

## MEDIATION AS AN ALTERNATIVE OF CRIMINAL CASE RESOLUTION IN KOSOVO

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### ABSTRACT

*Mediation as an institute of criminal law enables alternative resolution of criminal cases between parties without the need to go to court. This institute aims to help parties in order to achieve functional solutions which are in their best common interests. Mediation effects in reducing pending court cases, reducing public expenditure, increasing the level of social responsibility, education of citizens with a sense of apology and compensation of damages as well as cooperation with criminal procedure bodies, elimination of vigilantism cases etc. Mediation shall be addressed when it comes to commission of light offences and when it is estimated that for this alternative of criminal case resolution are fulfilled specified legal requirements. Modest results of this scientific paper prove that this criminal case resolution instrument is used in relatively few cases by Kosovo Basic Courts and Prosecutions. Causes of this situation may refer to the fact of not knowing advantages of this institute by judges and prosecutors as well as not having sufficient trust on independent mediators.*

**Key words:** Mediation, instrument, state prosecution, court, mediator.

### Introduction

Mediation as a criminal law institute aims to help parties in order to achieve functional solutions which are in their best common interests, to reduce expansion of conflict between parties, to improve communication between them and to encourage development of processes and perspectives for them. Mediation has a long history. Its origin probably relates to appearance of crime in society. As such it has gone through important transformations. Mediation takes an important place in contemporary society within alternative procedures of criminal case resolution. As a criminal case resolution mechanism mediation may be initiated in cases of criminal offences punishable by fine or imprisonment up to three years, but not always. This means while addressing mediation procedure it should be taken into account the type and nature of criminal offence, circumstances of its commission, personality of a perpetrator and previous punishments as well as the level of its liability. The initiative to implement mediation procedure may be undertaken by the state prosecutor of relevant basic prosecution or by a single trial judge of basic court, whereas the application of this procedure is a competence of an independent mediator. As it shall be seen below, this criminal case resolution instrument in Kosovo, despite of advantages provided, during the researching period of time (2013 - 2015) has been applied relatively in rare cases. This situation has been determined by the fact that judges and prosecutors are not familiar enough with the mediation procedures. Therefore, bearing in mind advantages provided by this criminal case resolution instrument for parties and the state, it is necessary in the future to have greater dedication in motivating new generations of judges and prosecutors for more common application of mediation. Also, it should be increased the work in terms of motivating scholars to handle mediation more in their scientific-research work. Within this scientific paper shall be handled: meaning, importance, criteria, authority and procedure on implementation of mediation, shall be present several data concerning mediation in Kosovo and conclusions.

During the preparation of this scientific paper I have used historical-legal, dogmatic, comparative and statistical methods.

#### 1. Meaning of mediation

Mediation is an institution of criminal law that enables alternative resolution of criminal cases between subjects of law in extra-judicially manner.<sup>1</sup> In fact, mediation, which entails in itself compensatory justice, presents a type of alternative procedure that marks a development trend, in the civilized world.<sup>2</sup> Through this institute is implemented restorative justice, respectively resolution of conflicts without having the need to go to court. Mediation aims to help parties in order to achieve functional solutions which are in their best common interests, to reduce expansion of conflict between parties, to improve communication between them and to encourage development of processes and perspectives for them. In fact, mediation is a negotiation between parties by involving a third person-mediator, which through neutral attitudes shows to the parties the fact that it's their dispute and they are capable of resolving the conflict.<sup>3</sup>

Mediation often is outlined as a way of scale-scale creating order and cooperation between parties. Hence, all issues being part of conflict whether shall be resolved through mediation it is possible that what is achieved and done shall resist the test of time. As it results, to mediation procedure a perpetrator of criminal offence and victim reach an agreement on their free will concerning

<sup>1</sup>Hajdari Albulena & Krasniqi Milot, Mediation as a new approach of alternative criminal case resolution, Advocacy, Bulletin of the Chamber of Advocates, No.13, Pristina 2012, p. 129 - 130. In fact, mediation as a criminal case resolution instrument is applicable not only in extra-judicially practices but also within the criminal justice system.

<sup>2</sup> In many world countries mediation has its legal basis in juvenile legislation or Criminal Code - Latifi Vesel & Elezi Ismet & Hysi Vasilika, The policy of combating crime, Pristina, 2012, pg. 187.

<sup>3</sup> Hajdari Azem, Commentary, Criminal Procedure Code, Pristina, 2016, pg. 606.

the existing conflict and for the damage inflicted by criminal offence. Mediation as a form of conflict resolution between victim and perpetrator of criminal offence was supported also by Council of Europe and United Nations recommendations.<sup>4</sup>

Mediation as a form of dispute resolution between parties in a conflict has a long history. Mediation is known almost by all unwritten laws, including the Albanian customary law.<sup>5</sup>“The Albanian customary law elaborated and advanced among centuries with the best self-organization and governance experience, since in Middle Ages took its regulated form, and served as a guide for living together in all Albanian territories. Under foreigners ruling and within self-organization and survival efforts, in addition to other institutes, has been elaborated also the mediation institute in order to prevent disputes and to resolve conflicts, by special emphasis in resolution of vendetta and revenge conflicts as the most serious wound of the Albanian society.<sup>6</sup> Consequently, through mediation conducted according to the Albanian customary law have been resolved almost all criminal cases.<sup>7</sup>“Also, contemporary societies, almost without exception, recognize this criminal case resolution institute. Thus according to several published data through mediation in Albania during the last five years have been resolved about 4% of criminal cases,<sup>8</sup> in Italy, about 9%,<sup>9</sup> in Austria 18%,<sup>10</sup> in Sweden 34%,<sup>11</sup> etc.

This institute is foreseen also by Kosovo criminal legislation (the Criminal Procedure Code (Article 232), Juvenile Justice Code<sup>12</sup> and the Law on Mediation.<sup>13</sup>

## 2. The importance of mediation

Mediation has multiple importance. Consequently, this institute manifests stretch of interest as in criminal procedure law,<sup>14</sup> in substantive criminal law<sup>15</sup> as well as in criminal policy.<sup>16</sup> Indeed, the importance of mediation is dealing with the fact that through this instrument:

1. Is affected in reducing the number of criminal cases proceeded in prosecutions and courts. Procedures of criminal case resolution through mediation are simple than in cases when they become subject of regular treatment in criminal proceedings, respectively through their proceeding at main trial. In these cases shall be shorten timelines of their resolution. This approach has a great criminal policy importance bearing in mind the fact in Kosovo Courts wait for resolution 440832 cases from which approximately half of them are criminal cases.<sup>17</sup>
2. By applying mediation procedure shall be shorten public money expenses which in terms of conducting regular criminal proceedings (standard) would be spent for witnesses, experts, and other lump sum expenses, which shall be estimated of a particular importance due to the fact Kosovo continues to have a very limited budget.<sup>18</sup>
3. Another benefit of implementing mediation procedure deals with the fact that society shall be protected from re-commission of criminal offences, based on the fact the accused persons for commission of criminal offences in relation to which was applicable mediation procedure in practice very rarely decide to commit again criminal offences, in comparison to persons against which were applicable regular criminal proceedings, despite judgment imposed by the courts.<sup>19</sup>
4. Perpetrators of criminal offences shall motivate to be educated with the feeling of repenting for the committed offence, apology and compensation of damage for victims of crime. This is dictated by the fact that mediation procedure shall be implemented in practice only if the accused person repent for the committed criminal offence, apologizes to the victim and indicates readiness to compensate the inflicted damage. Such acting approach has been very effective in elimination of vengeance feeling, which concerning various criminal offences, such is the case with criminal offences against life and body, those against sexual integrity, etc., continues to be present to a considerable category of victims of these crimes.

<sup>4</sup>Sahiti Ejup & Murati Rexhep, Criminal Procedure Law, Pristina, 2013, pg. 328.

<sup>5</sup> See: Sahiti Ejup, Argumentation in criminal proceedings, Prishtina, 1999, pg. 76 – 78.

<sup>6</sup> Conflict Resolution and Reconciliation of Disputes, Tirana, 2004, pg. 170-171.

<sup>7</sup> Elezi Ismet, The Albanian criminal customary law, Tirana, 1983, pg. 226.

<sup>8</sup> Çerkeja Besnik, Mediation and reform to justice, Tirana, 2015, pg. 17.

<sup>9</sup> Ibid., pg. 22.

<sup>10</sup> Walter Rechberger, Mediation in Austria: an overview and some updates Tuesday, March 18, Wien, 2014, pg. 22.

<sup>11</sup> Lindell Bengt, Mediation in Sweden, Malmo, 2016, pg. 123.

<sup>12</sup> Article 81, 82 of the Juvenile Justice Code (Code no. 03 / L-193).

<sup>13</sup> Article 9 of the Law on Mediation (Law No.03 / L-057).

<sup>14</sup> The Criminal Procedure Code except punitive order has foreseen also three other possibilities of criminal case resolution outside of main trial. Those are: temporary suspension of criminal proceedings, mediation and decision-making during first review of indictment.

<sup>15</sup> See more: Latifi Vesel, Elezi Ismet, Hysi Vasilika, work citeid, pg. 257 – 259.

<sup>16</sup> See: Milutinović Milan, Criminal Policy, Prishtina, 1984, pg. 321 – 323.

<sup>17</sup> The statistical report of Court work, Yearbook 2015, Kosovo Judicial Council, Pristina, 2016, See the link: <http://www.gjyqesori-rks.org/sq/kjc/report/list/1>.

<sup>18</sup> This budget in recent years, although increased, does not exceed more than half a billion dollars per year.

<sup>19</sup> Hajdari Azem, Criminal Procedure, Commentary, Pristina, 2010, pg. 591.

5. Victims of crimes shall be motivated in cooperation with state prosecutor to raise the level of communication with perpetrators of criminal offences aiming to realize easier the compensation of inflicted damage from criminal offence. In case of mediation procedure application comes more quickly, more easily and in a manner that more satisfies criminal-procedural parties to realization of property claim.<sup>20</sup>

### 3. Criteria for application of mediation

For application of mediation procedure must be fulfilled certain criteria. Consequently such criteria shall be considered:

1. Small importance of the committed criminal offence. In order for a state prosecutor or a single trial judge<sup>21</sup> to proceed a case to mediation procedure is required to have been committed a criminal offence punishable by fine or imprisonment up to three years foreseen by legislator.
2. The existence of relevant evidences proving existence of a concrete criminal offence and its relation to the accused person. Such evidences are required to be proceeded to the state prosecutor through criminal report or to the court through filing an indictment to the competent court. In this case it is about credible evidences by means of which is indicated the circumstances of commission of criminal offence and the authorship of the accused person associated with it.
3. Evaluation of evidence. It's an insuperable rule that state prosecutor or a single trial judge before deciding to proceed a case to mediation must conduct a detailed assessment of the evidences on the basis of which is proven the existence of a criminal offense and its relation to the accused person. This means that addressing a concrete case to mediation procedure should be done as a result of professional assessment of evidences which refer to a concrete criminal case.
4. The consideration of type and nature of the offence, circumstances of its commission, personality of perpetrator and his previous punishments, as well as his criminal liability level. Therefore, mediation cannot be authorized for any case of criminal offence punishable by fine or imprisonment up to three years. Consequently, mediation cannot be authorized for a criminal offence for which the legislator has provided a punishment of imprisonment up to two years, if that offence has been committed by a person that even earlier has been convicted for a similar criminal offence.

### 4. Authority in addressing mediation procedure.

Competent authority to address mediation procedure in the Republic of Kosovo belongs to the state prosecutor and a single trial judge.<sup>22</sup> To state prosecutor this authority is granted by the Criminal Procedure Code (Article 232, paragraph 1), whereas to a single trial judge by the Law on Mediation (Article 9, paragraph 9.6).<sup>23</sup> When the state prosecutor or a single trial judge oriented to submit the case which is subject of criminal proceedings in mediation procedure they shall proceed it to an independent and neutral mediator. According to Kosovo legislation mediator is obliged to accept a case referred to mediation and undertake all the necessary measures to ensure that the content of agreement is proportional to the seriousness of the case and consequences of the criminal offense. What kind of actions shall be taken by mediator it is a matter of its assessment which should be as a result of case study and interests of parties.<sup>24</sup> "All undertaken measures should aim reaching an agreement between parties at the end. Legislator makes it clear the fact that the reached agreement in any case should be based on the will of parties. Mediator also is obliged to notify the state prosecutor or a single trial judge upon reaching an agreement or its failure. This information is important because depending on the fact of reaching or failing the agreement, they decide on dismissal of the case or further processing.

### 5. Procedure of mediation

Procedure for application of mediation, as abovementioned, may be initiated by the competent state prosecutor or a single trial judge. They may initiate such procedure only when it comes to fulfillment of legal requirements (for the committed criminal offence punishable by fine or imprisonment up to three years) and when they consider that the type and nature of a criminal offence, circumstances of its commission, personality of perpetrator and his previous punishments for the same criminal offence or different criminal offences, his level and criminal liability are considered to be suitable for mediation. In these cases the state prosecutor or a single trial judge submits the case for mediation to an independent, neutral, reliable, and with high moral and credibility mediator as well as dedicated to make progress in reaching the agreement between parties.<sup>25</sup>

Once mediator receives the submitted criminal case for mediation he is obliged to undertake measures considering necessary for reaching an agreement. In order to achieve this goal he has available a period of time of three months.<sup>26</sup> In relation to mediation

<sup>20</sup>Compare: Hajdari Azem, Conditional Release of Convicted Persons in Kosovo, International Journal of Research in Humanities and Social Studies, Volume 3, Issue 7, July 2016, PP 32-39, pg. 34.

<sup>21</sup> When the court proceeds a criminal case to mediation is not obliged to seek the consent of the state prosecutor. However, it is obliged to inform the state prosecutor when undertaking this action.

<sup>22</sup> According to the Law on Courts (Law no. 03 / L-199 article 11) the single trial judge has the authority to adjudicate criminal cases for which it is competent General Department of Basic the Court.

<sup>23</sup>Sahiti Ejup & Murati Rexhep & Elshani Xhevdet, Criminal Procedure Code of the Republic of Kosovo, Commentary, Prishtina, 2014, pg. 1165.

<sup>24</sup>HajdariAzem, Commentary,....., pg. 607.

<sup>25</sup> Hajdari Azem, Criminal Procedure Law, The Special Part, Pristina, 2013, pg. 121.

<sup>26</sup>Pavišić Berislav, Vučković Miloško, Veić Petar, Radolović Aldo, Zakon o kaznenom postupku- s'komentarom, literaturom Isudskompraksu, Zagreb, 1998, pg. 421.

the legislator has prohibited undertaking of any action that may be considered of compelling character for parties. This means that the agreement may be reached through mediation only with the consent given by the defendant and victim. "In these cases none of the parties feels to win or lose a circumstance that gives priority to this alternative procedure in relation to criminal case judicial resolution."<sup>27</sup>

When mediator considers necessary and with the purpose of reaching the agreement between parties, he may set up separate meetings with them. This situation comes to expression especially when parties submit unrealistic requests. In these cases is a rule for mediator to undertake adequate measures in order to ensure that content of the agreement is proportional with the seriousness of case and consequences of the criminal offence.<sup>28</sup> In these terms, he may propose alternatives and ideas about how to resolve a criminal offence, notwithstanding parties are independent to finally decide on the matter.<sup>29</sup> In any case when parties reach an agreement in mediation procedure, the mediator prepares a written agreement which is signed by the parties (perpetrator and victim) as well as mediator itself. Reached agreement in mediation procedure is equivalent to the final document (the verdict) and is obligatory to the parties.<sup>30</sup>

Mediator is obliged to inform the state prosecutor and a single trial judge on the reached agreement as well as failing to do so, in which case they are notified about the reasons of such failure. Therefore, upon notice of reaching an agreement, the state prosecutor and a single trial judge dismiss the case. Whereas, if the mediator fails to reach an agreement or expires the deadline of three months to achieve it, the state prosecutor and a single trial judge shall proceed such case.

#### 6. Several data concerning mediation in Kosovo

In order to be able to come to conclusions and addressing concrete as well as useful recommendations for respective state institutions (mainly courts and state prosecutions) and society in general by using modest results of this scientific paper has been necessary the examination and study the work of this institution concerning the application of mediation in Kosovo for the period of time including the last four years (2013-2016). We have been focused in this short period of four years based on the fact this instrument of criminal case resolution has been marked tendency of advancement. Presentation of prosecutions and courts work concerning this instrument was not easy at all. This due to the fact concerning the work of this institution during the researching period there are no published data. Such data are not published within reports which regarding prosecutions and courts work are published by Kosovo Prosecutorial Council and Kosovo Judicial Council. Despite of this fact, in the following treatments, presentation of cases concerning criminal case resolution through mediation shall be conducted based on data obtained from criminal registers of four of the seven basic courts and prosecutions which currently act in the territory of Kosovo, the Basic Courts and Prosecutions of Prishtina, Gjilan, Mitrovica, Peja.<sup>31</sup>

In the following, in a special table shall be presented data concerning the number of criminal cases which State Prosecution of Prishtina, Gjilan, Mitrovica and Peja have resolved through mediation during the period of time 2013-2016.

Years	Number of cases processed for solution by the state prosecutor	Number of processed cases for solution by courts	In total proceeded cases for mediation
2013-2016	359	511	870

Table 1. Data over the number of cases addressed to mediation in Kosovo during the period of time 2013 – 2016.

In meanwhile, in the following table shall be presented the number of completed cases by mediation from independent mediators and resolved criminal cases in general from the Basic Court of Pristina, Gjilan, Mitrovica and Peja during the period of time 2013-2016.

Years	Number of cases resolved by mediation	Number of criminal cases resolved by conducting judicial proceedings
2013-2016	673	30808

Table 2 Data over the number of resolved cases by mediation and those resolved by conducting judicial proceedings.

According to these data during the period of time 2013-2016 Basic Prosecutions and Courts of Pristina, Gjilan, Mitrovica and Peja have addressed to mediation procedure 870 criminal cases. Sources used indicate that Basic Prosecutions during the researching period sent to mediation procedure fewer criminal cases (359) than courts (511 cases), which in reality was expected to be the opposite, based on the fact the Criminal Procedure Code constitutes a basic law of application at criminal proceedings the right to submit a case to mediation procedure recognizes only to the state prosecutor. From these cases the independent

<sup>27</sup>Elezi Ismet, Mediation for reconciliation in criminal conflicts, Tirana, 2004, pg. 71.

<sup>28</sup>Sahiti Ejup & Murati Rexhep, work cited, pg. 328.

<sup>29</sup> Ibid. pg. 141.

<sup>30</sup> Paragraphs 3, 4 of Article 12 of the Law on Mediation.

<sup>31</sup>See: Criminal records of Basic Court of Pristina, Gjilan, Mitrovica and Peja for the period of time 2013-2015.

mediators have reached agreement in 673 mediation cases. According to the modest results of this scientific paper mediation procedure failed in 197 cases which represents a relatively high figure. This situation is estimated to be due to the fact that many mediators of country belong to very young generation of lawyers who have problems with experience in the exercise of their profession. On the other hand, the number of cases submitted to mediation procedure (870) is very small compared with the number of cases that are resolved in court proceedings 30808.

As it results a number of criminal cases, although they could easily be resolved through application of mediation procedure, they were not resolved in this manner. For the current situation, probably influenced the fact of lack of experience, but also the lack of proper level of professionalism. Therefore, bearing in mind the application advantages of this criminal cases resolution instrument, I consider that Kosovo State Prosecutions and Courts should in the future apply it more often (in all cases when it comes to fulfillment of legal requirements) always by considering application benefits of this institute by parties and the state. Hence it is recommended that Kosovo courts and prosecutions to avoid in maximum traditional procedures of criminal case resolution, always when it comes to fulfillment of legal requirements and when it assessed that application of this institute is more reasonable for the case. Of course, in order for this to happen is required a hard work in terms of increasing the level of judges and prosecutors professionalism because in this way the state and criminal-procedural parties easier manifest their interests in criminal proceedings.

### Conclusion

Modest results of this scientific paper led me to these conclusions:

1. Mediation is an institution of criminal law that which enables the alternative resolution of criminal cases between subjects of law in extra-judicially manner. Through this institute is implemented restorative justice, respectively resolution of conflicts without having the need to go to court.
2. The Criminal Procedure Code and the Law on Mediation enabled addressing and criminal case resolution through mediation for criminal offences punishable by fine or imprisonment up to three years by always considering the type and nature of criminal offence, circumstances of its commission, personality of a perpetrator and previous punishments as well as the level of its liability. Consequently, there is no possibility for every criminal offence punishable by fine or imprisonment up to three years to be addressed through mediation. In order for a criminal offence to be addressed to mediation procedure it should be committed in mitigating circumstances or by negligence, to be committed by a person committing a crime for the first time and not by a recidivist etc.
3. Competent in addressing a case to mediation procedure is the state prosecutor working at Basic Prosecution and a single trial judge working at General Department of Basic Court. Mediation is undertaken by an independent mediator which as a third party helps the perpetrator and victim to reach an agreement and reconciliation. In order to achieve this goal he has available a period of time of three months as well as has the authority to undertake adequate measures in order to ensure that content of the agreement is proportional with the seriousness of case and consequences of the criminal offence. In these terms, he may propose alternatives and ideas about how to resolve a criminal offence, notwithstanding parties are independent to finally decide on the matter. They should inform a competent state prosecutor and a single trial judge on reached agreement as well as failing to do so, in this case they should be informed about the reasons of such failure.
4. Criminal case resolution through mediation manifests important effects of state (public) character, group character and for criminal procedural parties itself, especially for the defendant and victim of crime. Through this instrument is affected in reducing the number of pending court cases, there shall be a cut of public money expenses, there shall be a raise of social responsibility level, and shall be eliminated the cases of vigilantism.
5. During the research of the Basic Prosecutions and Basic Court of Prishtina, Gjilan, Mitrovica and Peja work, has been noticed that during the period of time 2013-2016 they have addressed to mediation procedure 870 criminal cases, from which independent mediators have reached an agreement between parties in 673 cases. As indicated mediation procedure has failed in 197 cases, which could be as a result of lack of mediators' professionalism due to the fact many mediators in Kosovo belong to very young generations of lawyers.
6. Kosovo Prosecutions and Courts during the period of time 2013-2016 have applied mediation in relatively rare cases. Therefore, bearing in mind the great importance this instrument of criminal case resolution has is necessary to be promoted more by the Ministry of Justice, Kosovo Judicial Council, Kosovo Prosecutorial Council and civil society in general. Also is required for Kosovo courts and prosecutions in the future to apply more often this institute of criminal case resolution. In this regard, is required for Kosovo judges and prosecutors to be developed respective training programmes that would motivate them toward common application of this instrument.

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