consequence that there is not a harmonized practice or modality currently. Some of the “innovations” or modalities included opening an individual business²⁰¹ or arranging fiscal numbers in order to comply with Kosovo’s legislation on tax on personal income. In other instances, inappropriate payment or reimbursement procedures might have also occurred or occur. The arrangements upon the decision of the KPC, also imposed additional burdens and expenses for mediators. As result, a number of them disengaged with mediation as they did not view it convenient to continue the practice. In several instances, the ADRC registered concerns of the mediators of Mitrovicë/Mitrovica region who stated that the minimum yearly expenses for maintaining the individual business exceeds €600, which means that mediators must complete at least 24 cases per year to meet the expenses of maintaining the individual business. This gives an added urgency to the imperative to issue a sub-legal act that will uniformly and adequately regulate in these areas. In 2019, Kosovo Judicial Council also took a similar decision to that of the Kosovo Prosecutorial Council and discontinued the payments or reimbursement of mediators for their services in court-connected mediation.

The Chamber of Mediators has been established. However, its establishment and acts must be approved by the Ministry of Justice, and this has not yet occurred. But there have been positive developments as the Ministry of Justice has provided facilities to the Chamber of Mediators in Pristina, and a handover was initially scheduled for March 2020.²⁰² But COVID-19 postponed this, and the Chamber has not yet begun to function properly.²⁰³ Once it does, it is expected that it will engage with private/out-of-court mediation, and pass regulations on the facilities that can be used in such instances.²⁰⁴

Although the Ministry of Justice has yet to fulfill a relevant amount of responsibilities that were assigned to it by the new Law on Mediation, it has, nevertheless, undertaken some concrete steps to comply with the sub-legal acts that it has issued.²⁰⁵ The Ministry started updating the registry of mediators, which includes refreshing mediators’ details and removing those who passed away, who no longer wish to practice mediation or who assumed positions that conflict with the role.²⁰⁶ Ministry representatives who participated in one of the working meetings said

²⁰¹ Suggested by the Secretariat of the Mediation Committee 2017.

²⁰² Working meetings on mediation organized for the purposes of this overview.

²⁰³ Ibid.

²⁰⁴ Working meetings on mediation organized for the purposes of this overview; B Kelmendi, 'Analizë Ligjore' (2018) AL 1, p. 2; Available at: <https://prokuroria-rks.org/assets/cms/uploads/files/Dokumente%20Publikime/KPK/Raporte/Analiza%20ligjore%20p%C3%ABr%20nd%C3%ABr%20mjet%C3%ABsim.pdf>

²⁰⁵ Administrative Instruction MOJ-No. 05/2019 on Registry of Mediators 2019

²⁰⁶ Working meetings on mediation organized for the purposes of this overview.

this process has been, and continues to be, subject to challenges, due to the fact that a number of mediators have been slow in responding or have not responded until now to their requests for information. Nonetheless, this process is ongoing and is expected to close in the forthcoming period.²⁰⁷ The register is expected to contain the Kosovo's licensed mediator's following details: registration number; name, surname and father's name; phone number and email; occupation; nature of cases he/she mediated; date and potential reason of deletion from the register.

The Ministry has also populated its website and made an important amount of information related to mediation available and accessible at its website.²⁰⁸

While the section above focused on some of the main challenges that confront the implementation of the new Law, the participants in the mediation-focused working meetings organized for the purposes of this overview also referred to the following:

- ✚ The necessity for **enhanced awareness of mediation**, and its ongoing **promotion**. Targeted engagement of the courts and prosecutions to encourage judges and prosecutors to increase their number of referrals. The engagement of the legal community, and lawyers in particular, is also seen as important in order to incite them to orientate their clients to mediation. A similar outcome could be expected from the sustained engagement of the public which remains generally and to a considerable extent unfamiliar with mediation. Participants stressed that the new Law requires broader exposure and familiarization if it is to achieve its full potential.
- ✚ The demand for ongoing **capacity-building work focused on mediators** that will enhance their understanding of the new legislation and also their mediation skills.
- ✚ The need to organize **mediation skill-focused trainings** that will benefit **mediation clerks** of the Basic Courts and Prosecutions.
- ✚ The need to consistently and closely **monitor the practical implementation of mediation** in alignment with the principle of the confidentiality in order to identify and assess continuing and emerging challenges, provide quality assurance and develop improvements.

²⁰⁷ Ibid.

²⁰⁸ See: <https://md.rks-gov.net/page.aspx?id=1.41>

Overview of the Mediation Statistics: 2019²⁰⁹

	Ferizaj/ Uroševac	Gjakovë / Đakovica	Gjilan/ Gnjilane	Mitrovicë / Mitrovica	Pejë/Peć	Pristina	Prizren	Total
REFERRED TO MEDIATION	654	234	518	516	848	1142	1049	4961
SUCCESSFUL MEDIATION	638	210	350	507	404	947	880	3936
UNSUCCESSFUL MEDIATION	9	8	128	9	444	131	59	788

The COVID-19 outbreak reduced the operations and output of a number of departments and sectors, and in some cases has even resulted in their suspension. As a result, the 2020 statistics on mediation are yet to be properly collected and confirmed. But, the publisher's interviewing and communication with the appointed mediation clerks of six Basic Courts and Basic Prosecutions²¹⁰ suggest that, in the period January – March there were approximately 1392 cases referred by the Basic Courts and Basic Prosecutions to mediation at country level of which around 828 cases were mediated successfully and 75 did not have a successful outcome.²¹¹ The remaining number of cases is in process.

ALTERNATIVE DISPUTE RESOLUTION CENTER – MEDIATION CENTER MITROVICA

The Mediation Center Mitrovica was opened in March 2013 by the CSSP Berlin Center for Integrative Mediation, with the support of the Royal Norwegian Embassy in Pristina, Swiss Embassy in Pristina, and German Federal Foreign Office. In the end of 2016, it was registered as a non-governmental organization under the name Alternative Dispute Resolution Center (ADRC) and it is since known as the Alternative Dispute Resolution Center (ADRC) – Mediation Center Mitrovica (MCM).

Since its establishment first by CSSP and then as its own organization, the ADRC – MCM worked to facilitate easily accessible, expedited, and low-cost access to justice for the citizens and

²⁰⁹ The statistics for all the regions except Mitrovicë/Mitrovica were obtained by the Ministry of Justice. The statistics of Mitrovicë/Mitrovica region are of the ADRC – MCM.

²¹⁰ In Ferizaj/Uroševac, Gjakovë/Đakovica, Gjilan/Gnjilane, Pejë/Peć, Pristina, Prizren.

²¹¹ Including the statistics of the ADRC and Mitrovicë/Mitrovica region for the period January – March 2020.

legal entities of the Mitrovicë/Mitrovica region. Its work was not narrowly related to mediation as in law and it had and has an important peacebuilding component that promoted and promotes communication between Kosovo Albanians and Serbs in the Mitrovicë/Mitrovica region, the settlement of intra/inter-ethnic disputes and joint engagement.²¹² The ADRC – MCM had and continues to have a multiethnic staff and works in three languages (Albanian, Serbian, and English).

In the period 2013 – 2017, the ADRC – MCM made an important and valuable contribution to the region which was characterized by limited access to justice, weak rule-of-law and not-fully functional judicial institutions due to the divisions and the wider political situation.²¹³

After the court and prosecution in Mitrovicë/Mitrovica integrated or unified into one in late 2017, the ADRC - MCM assisted their work and the efficient integration and contributed to an increased engagement in particular of the Kosovo Serb citizens with mediation as an access to justice mechanism. Dusan Radaković observes mediation and this work is important because, in conflict-affected settings, citizens tend to trust only a prosecutor or judge from their own community and that they do not feel comfortable or trust when their case is engaged by a prosecutor or judge who is not of their community. In making the comparison against courts and prosecutions, he claims that this is one of the main and distinctive benefits of mediation and the work of the ADRC – MCM, since it provided citizens the opportunity to select mediators from their own communities and this then also increases the general trust in the legal and justice system.²¹⁴ In addition, mediation allows the possibility to engage two mediators, which is not the case with court and this is an added benefit.²¹⁵

A network of close to 60 trained and 50 licensed mediators has been affiliated to the Center since its establishment. From March 2013 to March 2020, the Center successfully resolved 1715 of 1813 cases, and more than 4200 parties benefitted as a result. Its work assisted the judiciary by alleviating backlog and preventing new cases from entering court proceedings and also helped citizens to obtain expedited and low-cost access to justice.

²¹² Since Kosovo's armed conflict ended, the Mitrovicë/a region has been divided along ethnic lines. Kosovo Albanians mainly live in Mitrovicë/a South and Kosovo Serbs mainly reside in Mitrovicë/a North.

²¹³ In the period 2013-2017, two separate judicial systems operated on each side of the Ibër/Ibar River. The system in the south operated based on Kosovo's legal framework and institutions, and the system in the north was maintained by Serb institutions.

²¹⁴ Interview with Dusan Radaković, Mediator/Executive Director of the NGO Advocacy Center for Democratic Culture

²¹⁵ Ibid.

In agreement with the court and prosecution, the ADRC – MCM began, at the end of 2019 and early 2020, to work towards the transfer of mediation services to both institutions as envisaged with the new Law and its own vision for the sustainability of mediation.

It was originally projected that the court and prosecution would begin with mediation in March 2020. However, the COVID-19 pandemic meant that this original schedule had to be postponed to June 2020.

In the future, the ADRC – MCM will continue to support the development of mediation in Kosovo in different capacities, and will place particular emphasis in assisting the court and prosecution as they work to acquire the skills and capacities that will enable them to provide efficient, flexible, and responsive mediation services. In addition, ADRC – MCM will continue to work on community mediation, reconciliation, and the development of Mitrovicë/Mitrovica region.

RECOMMENDATIONS

- ✚ The Ministry of Justice must without further delay issue the sub-legal acts that regulate private/out-of-court mediation and the mediators fee. The completion of the subsidiary legislation is imperative as it will make it possible to comprehensively apply and develop private/out-of-court mediation, define the fee and associated arrangements and help mediators to conveniently organize, improve and provide their services.
- ✚ The Ministry of Justice must, as a point of urgency, sign the establishment and acts of the Chamber of Mediators. The Ministry to continue to lend assistance to the Chamber. External actors/partners engaged with mediation to seek and support the full functionalization of the Chamber of Mediators and the strengthening of its capacities.
- ✚ Judges of the Basic Courts must comply with the aspects of the new Law on Mediation that relate to mandatory mediation, which obliges them to refer certain cases and engage mediation. External actors/partners supporting mediation should help the respective judges to become familiar with mediation and the new legislation, and they should also endeavor to facilitate communication and cooperation between the judges working in the cases that fall under mandatory mediation and mediators.²¹⁶

²¹⁶ Working meetings organized for the purposes of this overview.

- ✚ Presidents of the Basic Courts and the Chief Prosecutors of the Basic Prosecutions should encourage judges and prosecutors to refer more cases to mediation in general.²¹⁷
- ✚ Kosovo Judicial Council and Basic Courts must undertake the necessary steps to recruit and/or appoint mediation clerks (solely focused on the administration of court-referred cases to mediation and court-connected mediation).
The number of mediation clerks should increase both in courts and prosecutions in proportion to the workload. External actors/partners supporting mediation can aid in this respect through internship programs dedicated to the mediation “points” inside courts and prosecutions.
- ✚ Basic Courts and Basic Prosecutions must provide appropriate and sufficient working areas/spaces for the court/prosecution-connected mediation (where missing).
- ✚ Relevant institutions²¹⁸ and those supporting mediation should work together to increase the mediation-skills and capacities of mediation clerks and also their understanding of the primary and subsidiary legislation on mediation. They should also help to develop efficient “case-referral” and mediation administration programmes and infrastructures.
- ✚ External actors/partners working in the area of mediation should develop informative and promotional materials on mediation and then circulate them to Basic Courts and Prosecutions so that they can be provided to citizens who access these institutions or to interested and relevant parties.
- ✚ The relevant institutions²¹⁹ must issue an act or instruction that clarifies the application of technology to mediation. This is particularly important because the practical implementation of this aspect of the new Law is not clear (see p. 25).
- ✚ By the end of 2020, the Ministry of Justice, and external actors/partners must commit to and organize capacity-building trainings for Kosovo’s licensed mediators. In addition to being enshrined in the sub-legal act on the training and certification of mediators,²²⁰ this is also an ongoing need that participants of the working meetings of this overview identified. The training and development of mediators from non-majority communities

²¹⁷ Working meetings organized for the purposes of this overview.

²¹⁸ Kosovo Judicial Council and Kosovo Prosecutorial Council

²¹⁹ Kosovo Judicial Council, Kosovo Prosecutorial Council, and/or the Ministry of Justice

²²⁰ Administrative Instruction Moj-No. 06/2019 on Training and Certification of Mediators 2019

should also be prioritized, as this will provide and/or increase the availability of mediation to them and also encourage their engagement and association with the procedure.

- ✚ Mediators need to be more responsive and proactive when the Ministry of Justice seeks information and data with the aim of establishing an adequate and representative registry. The Ministry should also consider broadening the content of the registry to include information about the mediator's ethnic background and location.
- ✚ The Ministry of Justice should continue to populate its website with mediation-related material and it is invited to also provide information about the number of beneficiaries and the types of cases engaged by mediation in Kosovo that are at present missing.
- ✚ Those providing mediation must frequently report to the Kosovo Judicial Council, Kosovo Prosecutorial Council and Ministry of Justice and must, in so doing, meet recognized reporting standards.
- ✚ The Kosovo Judicial Council, Kosovo Prosecutorial Council, Ministry of Justice, and other external actors/partners who support mediation should, both independently and in collaboration, work to promote mediation and highlight its advantages. Social and traditional media activity could be complemented by conferences, panel discussions, roundtables, street actions, and university lectures – among other.²²¹
- ✚ The mediation provided by courts, prosecutions and mediators must be monitored in accordance with the principle of confidentiality and frequent reports should document the latest developments, provide quality assurances, identify ongoing challenges, and suggest potential improvements.

²²¹ Working meetings organized for the purposes of this overview.

