

Mediation as an Alternative Method of Dispute Resolution in the Civil Field in Kosovo

Skender Gojani¹, Ardian Mehmetaj²
& Lirie Hoti³

Abstract

Mediation is an alternative method of dispute resolution and as such creates legal effects. Therefore, in this paper, mediation will be analyzed as an alternative method of dispute resolution in Kosovo, with special emphasis on the applicability of this process in Kosovo in the civil field.

Furthermore, this paper will delve into the concept of mediation, its legal implications, comparative advantages vis-à-vis judicial proceedings, and based on qualitative data, provide recommendations for its continued enhancement, addressing delays and advocating for pertinent changes within the context of Kosovo. This study successfully addresses all research inquiries, achieves stipulated objectives, comprehensively examines the evolution and ongoing implementation of mediation in Kosovo, underscores its benefits, and derives actionable recommendations for its progressive evolution within the region. This study is based on the empirical methodology which presents the findings from the empirical data.

Keywords: mediation, alternative method, judicial procedure and legal effect.

Introduction

Mediation is a process that has existed since ancient times or better said since the existence of humanity itself, but which has not been recognized by law or rather regulated by legal provisions. If we look at mediation from a historical point of view, we can compare it to what the "elders" were in earlier years, so it is said that this process has existed since the existence of the union, although not with the same name. Mediation serves as an alternative procedure in the resolution of disputes between subjects. This procedure has its benefits as well as advantages compared to judicial procedures, because this method is considered a more efficient and effective method, a process with lower costs, a process in which the principle of confidentiality is respected as well as a process in which both subjects participate from its initiation. Being such a process, the implementation of mediation also eases the volume of cases in court proceedings. In Kosovo, this

¹ Professor at the Faculty of Law – AAB College, Prishtine – Kosove
skender.gojani@uiversitetiaab.com

² Lecture at AAB College, Prishtine – Kosove a_rdim19@hotmail.com

³ Teaching Assistant at AAB College, Prishtine – Kosove lirie.hoti@britishschoolkosova.com

process is regulated by a special law, the Law on Mediation (Kosovo A. o., 2018), which provides all the rules and principles of this process. Also, considering its importance, this paper will analyze the meaning of mediation as well as its development, will analyze the process of mediation in Kosovo and the stages of its development, the advantages of this process over judicial processes, will be evaluated how well known and how if this process is implemented in Kosovo, it will be discussed about the legal effect produced by the agreement reached during this process, it will be discussed about the cases that can be solved through this method, and recommendations will be given based on the research done.

Research Methodology

In this scientific paper, quantitative research methodology was used based on the results of our empirical study. 200 respondents from Kosovo were surveyed from November 2022 to 2023 who answered questions related to various mediation problems. Furthermore, this study also conducts an analysis of the legal infrastructure concerning mediation in Kosovo and the implementing institution of mediators as the mechanism for executing the mediation procedure.

In this way, Quantitative research methods, normative methods and analytical study methods have been employed in this research. The research questions related to this study are; How effective is mediation as an alternative method for resolving disputes outside of court? Is Kosovar society sufficiently aware of the possibility that various disputes can be resolved through the alternative method of mediation? The paper presents the sessions as; abstract, introduction, research methodology, various titles as part of the trunk of the scientific paper, conclusions and recommendations and finally references.

Issues that can be resolved through the mediation procedure

As mentioned above, since mediation is an easier and faster way to resolve disputes, since the law on this procedure has been approved, it has also started to be used for some of the disputes and cases instead of regular court procedures. Starting from this Of course, not everyone has knowledge of mediation as a procedure, and despite the fact that they may have heard about the positive aspects of this process, this does not mean that they have full knowledge of what issues can be addressed in this procedure. Starting from the Law on Mediation which determines which cases can be addressed and resolved through mediation, but also from one of the principles of this process, the principle of expression of will, which means that this procedure cannot start without both parties expressing their will to receive part of this procedure, in the following it will be mentioned which issues can be resolved through this procedure and the

cases which are required by law to be resolved with this procedure (Mediation, 2018).

Based on Article 4 of the Law on Mediation of the Republic of Kosovo, which states: "The mediation procedure takes place with the free will of the parties, expressed orally and in writing, in accordance with the law" (Kosovo A. o., 2018), the cases that can be addressed in the mediation procedure are:

- Disputes arising from discrimination at work;
- Disputes related to salary compensation;
- Disputes related to the compensation of benefits and other rewards at work on the basis of equal treatment of employees;
- Disputes related to the compensation of material and non-material damage for injuries at work, including lost earnings and rent;
- As well as other disputes that are considered suitable for mediation (Council, 2021).

Disputes that must be handled through mandatory mediation are:

- Family relationship disputes related to alimony cases;
- Guardianship;
- Child care contacts;
- Separation of joint marital property;
- Ownership disputes that have to do with the rights and obligations of servitude rights;
- Compensation to the expropriated owner (Council, 2021).

Mandatory mediation is also regulated by the Kosovo Mediation Law, specifically Article 9 of that law, by which this procedure is regulated. The meaning of mandatory mediation according to this law is defined in this way: "Mandatory mediation means the mediation procedure initiated by the competent judge who obliges the parties to try the mediation procedure, as provided by this law" (Kosovo A. o., 2018).

Modern and traditional mediation in Kosovo in the civil field

Knowing the antiquity of the mediation process in Kosovo, especially in the civil field, it is worth making a comparison between the two periods of this process, the modern and the traditional one, seeing the differences and similarities and if the advantages of one over the other. One of the most important differences important is the legal way of regulating this two-period process. During the period of traditional mediation or that of the Chambers and the Council of Elders, the way of mediation was regulated by means of 'besa', as well as the Canon of Lekë Dukagjini (Dukagjinit, 1933), which was not an important act that would regulate

this procedure, but that contained rules that regulated different cases and based on which mediation was based at that time. The faith and participation of elders, notables and sages were valued as a guarantee that the outcome or outcome would be respected (Krasniqi, 2019). On the other hand, in the period of modern mediation, the one that still exists today, mediation is regulated on the basis of a special law, known as the Kosovo Mediation Law, which entered into force in 2018 and based on which regulation of this entire procedure and its development. Another difference between these two periods is the naming of the third party, in the period of traditional mediation, the third party or the person who has mediated is called 'elder', while in the period of modern mediation, the third party is called 'mediator'. In addition, the space in which a reconciliation or mediation session was held in the early periods is different from today's, in traditional mediation, such a session was held in the premises of the chambers, in which the most prestigious men of the town or province where it was held took part. a disagreement occurred, the elders also gathered in a group form with the aim that this process was more reliable and when 'besa' or the word was given it had more power and could be argued, as long as we are in the period we are in, in the time of modern mediation it takes place in the offices designated for mediation near the Courts and Basic Prosecutions or the Mediation Chamber (Kosovo A. o., 2018) as well as mediation as a process can be supervised and managed only by a mediator unlike at that time. In addition to these points, another difference appears between the "nurses" and the "mediators" because their role is the same as the mission. Elders at that time may not have been qualified and educated, but it was enough to be men known for loyalty, wisdom and wisdom, in a word, to have had prestige in the area where they lived, while for mediators in the era of modern mediation it is required that the mediators have a university degree and meet all the criteria as defined by the Mediation Law of Kosovo, in article 22 thereof. In Kosovo, "traditional mediation" involved the process in which the perpetrator or victim or his family (because they were mostly men) asked the older, more prominent and wise members of the community to jointly intervene and help closing the conflict between the parties, thus making it possible to prevent the continuation of the conflict or the birth of any new conflict (Buqaj, 2016). The common point, referring to the field of civil law, is that in the period of traditional mediation, as well as in the modern one, issues such as property disputes, separation disputes, and other family disputes have been chosen through mediation. It should also be mentioned that despite the fact that we now have a special law on the mediation procedure in some areas, mainly rural ones, the form of traditional mediation still continues to function, through the elders and the canon.

Advantages of mediation

Mediation as an alternative way to resolve disputes is also defined by law as the shortest way to resolve a dispute. Of course, practice has proven that this procedure has many advantages compared to regular court procedures (Gojani, 2012). Some of the advantages that this procedure offers to the persons involved in a dispute are: Faster completion time of the process, lower cost of the procedure due to the shorter time, making the mediation an efficient process. As for the lowest cost, the cost-effectiveness of mediation, by many researches, is considered as one of the most beneficial points of this process (Bingham, 2001). Confidentiality can also be considered another advantage of mediation, where the information provided during mediation cannot be taken as evidence in any trial or criminal proceeding as required by law or with the approval of the parties (Mediation, 2018). This is also ensured by the principle of confidentiality on this procedure also stipulated in the Law on Mediation, article 7 thereof. Public participation is also regulated here, where in this procedure the public must be excluded. Another advantage of mediation is that this process is friendly and inclusive due to the fact that it allows the parties who have conflict with each other to be directly involved in this process, without being represented by a proxy or other representative. The advantages of mediation are also reflected in disputes business, where the very existence of this procedure has made their solution much easier. Considering this, it has been proven that mediation offers the parties in disputes the opportunity to quickly resolve costly business disputes, avoiding mutual battles through court proceedings (USAID, 2022).

So to summarize the advantages of mediation compared to judicial procedures, we can say:

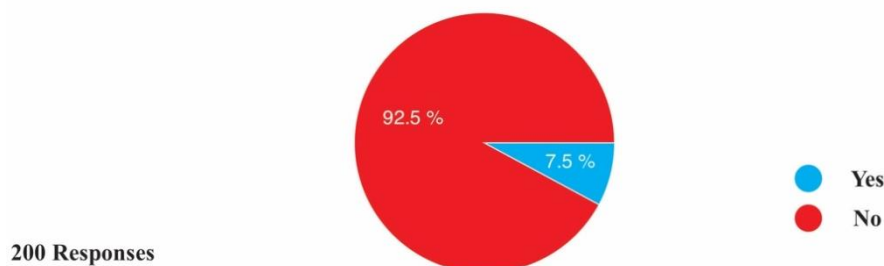
- It is a faster procedure compared to the judicial procedure;
- All parties win;
- The parties themselves decide on the disputed issue;
- It is a cheaper procedure;
- All information remains confidential;
- The parties agree on their agreement;
- The agreement is valid and the relations remain good;
- Personal values, culture, customs and traditions are respected (Monitor, 2022).

While based on a survey conducted in November 2022, in the form of an online questionnaire, by the candidate of this paper, in which 200 respondents participated, to the question of whether they encountered any problems during the mediation procedure, 92.5% of the respondents answered have not encountered

any flaws, while 7.5% of the respondents answered that they encountered flaws and that these flaws were: that there was partiality on the part of the mediator during the mediation session, that the process was developed in favor of the strongest (Questionnaire, 2023).

Figure 1:

If you have participated in a mediation process, have you encountered any flaws in this process?



Legal effects of the mediation agreement

Like any other legal act, the mediation agreement produces its own legal effects. For this article 15 of the Mediation Law, all the legal effects arising from this agreement are provided. The agreement reached in the mediation procedure marks the final steps of this procedure and at the same time marks the resolution of the dispute as well as the end of the procedure. The mediation agreement must be in written form, while its compilation was done by the mediator who supervised the process, this agreement must be in harmony with the laws in force, if the opposite happens, it cannot create a legal effect and cannot be valid. The mediation agreement can be drawn up only when the parties with their full will have reached the agreement and agreed to sign it.

The agreement reached in the mediation procedure must contain:

- the name of the court;
- the names of the parties in the procedure and the names of their authorized representatives/representatives (if any);
- the name of the intermediary/s;
- the text of the agreement reached regarding the mediation object;
- signatures of the parties and the mediator/s;
- the date and place of conclusion of the agreement;
- approval by the judge (with a special ruling or by placing the court's seal) (Council, 2021).

While some of the legal effects that this agreement can create and as determined by this law are, its full force, also that this agreement, depending on the form it was reached in the case provided by law, has the enforcement power in some other

cases and the power of the final decision. The legal effect of the final decision is produced only when the case is referred by the prosecution, the agreement reached in writing is sent to the prosecution, which after approval by the chief prosecutor has the power of the final decision (Kosovo A. o., 2018).

While the legal effect of the document with executive power is produced in the following cases:

If the matter is referred by the court, the agreement reached in writing is sent to the court, which after approval has the power of the enforcement document according to the relevant law for the enforcement procedure;

If the matter is referred by the competent administrative body, the agreement reached in writing must be sent to the competent administrative body, which after approval by the head of the administrative body, has the power of an executive document (Kosovo A. o., 2018). Likewise, in cases of self-incrimination, in order for an agreement to have a legal effect, it must contain the enforceability clause of that agreement. The enforceability clause in the agreement is established according to the same rules as court decisions (Council, 2021).

The mediation procedure according to the Mediation Law of the Republic of Kosovo

Mediation as a process in Kosovo is regulated by a special law, namely the Law on Mediation (Kosovo A. o., 2018), which entered into force in 2008 (Kosovo T. A., 2008). This law regulates the further initiation, development and way of ending this process. Given the weight of this procedure in the legal field, in the selection of cases and all the legal effects that emerge from the last process, then the regulation of each of the steps in this process has been the most necessary and facilitating for all parties. The 29-article law on mediation covers various aspects, including: the roles and parties involved, procedural principles, initiation, mandatory mediation, mediator selection, consent, procedure development, mediation's impact on limitation periods, mediated agreements, legal effects, duration, termination, conflict of interest, costs and mediator fees, professional standards, mediator chamber, certification and licensing requirements, mediator registry, rights and duties, recognition of foreign mediators, and penalties. All the points mentioned above are explained in separate articles with the aim of providing the clearest possible legal explanation on the mediation procedure and facilitating the work for all parties who are directly or indirectly involved in this process (Kosovo A. o., 2018). Given that this law also defines the way to initiate this procedure, according to its article 8, it is determined who are the parties who can initiate this procedure, which states: "The mediation procedure can be initiated by the parties, the court, the prosecution or the competent administrative body

according to the legislation in force" (Kosovo A. o., 2018). Whereas, like any other procedure, the mediation is developed based on the principles which are also regulated in the Law in question, where the following principles are defined in Chapter 3 of this Law:

1. The principle of voluntary expression;
2. The principle of equality of the parties in the procedure;
3. The principle of impartiality and independence and - "The mediator during the development of the mediation procedure is completely independent and impartial" (Kosovo A. o., 2018);

The principle of the expression of will means that the parties are free to express their will to initiate or not the mediation process, which means that they must first give their consent to the initiation of this procedure, which is determined by Article 11 of the Law on Mediation. While the principle of equality of the parties means that all the parties involved in the procedure are equal, such accessions should also be handled by the mediator. This principle is regulated by Article 5 of the Law, which means: "In the mediation procedure, the parties are equal and have rights and obligations in accordance with the law." (Kosovo A. o., 2018) Whereas the principle of impartiality and independence means that the mediator or the independent party in this case must be impartial and judge the situation fairly and with the aim of reaching a beneficial agreement based on their will, rights and obligations. Also, from this principle in some form it is demonstrated why the mediator is presented to us in this procedure, that is, a party that must be impartial and independent. In the event that the mediator's impartiality and independence are doubted, then with the requests of any of the parties, his exclusion may be requested, if there is sufficient evidence for this. The mediator is also required to be independent with the goal that the mediation process achieves the goals and purpose for which it was created. Meanwhile, the last principle of this procedure, regulated in article 7 of this law, once again shows the importance and security that this process builds and offers to its parties. The fact that an element of it is necessary and standardized speaks a lot about the value that this process has as well as about the advantages that can be qualified compared to other judicial procedures. Knowing the emotional and psychological effect that every situation treated in this procedure has on the involved parties, respecting their privacy and the issue treated, as well as the agreement reached, is the most essential (Mediation, 2018)

Figure 2:

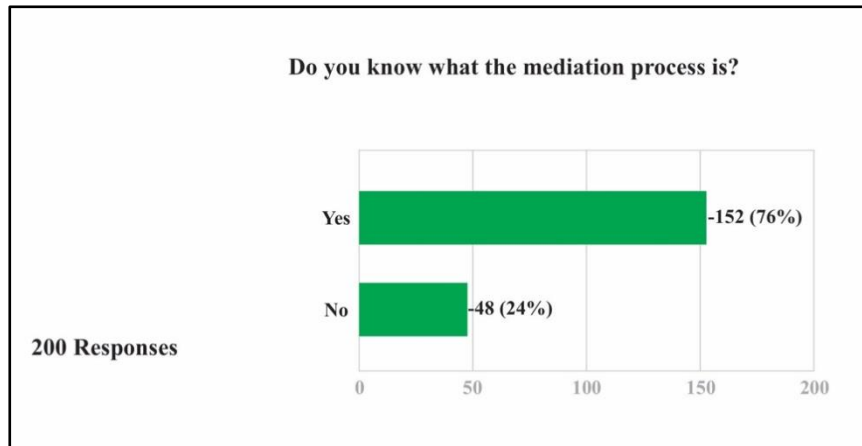


Figure 2:

How familiar is society in Kosovo with the mediation process?

In order to better understand how familiar the Kosovar society is with the mediation process, in the survey conducted in November by the researcher of this paper, it has resulted that of the 200 respondents, 76% of them have heard or are familiar with the mediation process, while 24% of them have not heard and have no knowledge of this process (Questionnaire, 2023):

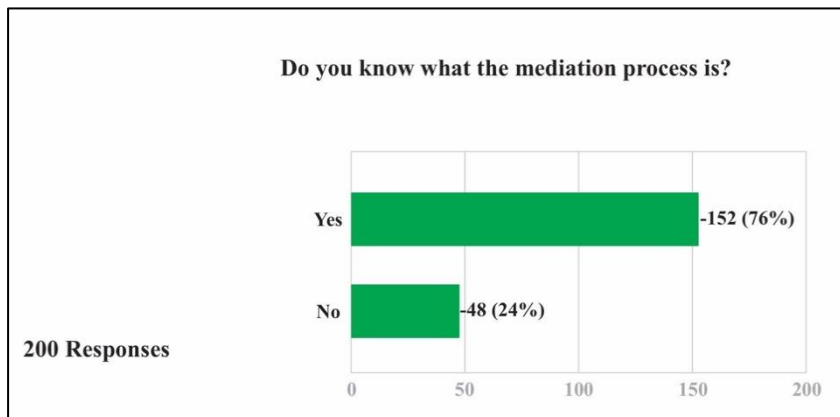


Figure 3:

Of course, this statistic shows a satisfactory degree of recognition of the mediation process, although it leaves room for its promotion by the relevant institutions based on various promotional and information campaigns, based on the importance and advantages that this process has. As well as the facilitation that they did to the judicial process, especially in cases of the civil field.

The cases which the respondents have sent to the mediation procedure

Some of the issues that the respondents have sent to the mediation procedure according to the developed questionnaire (Questionnaire, 2023) are:

- Dispute over the division of inheritance;
- Property disputes;
- Disputes on family issues;
- Disputes of a commercial nature;
- Disputes related to child custody and alimony;
- Disputes over rent;
- Debt-related disputes;
- Disputes on the issue of obstruction of possession.

The cases mentioned above are the cases which the respondents have referred to a mediation procedure.

Other statistics based on the developed survey

Regarding the conducted survey (Questionnaire, 2023), the following statistics on the mediation process were extracted:

In the question of which of the procedures they find more favorable for resolving disputes in the civil field, the judicial procedure or the mediation procedure, the respondents answered the following:

- 37.4% - have declared that they prefer the judicial procedure, while
- 68.7%- have declared that they prefer the mediation procedure (Questionnaire, 2023).

In the question of what are the reasons why they would have chosen the mediation procedure, the answers are as follows:

- (a) Avoidance of court proceedings;
- (b) Shortest cost and time;
- (c) Faster and more efficient process;
- (d) Simpler procedure;
- (e) As easy as possible for the parties to agree among themselves;
- (f) The opportunity which is given to the parties to decide on the terms of the choice of disagreement and not the judge or the lawyer;
- (g) It is qualified as a process by comparison with the judicial procedure;
- (h) If there were no other choice but mediation;
- (i) Absence of bureaucracy in this process;
- (j) Giving more opportunities, alternatives in choosing the dispute;

The enforceable title that the mediation agreement has (Questionnaire, 2023).

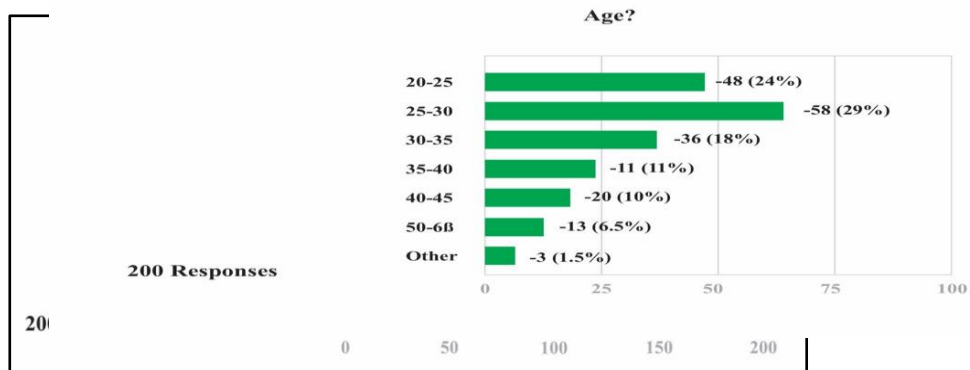


Figure 4: Reflects the gender of the participants in this questionnaire

This table shows the gender of the surveyed participants, where of the 200 respondents, 56.5% were female and 43.5% were male (Questionnaire, 2023).

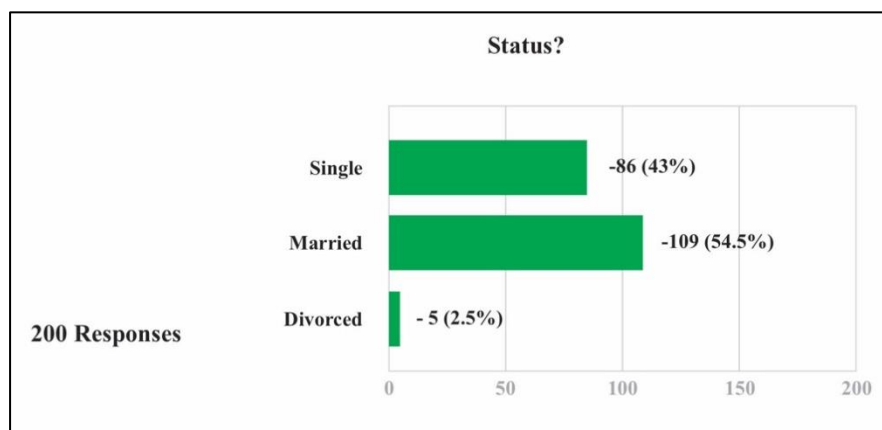


Figure 5: Reflects the status of the respondents

In this table, the status of the respondents is reflected, as it plays an important role in terms of the topic addressed. Of the 200 respondents, 43% of them are single, 54.5% of them are married and 2.5% of them are divorced (Questionnaire, 2023).

Figure 6: Reflects the age of the respondents

The age of the respondents in this questionnaire is reflected in this table. Where of the 200 respondents, 24% of the respondents are from the age group of 20-25 years, 29% of the age group of 25-30 years, 18% of the age group of 30-35 years,

18% of the age group of 40-50 years, 10% of the age group 50-60 years old and another 6.5% (Questionnaire, 2023).

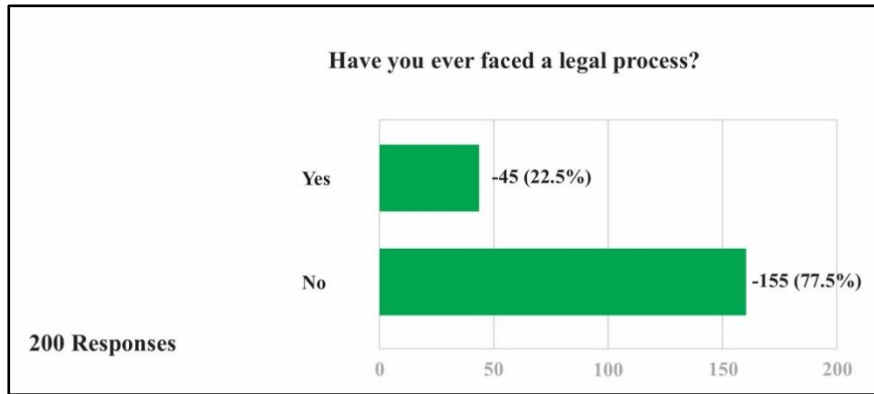


Figure 7: Shows whether the respondents have ever faced any legal process

In this table it is shown whether the respondents have ever faced any legal process. And out of 200 respondents, 22.5% declared that they participated in the judicial process, while 77.5% declared that they did not participate in any judicial process (Questionnaire, 2023).

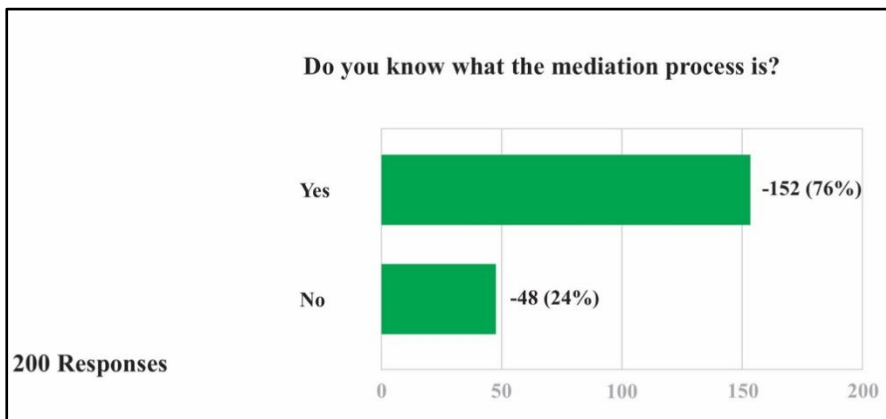


Figure 8: It shows whether the respondents are aware of the mediation process

This table shows how familiar the respondents are with the mediation process. Of the 200 respondents, 76% of them stated that they have knowledge and that they know what the placement process is, while only 24% of them stated that they have no knowledge of this process (Questionnaire, 2023).

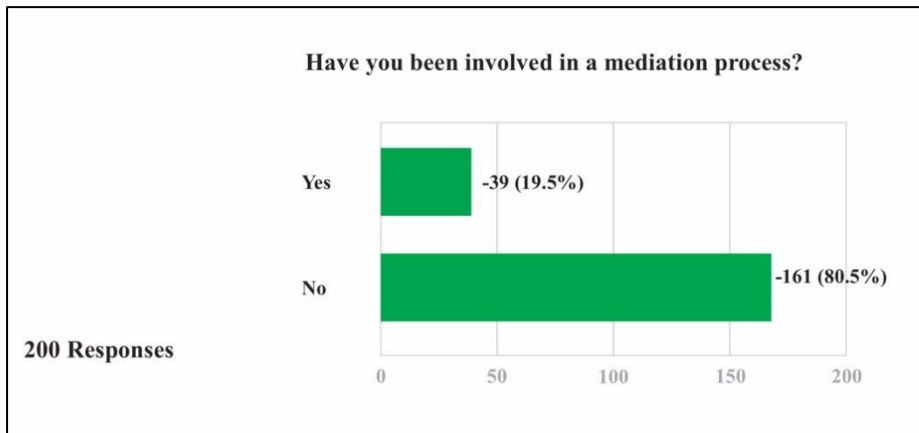


Figure 9: Participation of respondents in the mediation procedure

This table reflects the respondents' participation in the mediation procedure. Of the 200 respondents, 19.5% of them were involved or participated in a mediation procedure, while 80.5% of the respondents were not involved or did not participate in such a procedure. Of course, this shows a not very satisfactory number of participations in mediation and from this arises the need to organize campaigns or different advertisements in order to inform and inform citizens about the positive sides of the mediation procedure and its advantages (Questionnaire, 2023).

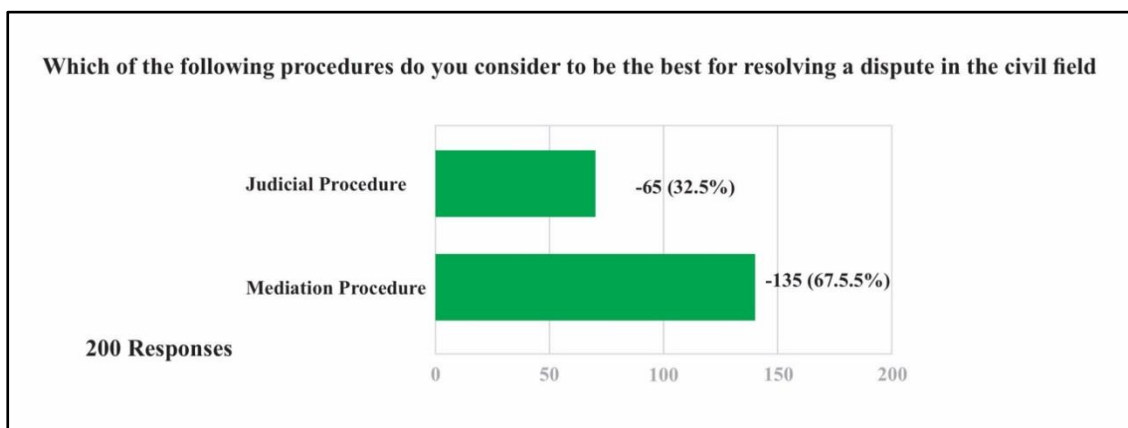


Figure 10: It shows which of the judicial or mediation procedures is more preferable according to the respondents in resolving disputes in the civil field

This figure shows which of the procedures, the mediation, or the regular court procedure, are more preferable for the choice of disputes in the civil field by the respondents. Of the 200 respondents, 32.5% stated that the most preferable for the

selection of these disputes is the judicial procedure, while 67.5% of them stated that they prefer the mediation procedure. Of course, the latest statistics show a much higher rate of the mediation procedure compared to the regular judicial one, and this is of course due to its advantages (Questionnaire, 2023).

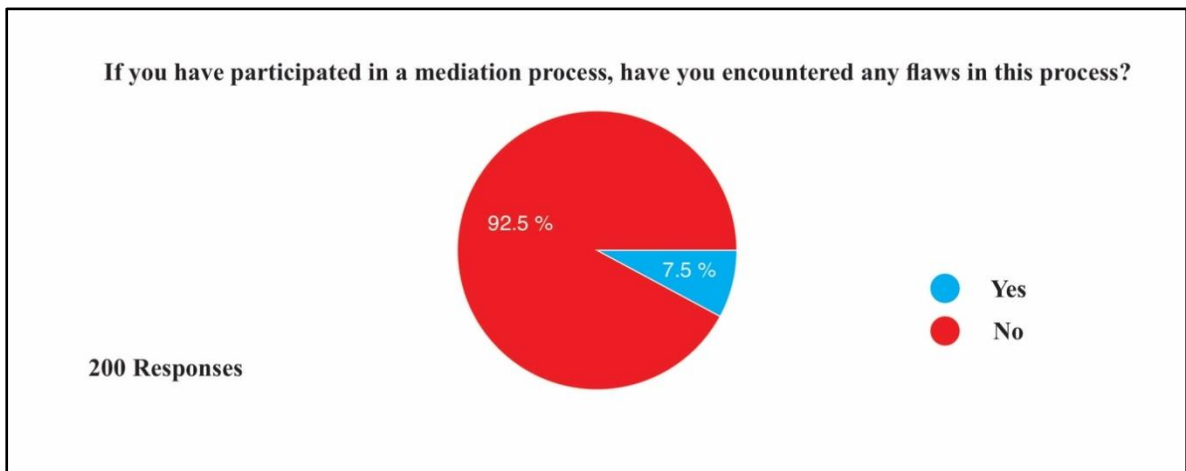


Figure 11: Shows whether the respondents encountered any defects during participation in the mediation procedure.

This diagram shows whether the respondents encountered any flaws during the mediation process, if ever they were involved in this process. Of the 200 respondents, only 7.5% of them stated that they encountered deficiencies or flaws during this process. From the survey conducted and the answers received, the respondents who stated that they encountered flaws in this process, then to the next question about what the flaws were, answered that the flaw was the bias of the mediator during the mediation session (Questionnaire, 2023).

Conclusion

As was said above in this paper, mediation as an alternative method of dispute resolution creates its legal effects, in our case with particular emphasis on the civil field. Effects that also affect judicial procedures by reducing the number of cases. It was also understood that this process in Kosovo is under development, increasing the number of cases that are solved through this method in recent years, even though it leaves room to work and to get to know the society with this procedure and the benefits it offers. In addition, as mentioned in this paper, this method has several advantages compared to judicial procedures, advantages such as: effectiveness and efficiency of this process, confidentiality, lower cost,

participation of the parties in the development of the process, etc. Also, through the conducted survey, it was understood and an insight was given on the fact that this process is known in Kosovo and at what level is its applicability. From this paper it was possible to understand that the process of mediation in the civil field plays a very important role in terms of its time and efficiency, as well as in terms of the lowest cost compared to other procedures. Therefore, from this paper we can come to the conclusion that the mediation process is a very important process which should continue to be applied even further and at a higher level, due to the advantages it has compared to regular judicial procedures. Regarding its applicability, the competent bodies should provide more knowledge about this process, developing campaigns and promoting the advantages and benefits that this process offers to the dispute side.

Recommendations

Taking into account what was presented in this paper, on the topic addressed, I give the following recommendations:

- To organize campaigns through which citizens would be informed about the mediation process, how it is developed, the cases that can be referred and how this procedure can be initiated;
- To organize campaigns and meetings, as well as information sessions highlighting the advantages and advantages of the mediation process compared to regular court procedures;
- To organize sessions and tables for mediators, to have the opportunity to be more informed and professionally prepared;
- To enable visits of local mediators to developed countries to have meetings with international mediators, as well as to have the opportunity to hold impromptu sessions with the latter.

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