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## **MEDIATION OF JUSTICE SYSTEM IN REPUBLIC OF KOSOVO AND ITS POSITIVE EFFECTIVENESS**

### **ABSTRACT**

In general term it can be said that the *conflict* can be defined as situation in which individuals do not agree or have different needs, interests or values, which results with disagreement, distrust and tensions between them. In such situations people often think that the usual form of the conflict solution is the *formal court proceeding*.

However, the judgement is not the only remedy of the effective settle of disputes between different parties.

*The most basic form of the dispute settlement is that of negotiation*, which mainly includes discussions between the interested parties with the purpose of conciliation of different opinions, or at least to understand different attitudes of the parties.

Based on this, and in general terms, *mediation* can be defined as “*negotiation concluded with the support of the third party*”. Saying in other words, *mediation is an extra-judicial action which is realized by a third person (mediator) for the settlement of the disputes between law subjects in accordance with the conditions foreseen by law*.

**Key words:** Parties, dispute - conflict, contest, negotiation, law, court, prosecution, mediation, communication, agreement.

### ***1. General Overview on Mediation***

Fast dynamics of economic development and social changes in contemporary world, and also in our country within these last years is characterized with huge increase of the disputes and conflicts between the people. The majority of those are determined by the impulsive flow of live, which is caused following huge changes in contemporary society, especially starting from the last decade of the past century. These are determined also by the interfering which are caused by social development based on market economy, where should necessarily coexist and act multiple private and public interests.

Development of these social flows definitely causes disputes, contest and conflicts between different parties. It can be generally said that *conflict* is defined as situation in which the individuals do not agree, or have different needs, interests or values, which results with disagreement, distrust and tensions between them. More concretely “conflict is the fact that is happening and is not perceived in the same way by the both parties. It is understandable that the perception depends on many factors. Such are the macro and micro environment where the person has grown up, educated, stereotypes and certain prejudices which are formed by the personal or others live experience, as are parents, sisters, brothers, relatives, and sometimes by the others that seems to not have influence in certain moment, but have influenced in certain deformation.”<sup>151</sup>.

In such conflictual situations people often think that the usual form of the conflict solution is the *formal court proceeding*.

The state poses the monopoly of the use of power, and is placing the courts in disposal which are applying procedures defined by law in order to settle the contests between the people. The implementation of the court decisions the state ensures by all means through its administrative tool. Nevertheless, the judgment is not the only remedy of the effective solution of conflicts between the different parties.

*The most basic form of the dispute solution is that of negotiation*, which mainly includes discussions between the interested parties with the purpose of conciliation of different opinions, or at least to understand different attitudes of the parties in dispute.

Based on this, and in general terms, *mediation* can be defined as “*negotiation concluded with the support of the third party*” or “*a form of assistance by the third party for the solution of a contest*”. Saying in other words, “*mediation is an extra-judicial action which is realized by a third person (mediator) for the solution of the disputes between the law subjects in accordance with the conditions foreseen by law.*”<sup>152</sup>

It can be emphasized that the mediation in essence is only an negotiation where is included the third party which knows the effective procedure of

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<sup>151</sup> Restorative Justice and the Mediation on the Solution of Criminal Conflicts, *The Manual for Judges and Prosecutors*: Edition by UNICEF, European Comittion and Sida Tirana, 2007 pg.44.

<sup>152</sup> The Law no. 03/L- 57 On Mediation: Official Gazette of Republic of Kosovo No.41 dated:1 November 2008

negotiation, and that aims to support the persons in conflict, to coordinate their activities in order to make as much as effective in reaching the agreements between them. In this procedure and action emerges the role of the third party, respectively the role of mediator, and based on this the action is named as the mediation or mediation activity.

The role and importance of it by all means stands only in facilitation of the solution of contest, and reaching the agreement between the parties of contest. The mediation authority is not allowed to reflect the power of enforcement for the decision to parties, but only makes available an extended form of a negotiation among them, because the right for decision have only the parties of contest, which is finalized with the final act of the signing of agreement. Because of this, mediator should be the neutral party, respectively person which facilitates negotiation between the parties in conflict, by enriching the shortage in communication, by adding a different dimension and perspective to the contest, but also by enriching it with the provision of new ideas, always focused in the direction to make parties to be as much as possible near to the friendly agreements as concerns to their contest.

The essence, meaning and the philosophy of mediation stands on the fact that the disputes between the people are always undivided part of the development of normal life. Disputes derive as the consequence of misunderstandings. Therefore, it is important to know how to approach and treat them. Each constructive and substantial treatment, offers the possibility for progress, solution of conflict, and achievement of the agreement between the parties. In the contrary they can be transformed in a conflict that can be dangerous and harmful for the normal life of the parties.

Based on this can be concluded that the parties almost each time are interested to reach the agreement. However, in order to reach this there is need for a person who mediates, so the mediator, who without a doubt becomes the creator on solution of conflicts between them.

The main catalyst for the success of mediation as an activity surely remains the development and perfection of high communication skills. Good communication skills are undoubtedly the most influential tools in mediation. If the mediator during the mediation session communicates with high professionalism, confidence, sincerity and sensitivity, most likely there will be created very real possibilities for reaching agreements between the parties. Mediation is nothing else but the activity which in essence has only the dialogue or negotiation with the involvement of a third party, where through attitudes and equal communication clearly shows to the parties that

the agreement is their one, and that they are the "god" in solution of their conflict. Mediation is realized through several phases and it is right when the activity is often described as "*gradual way of establishment of order and cooperation between parties*"<sup>153</sup>.

Therefore, we can conclude that, when all issues that are part of conflict will be settled through the mediation, there are created more real opportunities that the achieved success will resist to the time testing, by being considered as an advantage which has this process, more than the court solutions.

## ***2. Legal Determination and Definition of the Mediation in Republic of Kosovo***

### ***2.1. Law on Mediation***

Relying on the role and importance of mediation procedure in the justice system, today many countries of the contemporary world have applied this form of alternative dispute solution between the parties, outside the court proceedings, by adopting laws that decisively determine and define this activity through legal acts. Norway is a good example for the mediation process, where family issues have to be followed by mediator necessarily.

*"The origin of Mediation for the solution of the conflicts in peaceful way in Kosovo is a new legal institute, while in the past has been practiced also in the Customary Albanian Law as is the Kanuni i Leke Dukagjinit, Kanuni i Arbrit (Kanuni i Skënderbeut) Kanuni i Labit, and in Customary Islamic Law" (Sharia).*<sup>154</sup> Even though there is a strong genetic relation between traditional and modern mediation, there are also enough characteristics that make difference between each other. Among others, it is enough to analyse the position of the third party in this process. In "modern" mediation, the possession of the process is related with the parties in conflict, means that the parties are the "god" of the process, and that the mediator simply assists the parties to develop their solutions, while at the traditional one is seen the dominant role of the third party, suggestions of which have a great authority towards parties. So, there exist visible differences between the traditional and modern forms of the mediation activity. However, in general, mediation in contemporary world poses more priority for solution of different contest between the parties comparing with other forms and ways, from which will be pointed out following ones:

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<sup>153</sup> Gulliver.P.H.:Disputes and Negotiation- AcrossCultural Prospective

<sup>154</sup> [http://www.md.ks.net/Ndërmjetësimi si Alternative e Zgjedhjes së Kontestëve në Kosovë](http://www.md.ks.net/Ndërmjetësimi%20si%20Alternative%20e%20Zgjedhjes%20së%20Kontestëve%20në%20Kosovë) :Tryezë Shkencore, Prishtine, 9 March 2011.

- The solution is reached fast, and without losing a lot of time;
- For the initiation of the moderation procedure there should exist a full will of parties, and the procedure starts immediately when parties agree for it start;
- The cost of procedural expenses is to low comparing with other forms;
- The issue is always under the control, since the parties of the mediation have fully under control the results;
- During the mediation parties are educated with the real and legal situation;
- The active communication, and a lot of negotiations are developed during the process;
- The Mediation procedure lasts up to 90 days<sup>155</sup>
- The mediation procedure is of confidential type, since all other declarations and informations related with mediation procedure cannot be used as a proof in any other procedure, without the approval of the parties.

Like in many other countries, also the Assembly of the Republic of Kosovo, in order to create as much as can opportunities to advance the legal system, but also "in order to regulate, organize, functionalize, and settle the contests in the most effective way by mediation, as well as respecting the historic tradition of mediation in Kosovo,; *adopts the Law on Mediation - Law No.03 / L-057, promulgated by Decree DL-048 --2008, date: 03.10.2008.* The adoption of this law, although a bit late, encouraged the advancement of the justice system in Kosovo, creating good opportunities in affirming ways, alternatives of the dispute solutions between legal entities and outside the court proceedings, since in current Kosovo's reality, court procedures are very prolonged, cost a lot, are overloaded, and quite complex. This law, which now regulates the mediation process generally, the establishment, organization and functioning of the Mediation Committee, as well as rights, duties and responsibilities of mediators in level of state, surely marks an important step in the legal system of the Republic of Kosovo.

Without entering into a detailed analysis and interpretation of this law, we will focus only on some important issues. Thus, *Article 15- conflict of interest* where the Law in a very concrete way stipulates that "*In case when conflict of interest occurs, the mediator is expelled from the mediation*

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<sup>155</sup> Law No.03/L-057- The Law on Mediation, Article -13

*procedure, except if the parties, after being informed for the existence of such circumstances, agree that he conducts the procedure*<sup>156</sup>.

In continuation, the law stipulates, *Mediation Committee Establishment and Competences (Chapter IV - article 17)*. Mediation Committee shall be established by the Ministry of Justice (Article 17.1.), and the Committee shall consist of the Chairperson and four (4) members. (Article 17.2. of this law). While members of the Mediation Commission, respectively subjects represented in the Committee are:

- a) Ministry of Justice;
- b) Kosovo Judicial Council;
- c) Kosovo Prosecutorial Council;
- d) Kosovo Chamber of Advocates;
- e) Ministry of Labour and Social Welfare of Kosovo (Article - 18.1.)

Likewise, a special place in this law takes also determination of required conditions for mediators involved in *Chapter V - Article 22.1 - 22.5*.

Therefore, in the full sense of the word, the adoption of this law, but also other legal acts which are necessary to materialize in a most positive way, for sure that are successes and initiative to reform the legal system in Kosovo

There always remains the undeniable fact that *giving the parties the opportunity to settle the disputes within mediation is a useful alternative. This requires not only the contribution of the mediators as such, but also of the entire community of lawyers, and those who understand well that access to justice also relies on realization on time of the right, because "delayed justice is denied justice"*<sup>157</sup>.

Important issue by which greatly depends the success of the mediation, are the *communication skills of the mediator*, without which there cannot be imagined the effectiveness and success of this process. Communication between humans always contains non-verbal messages (mimicry, body movements etc.) but also verbal messages expressed through words. However, in this dimension, there are often encountered misunderstandings, and exactly this puts it in the first place the importance of communication skills, especially of the mediators. *Communication skills that are requested*

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<sup>156</sup> The same place, pg,107.

<sup>157</sup> Restorative Justice and the Mediation on the Solution of Criminal Conflicts, *The Manual for Judges and Prosecutors*: Edition by UNICEF, European Comittion and Sida Tirana, 2007 pg. 51.

*from the mediator, who intervenes in a situation of conflict in successful way are the following ones:*

- Professional attitude ;
- Strong verbal and nonverbal skills;
- Strong listening skills<sup>158</sup>.

Application and respecting of these principles during the process of mediation definitely are presented as main indicators for the success and effectiveness of the mediation.

## ***2.2. Positive Effects of Mediation in Republic of Kosovo***

According to analyses and received reports the adoption of the Law on Mediation in Republic of Kosovo has given positive effects in Kosovo reality. This law has given to the citizens an opportunity and mechanism of disputes solutions with the extra-judiciary instruments, has enabled the decrease of the number of the potential cases within the regular courts of Kosovo, has encouraged the greater approach to justice, as well has given the opportunity for an effective domination and function of law. Effects and benefits of the mediation among others are:

- Efficiency, (most of the cases are settled within few sessions)
- Sustainability, (mediation offers sustainable solution)
- Confidentiality, (parties and mediators preserve the confidentiality of the process) and
- Success (the percentage of the successful cases is too high and in further increase)

In development, promotion and advancement of mediation process the main role have Mediation Centres in Kosovo. These consolidated centres after the adoption of the Law, coordinated in accordance with the Mediation Committee. and supported by the Ministry of Justice of Kosovo but also by other international partners are operating in 6 cities of Kosovo. The focus of their activities is directed towards implementation of these objectives in level of their territory, and they are as follows:

- Receive, plan and manage the cases;

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<sup>158</sup> The same place, pg.46.

- Support the mediators in coordination and implementation of activities through:
  - Creation and management of the databases for the issues of mediators in mediation;
  - Promotion of innovation and effectivity in mediation;
- Keep the confidentiality of all activities of the case and client information;
- Promote the mediation as the alternative solution of the contest;
- Develop and implement trainings for the mediators;
- Facilitate the working relation with judges, lawyers, social workers, service providers and other professionals, and individuals included in mediation process;
- Organize and coordinate activities of the Mediation Centres in accordance to the protocols of mediation, and the rule and regulations of Law on Mediation.

The effects of the activities of Mediation Centres are reflected with the following data.

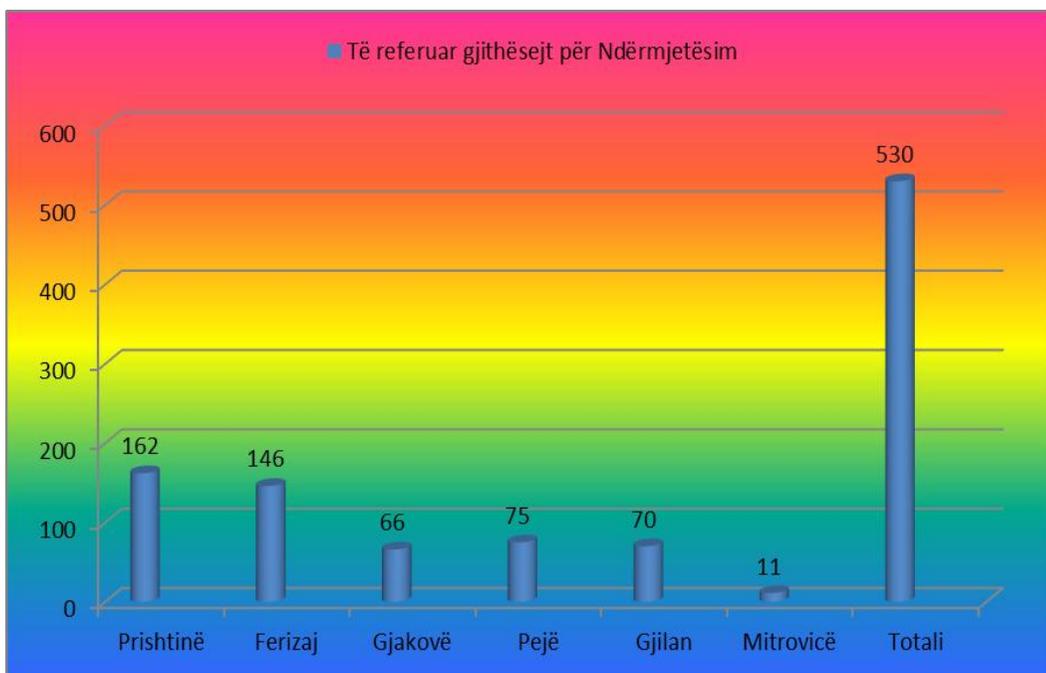
**Table 1. - Data on referred cases for mediation in country level for year 2013\***

<b>2013</b>	<b>Prishtine/ Pristina</b>	<b>Ferizaj/ Ferizovic</b>	<b>Gjakovë/ Djakovica</b>	<b>Pejë/Pec</b>	<b>Gjilan/ Gnjilane</b>	<b>Mitrovicë/ Mitrovica</b>	<b>Total</b>
Cases referred by Court	86	139	57	75	70	4	431
Cases referred by Prosecution	74	/	6	/	/	/	80
Cases with self-reference	2	7	3	/	/	7	19
<b>The total number of referred cases for Mediation</b>	<b>162</b>	<b>146</b>	<b>66</b>	<b>75</b>	<b>70</b>	<b>11</b>	<b>530</b>
The total number of settled cases	145	40	34	28	45	11	303

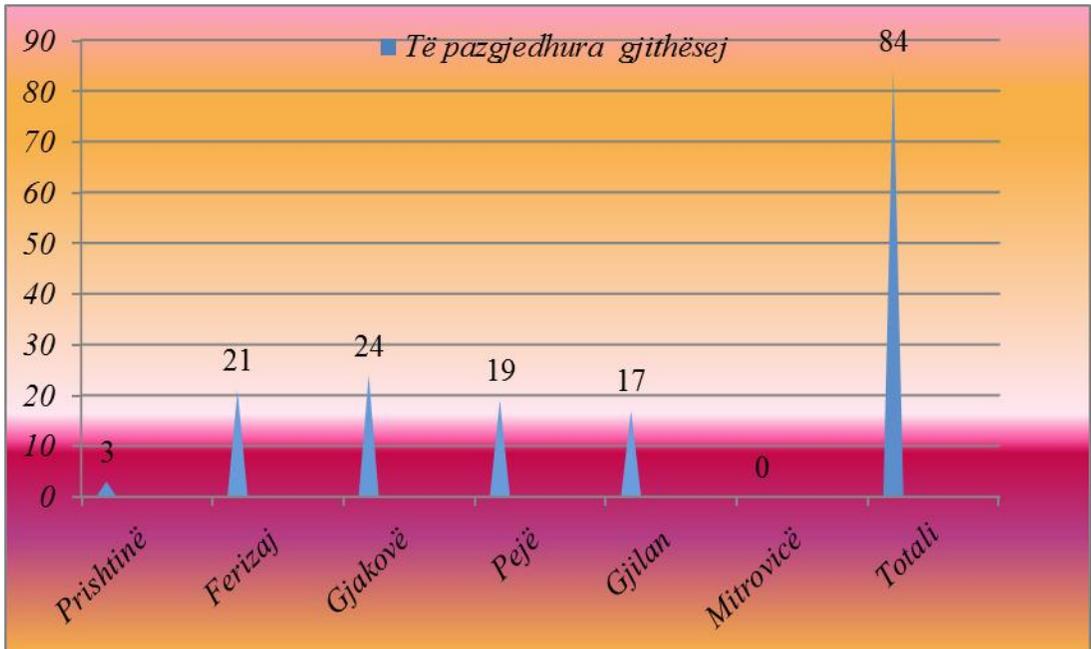
The total number of unsolved cases	3	21	24	19	17	/	84
In process (the number of total varies)	/	2	4	48	9	/	63

\*<http://www.md-ks.net>

**Table 2. – Graphical presentation of the data in country level for year 2013**



**Table 3. Graphical presentation of data for the unsolved cases of mediation in country level for year 2013**



Analysis of the data, according to the report by six Kosovo Mediation Centres in 2013, argues inter alia that:

- There is a general increase of interest by the parties for mediation since there are referred **530** cases, out of which **303** or **57.16%**, were settled successfully, by showing a positive effect but also the advantage compared to **84** or **15.84%** of the cases which are unsolved.
- These figures show that despite the positive effects that are emerging, still is little interest of **self-referred** cases, (still are dominating cases referred by courts and prosecutors), since through this form in country level for year 2013, there were only **19** or **3.58%**, of referred cases;
- Based on this data and by using the comparative method, the most noticeable cities are Prishtina/Pristina and Ferizaj/Ferizovic. Even though, these cities have great differences between each other as concerns to their number of citizens, still the number of referred cases for mediation is too close. In Ferizaj we have **16** or **3.01%** less referred cases for mediation, eventhough, Prishtina/Pristina has greater number of citizens.

- However, concerning successful solution of cases there is a huge difference between these two cities. Out of **162 cases**, Prishtina/Pristina has settled successfully **145 or 89.50% of cases**, which is considered as a real success, while in Feriza/Ferizovicj, out of **146** referred cases are settled only **40 or 27.39 % cases**, which is very low percentage. There is also difference between these two cities regarding the self-referral. In Prishtina/Pristina there were **2 cases**, while in Ferizaj **7 cases**, as much as Mitroviva have had.
- Another characteristic is seen in Mitrovice/Mitrovica, the city which in new reality of Kosovo differs with specific socio-politic flows. During the mediation process there were **11 referred cases**, out of which **7** were self-referred and all settled. This result shows the successful work of the Mediation Centre of Mitrovice/Mitrovica.
- A smaller effect of mediation cases and positive solutions of the contests according to this data is seen in Peja/Pec. The total number of referred cases is **75**, out of which are settled only **28 or 37.33%**, while **19 or 25.33%** of cases are unsolved, even though in process of solution were **48** cases.
- In Gjakova/Djakovica and Gjilan/Gnjilane successfully solved cases show a positive index, since more than half of the referred cases have reached agreement, although there is still need for a greater public awareness about the performance increase of mediation in these cities.

### **3. Conclusion**

Mediation is important activity and alternative for the solution of conflicts between the parties. However, the process of mediation has greater purposes rather than simple stimulation of the consensual solutions, even though it contains final objective and goal. While elaborating the mediation process, we can see a lot of advantages, out of which we will mention only some:

- Mediation does not offer only the simple agreement for the parties. Mediation aims to assist the parties to achieve a functional solution, which will be in their favour, to improve communication between them, and to foster fair and rational division of actual responsibilities and in prospective.

- Mediation offers to the parties involved in the conflict permanent solution through a short period of time. Solution of conflict between the parties, through the mediation process allows to solve a conflict in a short timeline and quickly, being distinct from any other procedure. This process obviously enables deviations from long delays at the judiciary, significantly minimizing

the time and financial costs. For cases referred by the courts and the prosecution, mediation procedures in the Republic of Kosovo last up to 90 days.

- The mediation process is a process with a modest financial cost compared with other justice procedures.

- Mediation enables that the parties which have disputes to have equal positions. During the mediation process parties play active and equal role, being educated with the feel of tolerance and understanding. During this process the parties avoid insecurity which often is experienced in court, as a result of the “arbitrary” decisions in their judgement.

- The process of mediation gives the opportunity to parties to know with transparency the options of each other. Communication and language used during the mediation sessions is simple and closer, where the parties understand and develop dialogue in favour of the effective and useful solution for both parties.

Based on these and many other advantages that characterize the mediation process, today it is applied in many countries of contemporary world, as well as in Republic of Kosovo, which in year 2008 has adopted the Law and other legal acts. Contribution and promotion of this area are showing the constitution and functioning of the Mediation Centres in six major cities of Kosovo, by organizing and coordinating their activities in accordance with the Law on Mediation, and by sensitizing public opinion about the opportunities offered by mediation in conflict resolution, sustainability, and long-term benefits to the parties, and by creating substantial impact on the quality of their life development.

## **REFERENCES:**

### ***I. Literature:***

Restorative Justice and Mediation in Solution of Criminal Conflicts: Manual for Judges and Prosecutors: Edition of UNICEF, European Commission and Sida, Tirana 2007,

Gullive.P.H.:Disputes and Negotiation- across Cultural Prospective.

### ***II. Legal acts:***

Law number 03/L- 57 on Mediation: Official Gazette of Republic of Kosovo, No.41 of dated: 1 November 2008.

***III. Electronic pages:***

[http://www.md.ks.net//Ndermjetesimi si Alternative e Zgjedhjes se Kontesteve ne Kosove:Tryeze Shkencore](http://www.md.ks.net//Ndermjetesimi%20si%20Alternative%20e%20Zgjedhjes%20se%20Kontesteve%20ne%20Kosove:Tryeze%20Shkencore), Prishtine, 9 March 2011.

[http://www.md.ks.net//Ndërmjetesimi/Evidenca e rasteve për 2013](http://www.md.ks.net//Ndërmjetesimi/Evidenca%20e%20rasteve%20për%202013)

[www.mediation-mitrovica.org](http://www.mediation-mitrovica.org)