

## THE IMPLEMENTATION OF FAMILY MEDIATION IN ITALY AND ALBANIA: A COMPARISON STUDY

Klodiana Rafti<sup>1</sup>, Fleura Shkemi<sup>2</sup>

<sup>1</sup>PhD Candidate., European University of Tirana, Albania, [klodiana.rafti@uet.edu.al](mailto:klodiana.rafti@uet.edu.al)

<sup>2</sup>Dr., European University of Tirana, Albania

### Abstract

Family mediation is proposed as an alternative approach to conflict management in couples seeking the divorce, where a third, impartial person, named mediator operates to facilitate the dispute resolution processes. Unlike the approach offered by the procedural system, family mediation is an alternative system created to regulate interpersonal disputes. The purpose of this study is to provide a different perspective on how family mediation has been implemented in Italy which as a member country must at least try to follow guidelines provided by the EU. From the previous considerations of the current Italian legal framework for family mediation, it seems clear that family mediation, as it is, cannot be seen by the public as an effective tool of alternative dispute resolution. The lack of regulatory laws for family mediation – in a civil law jurisdiction where laws are necessary to create, legitimate, and develop legal institutions – negatively affect access to justice for people that cannot afford initiating or continuing a judicial process for years. This study also generates important data regarding the way family mediation has been introduced in Albania, by considering the country's obligation to adapt its internal laws to those of the EU, although not being a member state yet. In the case of Albania, the Mediation Law is generally in line with all compulsory provisions of the *Mediation Directive* regarding confidentiality and enforceability of settlement agreements. As regards the discretionary provisions, the Albanian legislator, differently from the Italian legislator, has chosen to include family law within the realm of application of the *Mediation Law* by extinguishing any visible uncertainties as to whether and how parties can resolve their family issues by mediation. The Albanian legislator has taken a more parties-are-free-to-mediate approach than that of the Italian legislator. There are still no statistics as to the impact that *Mediation Law* has had over resolution of family disputes in Albania, but the premises for a serious growth in family mediation have been set. As a conclusion, in terms of mediation in general, and family mediation in particular, what works for one country may not work for another. Trying to provide unifying principles for a multitude of countries is, at the very least, challenging. Having different perspectives from different realities may help in identifying practices that have in common the potential for being successful. Whether mandatory family mediation in its mitigated form or not is one of these successful practices, will depend on a series of factors, such as legal and historical background, legislative will and openness to change. However, having a good and clear regulatory framework is the first step to creating and developing a culture and practice of family mediation.

**Keywords:** family mediation, conflict, dispute resolution, legal

## 1. INTRODUCTION

Family mediation is proposed as an alternative approach to conflict management in couples seeking the divorce, where a third, impartial person, named mediator operates to facilitate the dispute resolution processes. According to Lisa Parkinson (1997), family mediation is a process that allows the parties to handle their own problems, unlike the approach offered by the procedural system. In other words, family mediation is an alternative system created to regulate interpersonal disputes.

On the one hand, as it happens with EU laws, their main purpose is to regulate the activity of the member states, by either imposing rules, on a broad or specific basis, or by providing recommendations as to how this can be achieved. On the other hand, there are countries that are not yet part of the EU but that have initiated a process of integration, with all the obligations for legal compliance and fulfillment of several requirements that this process encompasses.

The purpose of this study is to provide a different perspective on how family mediation has been implemented in Italy which as a member country must at least try to follow guidelines provided by the EU.

The study will also look at how family mediation has been introduced in Albania, by considering the country's obligation to adapt its internal laws to those of the EU, although not being a member state yet.

## 2. FAMILY MEDIATION LEGAL FRAMEWORK IN ITALY

### 2.1. A successful case of Mandatory Mediation?

In 2014, in Italy, the average duration of litigation at trial in Italy was 3.5 years – which could easily increase to 9 years if the case was appealed – while the average duration of mediation was 66 days. The average cost of litigation was \$22,400 while the average cost of mediation was \$4,300. The figures speak for themselves.

According to De Palo & Keller (2012), the judicial system was overloaded with a backlog of 5.4 million cases and Italy was eager to adopt the *Mediation Directive* and make mediation finally known and available to the public.

The *Mediation Directive* was adopted in 2010 through the legislative decree 28/2010 (*Decree*). The *Decree* covers both cross-border and domestic disputes and recognizes the general availability of voluntary mediation for civil and commercial claims. In addition to that, and most importantly, the Decree introduces the mandatory mediation for certain categories of “civil or commercial claims and rights that are *freely disposable* by the parties.” We need go no further to understand that the Italian legislator decided to use its discretion – as allowed by the *Mediation Directive* – and leave family law mediation out of the scope of application of the *Decree*.

The consequence is that family mediation is less than regulated in Italy. However, in order to continue with this analysis, a general review of some of the most important provisions of the so-called ‘mitigated mandatory mediation’ needs to be undertaken.

#### 2.1.1. The Mitigated Mandatory Mediation

The mandatory mediation provisions entered into force in 2011, but were subject to harsh polemics among lawyers and other professionals. The mandatory provisions were constitutionally challenged by several associations of lawyers and in 2012 the Italian Constitutional Court declared the mandatory provisions unconstitutional. The reason for unconstitutionality, however, was not the breach of the constitutional “right to defence”, an equivalent of the Canadian “access to justice”, but the over delegation of legislative power by the Italian government which had not been expressly delegated by the Italian parliament to adopt the mandatory provisions by a legislative decree. The Constitutional Court did not find the provisions to be in breach of the Italian constitution or of the *Mediation Directive*.

As a result of the declared unconstitutionality of the *Decree*, mediations stopped and backlogged cases continued to increase. To fix the problem, the Italian government amended the *Decree* – this time in compliance with the delegation of powers – and the mandatory provisions were reintroduced in article 5, with some modifications. The new mandatory provisions came into force in 2013 and will be in effect for a trial period of four years at the end of which the result of their implementation will be reviewed and analyzed.

Here are some of the most important features of the *Decree*:

- *Applicable categories*: By law, mediation is voluntary for all civil and commercial claims and rights that

are freely disposable by the parties. However, mediation will be mandatory for: condominium disputes, property rights, division of goods, trusts and estates, family-owned businesses, landlord/tenant disputes, loans, leasing of companies, medical malpractice, libel and slander, insurance, banking and finance contracts (art. 5).

- *Condition Precedent*: mediation is a condition precedent for the initiation or continuation of the judicial proceeding in the mandatory categories (art. 5).
- *Mandatory Mediation Request*: Parties must submit a request for mediation near one of the mediation organisms in the same jurisdiction of the court that is competent for the dispute (art. 4). Following the request for mediation, the mediation organism assigns a mediator and determines the date for the first mandatory meeting (art. 8).
- *Mediation Organisms*: Mediation organisms are instituted by private or public entities and are registered in an apposite registry with the Minister of Justice. They are entitled to manage the mediation process, upon fulfillment of efficiency, reliability and professional requirements (art. 16).
- *Opt-out model*: The first mandatory meeting will be for informational purposes only, at the end of which the parties and their lawyers will be invited to decide whether to continue with the mediation or not (art. 8).
- *Legal counsel presence obligatory*: Parties' lawyers must be present during all meetings of the mandatory mediation (art. 5).
- *Duration*: Mediation cannot last for more than three months (art. 6).
- *Enforceability*: The settlement agreement is automatically enforceable if executed also by the parties' lawyers, otherwise the court approval is needed (art. 12.1).
- *Mediator's Proposal*: Where parties cannot reach an agreement, the mediator can draft a proposal and submit it to the parties for review (article 11). Acceptance of the proposal by both parties settles the dispute and brings mediation to an end. Rejection, however, may cause a fee-shifting penalty at trial in case the mediator's proposal is equivalent to the subsequent judicial decision (art. 13).
- *Certification & Training*: Mediators are certified by mediation organizations that are registered with the Ministry of Justice. A mediator is required to have a three-year university degree or be enrolled in a professional society. They are required to have 50 hours of training and 18 hours of courses every two years. New mediators must work with experienced mediators for at least 20 mediations during the first two years following their certification. Lawyers are mediators by right but still need to attend training courses (art. 16).
- *Duty to Inform*: Lawyers have the duty to inform their clients, in writing, about the option of mediation. A client can void the attorney-client agreement if the lawyer fails to perform such duty (art. 4).
- *Confidentiality*: Each individual involved in the process of mediation has an obligation of confidentiality (art. 9).
- *Incentives*: There are several incentives provided, from exemption from stamp duties, expenses, taxes and charges for all mediation acts and documents, to an exemption from the registration tax of the settlement agreement. A tax credit is also granted towards the mediation fee (art. 20).
- *Sanctions*: The judge may make presumptions of evidence in a subsequent trial. In addition, the judge can condemn a party that unjustifiably declines the mediation by paying double the amount of the court proceeding administration fee (art. 8).

The increase in the use of mediation following entry into force of the Decree was called the "Italian Mediation Explosion" and is considered as the only successful case of the implementation of the *Mediation Directive*.

Many of the provisions constitute indeed a success, like the specific recognition of the mediation and the mediator, the enforceability of settlement agreements, the duty of confidentiality, the training requirements for mediators, the incentives provided to parties choosing mediation over litigation, and most importantly, the introduction of mandatory mediation. Although the latter was subject to objections and challenges, the positive effects of an opt-out system, which gives the parties the possibility to get to know mediation and make an informed decision before rejecting it, are proved to be real.

On the other hand, provisions like the ones imposing the mandatory presence of lawyers, or entitling the

mediation organisms to assign mediators, or allowing the mediator to propose solutions to settle the dispute also in lack of consent of the parties, or imposing sanctions if such solution is not accepted, may result problematic. Such provisions, besides positive effects that are supposed to bring, affect the right of self-representation, the freedom of contract between mediator and parties, the duty of impartiality and neutrality of the mediator and also the voluntariness of the entire process.

## 2.2. The Current Status of Family Mediation in Italy

It was after the adoption in Paris of “*The European Charter for Training in Family Mediation for Separation and Divorce*” that in Italy began to appear the first associations of family mediators (Impagnatello, 2009).

The first European recognition came in 1996 with the ratification of the European “*Convention on the Exercise of Children’s Rights*” (*Convention*) which requests the signatory parties to encourage “the provision of mediation or other processes to resolve disputes and the use of such processes to reach agreement in appropriate cases.” Although the *Convention* did not enter into force until 2003, it served as incentive in adopting law 285/1997, which introduced in the Italian *Civil Code* the first explicit legal reference to family mediation for families and minors, as one of the means of implementing the law. Despite the generality and somewhat vagueness of the provision, it served its purpose of introducing family mediation in the Italian legal framework.

The next legal reference to family mediation came four years later with law 154/2001 which introduced amendments to the Italian *Civil Code* in the area of high-conflict family relations. The new article 342-ter of the *Civil Code* provides for the judge, in issuing protecting orders, the power to order the intervention of social services or a family mediation centre. This is a discretionary power that the judge can use without consent of the parties. This has been subject to some criticism based on the fact that imposing mediation would make it contradictory to the concept itself which assumes that family mediation makes sense only if the parties participate in it with absolute freedom and without coercion whatsoever

Another thing to be noticed is also the fact that family mediation was even considered for high-conflict cases in which, as a matter of principle and practice in common law countries, mediation is generally not advised.

According to Guaglione (2007), the largest reform of Italian family law happened in 2006 with law 54/2006 which among introducing for the first time joint-custody in the *Civil Code*, it also provided for family mediation in the context of joint-custody. The new provision allows the judge to send the parties to mediation, with their prior consent and with particular consideration of the protection of moral and material interests of the children.

The provision has also been subject to criticism for several reasons:

- It only refers to mediation pending a separation order of the judge, and does not consider the so-called preventive mediation that parties can undertake before initiating a court proceeding. This remains a grey area in the law.
- It creates confusion between family mediation and reconciliation. Reconciliation is well-known in employment and labour issues but is not used in family law issues. In the reconciliation process the third party is superior to the other parties and can propose solutions that parties can either adopt or reject.
- Legislator has in fact reduced family mediation to a form of ‘*qualified reconciliation*’
- Legislator’s purpose was to increase the judge’s powers more than promoting family mediation as a new and evolved form of alternative dispute resolution.
- The Italian Constitutional Court has interpreted article 155-*sexies* as simply “*referring to, and not creating, the institution of family mediator, which is in fact not defined or regulated in any internal law.*” [emphasis added]
- The law is silent with regard to any confidentiality requirement, representing a very big obstacle to the use of family mediation.
- Mediation agreement is not automatically enforceable but subject to verification from the judge with regard to the child’s best interest in custody and support cases.

### 2.2.1. Proposed solutions: Ad-hoc Regulatory Framework or Extended Application of the Mitigated Mandatory Mediation

The current legal framework for family mediation has been criticized and calls for the necessity of changes to

the legislation have been consistently made. The proposed solutions vary from the creation of a separate legal framework for family mediation, to the specific inclusion of family law disputes within the mandatory mediation framework of the *Decree*.

Even those who criticize the *Decree* as being inapplicable to family law disputes because irreconcilable with the peculiarities of family law mediation, still think that the road undertaken by the legislator through the *Decree* is without discussion worthy of being explored. For that purpose, a series of measures are provided, the most important being the regulation of the family mediator institution and determination of a confidentiality requirement (Impagnatello, 2009).

According to Scalise (2012), others explicitly express objection and concern for the exclusion of family mediation from the application of the *Decree*. Consider the following passage from an article written by Melina Scalise, journalist and civil mediator:

If the purpose of mandatory civil mediation was to reduce the court proceedings times and the respective social tensions by directing people to a model of extra-judicial resolution of disputes, why it is that family has been kept out from such intervention? Are maybe consumer protection or condominium conflicts resolutions more important compared to family conflicts? Isn't family the place where the citizen is formed and comprehends the sociality? **Family mediation cannot be abandoned to ignorance.**  
[emphasis in original]

From the previous considerations of the current Italian legal framework for family mediation, it seems clear that family mediation, as it is, cannot be seen by the public as an effective tool of alternative dispute resolution. The lack of regulatory laws for family mediation, in a civil law jurisdiction where laws are necessary to create, legitimate, and develop legal institutions, negatively affect access to justice for people that cannot afford initiating or continuing a judicial process for years and are either left to the vagueness of the law, or to the common sense of the judge in assessing the need for a mediation.

### 3. FAMILY MEDIATION LEGAL FRAMEWORK IN ALBANIA

During the many centuries of existence of the Albanian state, some form of mediation has always been practiced. Notions of mediation can be found in the *Kanuni i Leke Dukagjinit*, a code of customary rules dating back to the middle age. The code was an attempt made by Leke Dukagjini, an Albanian prince, to somehow control and discourage blood feud which has been the main form of restorative justice for centuries until 1944 with the advent of communism (Celik & Shkreli, 2010). Under the code, mediation was provided by a person with great virtues who was highly respected by the families involved in the blood feud.

During communism, a 'social court' provided a species of extra-judiciary conflict resolution and the mediator was a person of trust of the political party. Although sometimes in post-communist countries difficulties may arise in explaining to judges or legislators new terms or legal institutions, the reaction in Albania was positive because of a somewhat overlapping of already known notions. With the dismissal of communism in 1990, during which obtaining or even asking for a divorce was very rare, the number of divorces increased significantly by overburdening the Albanian courts with family claims (in addition to the claims in other areas of the law).

To overcome administrative deficiencies of the Albanian courts, and to alleviate social tension with regard to the newly found divorce, a first law on mediation was adopted in 1998.<sup>1</sup> The law introduced the concept of mediation as an alternative dispute resolution method. It was mainly to be used for civil claims including those in family disputes, but its impact was very limited.

The next attempt to regulate and promote mediation was made in 2003 with a new law on mediation. Despite the obvious improvements, such as the introduction of the mediator as a private profession, the law was not in line with the *acquis communautaire* and thus failed to meet all the EU requirements (Bushati & Spaho, 2011).

As a final attempt, the Albanian legislator adopted the current *Mediation Law*, in force since 2011. The law was drafted based on the *Mediation Directive*. Although Albania is not a member of the EU yet, since 2006 it has an obligation to approximate its internal legislation to that of the EU.

The Albanian legislator specifically chose to include family mediations within the application of the *Mediation*

Law. Some of its most important provisions are:

- *Mediation definition*: Mediation is the extra-judicial process through which parties attempt the dispute resolution by means of a third impartial party (art. 1.1). Mediation is also distinguished from reconciliation which is a different activity, independent from and sometimes concurrent with mediation (art. 1.2).
- *Voluntary & Mandatory*: The law provides for both types of mediation, voluntary and mandatory. Voluntary mediation can be undertaken by the disputing parties at any time and/or stage, regardless of whether a court proceeding has already started (art. 2.1). However, once a court proceeding is initiated, the judge must orient the parties towards mediation, especially for family law disputes and those where interests of children are at stake. The judge must refer to mediation also those cases where a mandatory reconciliation meeting is provided for under the Albanian *Family Code* (art. 4). This serves to confirm that reconciliation and mediation are two activities separate and independent from each other.
- *Monolithic system*: *Mediation Law* applies to both domestic and cross-border disputes (art. 2.8).
- *Mediator definition*: The mediator is a third neutral party that ensures resolution of the dispute is carried out with efficacy, fairness and impartiality, in a professional way and without prejudice to the parties or the dispute (art. 3.2). However, the mediator bears no responsibility if no settlement agreement is reached at the end of the mediation or if an already reached agreement is not complied with by the parties (art. 3.4). In addition, mediators do not have the right to order or oblige the parties to accept the resolution of the dispute (art. 1.3).
- *No legal advice*: it is specifically provided that the mediator can provide no legal advice to the parties (art. 10.2).
- *Licensing and Registration*: Mediators must be licensed and registered with the Mediators Registry near the Ministry of Justice (art. 4). Among the licensing requirements it is the completion of a university degree and completion of the formation and training program for mediators (as approved by the National Chambers of Mediators). Further training is also required each year for at least 20 hours (art. 9).
- *Procedure*: Parties are free to determine the terms, procedure and time limits for the mediation procedure (to the extent it is allowable by the law). They can freely choose one or more mediators from the Mediators Registry. They are also free to withdraw from the mediation process at any time (art. 3 and 15), and/or ask the court to resume the court proceeding in the case of mandatory mediation (art. 13).
- *Preliminary Meeting*: The mediator must inform the parties on the purpose and general principles of the mediation, his role as a mediator and the role of the same parties in the process, the costs and expenses related to the process, as well as the effects of the settlement agreement (art. 17.1). Unless otherwise agreed by the parties, the mediator has the right to propose an acceptable resolution of the dispute at any stage of the mediation (art. 17.5).
- *Confidentiality and Mediation Privilege*: All parties to the mediation procedure have an obligation of confidentiality, unless the parties have agreed otherwise. Exception is made when breaching the duty of confidentiality is necessary to safeguard the interest of the state, or of the public, or to prevent or stop physical or psychological violence, especially towards children or persons with disabilities (art. 19). Mediator is also bound by the mediation privilege, unless he/she is required by law to testify in a court proceeding.
- *Enforceability*: The settlement agreement is binding and enforceable between the parties at the same level as an arbitration award (art. 22).

The Mediation Law is generally in line with all compulsory provisions of the *Mediation Directive* regarding confidentiality and enforceability of settlement agreements. As regards the discretionary provisions, the Albanian legislator, differently from the Italian legislator, has chosen to include family law within the realm of application of the *Mediation Law* by extinguishing any visible uncertainties as to whether and how parties can resolve their family issues by mediation.

The Albanian legislator has taken a more parties-are-free-to-mediate approach than that of the Italian legislator. Though at first it might seem like *Mediation Law* has introduced elements of mandatory mediation, in reality, the judge's referral to mediation seems more like a proposal to try mediation than an explicit order to comply with. Nonetheless, this referral or proposal presents the parties with a new opportunity of which

they might not be aware.

There are still no statistics as to the impact that *Mediation Law* has had over resolution of family disputes in Albania, but the premises for a serious growth in family mediation have been set.

#### **4. CONCLUSIONS**

In terms of mediation in general, and family mediation in particular, what works for one country may not work for another. Trying to provide unifying principles for a multitude of countries is, at the very least, challenging. Having different perspectives from different realities may help in identifying practices that have in common the potential for being successful.

Whether mandatory family mediation – in its mitigated form or not – is one of these successful practices, will depend on a series of factors, such as legal and historical background, legislative will and openness to change. However, having a good and clear regulatory framework is the first step to creating and developing a culture and practice of family mediation.

#### **REFERENCE LIST**

*Charter of Fundamental Rights of the European Union*, 7 December 2000, 2000/C 364/01.

*Decreto Legislativo in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali*, 28/2010, GU 53/2010.

EC, Commission Directive 2008/52/EC of 21 May 2008 on Certain Aspects of Mediation in Civil and Commercial Matters [2008] OJ L 136.

EC, *Convention on the Exercise of Children's Rights*, ETS No. 160: 1996/2000.

EC, Council of Europe, Committee of Ministers, Recommendation R (98)1 (1998), online: Council of Europe

EC, European Council Presidency Conclusions, online: European Parliament

EC, European Parliament Study of 15 January 2014 on Rebooting' the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU, online: European Parliament

EC, European Parliament Resolution of 13 September 2011 on the implementation of the directive on mediation in the Member States, its impact on mediation and its take-up by the courts

EC, Proceedings of the 4<sup>th</sup> Conference on Family mediation in Europe, 1998(2000) Council of Europe Publishing 109

EC, Sitting of Tuesday, 11 December 2012, online: European Parliament

European Code of Conduct for Mediators, 2 July 2004, online: European Judicial Network

*Legge 28/1997 "Disposizioni per la promozione di diritti e di opportunità per l'infanzia e l'adolescenza"*, GU 207/1997

Ligj nr. 8465, date 11.3.1999 "*Per ndermjetesimin per zgjidhjen me pajtim te mosmarreveshjeve*".

Ligj nr. 9090, date 26.6.2003 "*Per ndermjetesimin ne zgjidhjen e mosmarreveshjeve*".

Ligj nr.10385, date 24.2.2011, "*Per ndermjetesimin ne zgjidhjen e mosmarreveshjeve*".

RD. 16 marzo 1942 (*Italian Civil Code*).

Stabilisation and Association Agreement between the European Communities and their Member States and the Republic of Albania, online: Delegation of the European Union to Albania

*Sentenza Corte Costituzionale 131/2010*, GU 16//2010.

*Sentenza Corte Costituzionale 24/2012*, GU 272/2012.

#### **Secondary Material**

Bushati, E., & Spaho, E, *Mediation: A concept that has to do not just with the justice system*, (2011), Academicus International Scientific Journal

- Celik, A, & Shkreli. A, *An Analysis of Reconciliatory Mediation in Northern Albania: The Role of Customary Mediators*, (2010), 62 *Europe-Asia Studies* 6, 885
- De Palo, G, *The EU Civil and Commercial Mediation Paradox and a Possible Solution*, (2012), European Union Agency for Fundamental Rights
- De Palo, G & Keller. R Lauren, *The Italian Mediation Explosion: Lessons in Realpolitik* (2012), Wiley Online Library
- Guaglione, L, *Affidamento condiviso tra mediazione familiare e poteri del giudice, in Corti pugliesi*, (2007), Edizioni Scientifiche Italiane 28
- Impagnatiello, Gianpaolo "La mediazione familiare tra Corte Costituzionale e legislatore delegate", (2009) *Mediaries* 163
- Parkinson, L, (1997), *La mediazione familiare: i modelli e strategie operative*, Erikson, Londra
- Scalise, Melina "Mediazione familiare e mediazione civile perchè la prima è facoltativa e la seconda obbligatoria" (2012), online: Giustizia e Mediazione Civile
- Steffek. F, *Mediation in the European Union: An Introduction*, (2012), online: European Justice