Perspectives of use of alternative dispute resolution techniques in cases of discrimination in Serbia

Second report
antidiscrimination
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The views expressed in this publication are those of the author and do not necessarily represent those of the United Nations Development Programme, the Ministry of Labor and Social Policy of the Republic of Serbia or of the European Union.
Introductory Remarks

This report is a continuation of the research work focused on examining the perspectives and possibilities for the use of alternative dispute resolution techniques in cases of discrimination. The recommendations and conclusions of this report are based on data collected during the training implemented in 2009, which was suggested in the first phase of this report, and the results of monitoring and evaluating the effects of the pilot projects in this area. The report contributed to the development of a publication called *Guide for the use of negotiation and mediation techniques in discrimination cases*. The guide is one of the numerous results of the project *Support to implementation of antidiscrimination legislation and mediation in Serbia* which was implemented in collaboration between the UNDP and the Ministry of Labour and Social Policy, with the financial support of the EU. The two most important results of the project are the drafting and adoption of the Antidiscrimination Law, in March 2009, and support given to the establishment of the institution of Commissioner for Protection of Equality, in May 2010.

This publication attempts to identify the alternative dispute resolution techniques (hereinafter: ADR techniques) which will efficiently provide assistance in prevention, management and resolution of disputes caused by discrimination. The Ministry of Labour and Social Policy, the Commissioner for Protection of Equality and other public authorities will be able to use the results of this research when examining possible mechanisms for more successful prevention and elimination of discrimination. The findings of the research may also be of use to civil society organizations working in the field of inclusion of marginalized groups into the society and promotion of equality.
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1. Analytical Framework

The basis for the analysis of the use of ADR techniques in cases of discrimination in Serbia is as follows:

- **The Antidiscrimination Law**\(^1\) — defines discrimination as groundless differences in the treatment of a person or a group on the basis of their personal traits. It provides a list of personal traits on the basis of which discrimination is forbidden (this list is informative in nature, i.e. according to the Law, discrimination is forbidden even on the basis of personal traits which are not on the list), and it defines different forms of discrimination. The Law comprehensively regulates the legal protection in cases of discrimination and introduces a special public authority for protection against discrimination — the Commissioner for Protection of Equality.

- **The Commissioner for Protection of Equality**\(^2\) — plays a key role in securing conditions for equal treatment of all the citizens of Serbia. The Commissioner’s term of office lasts for five years; one person cannot serve more than two terms, and cannot carry out any other public or political functions, or professional activities. The Commissioner enjoys the same immunity as Members of Parliament. It is envisaged that the Commissioner should have a Professional Service and two assistants. According to the Law, the Commissioner receives and examines complaints and if there are no ongoing court proceedings in relation to that particular case, gives opinions and recommendations in concrete cases, pronounces measures, and is also in charge of reconciliation (mediation). Upon receiving a complaint of discrimination, and before taking any other steps defined by the Law, the Commissioner has the obligation to recommend reconciliation, i.e. mediation.

- **The Law on Mediation**\(^3\) is a general law that established a legal framework for the use of mediation in Serbia. This Law allows the use of mediation in various kinds of disputes, especially in property-legal relations of natural persons and legal entities, commercial, family, labour and other civic-legal relations, administrative and criminal procedures, in which the parties can act freely, unless the Law dictates the exclusive competence of a court or other authority (Article 1). The Law supports the use of mediation both after the initiation of court proceedings or another procedure, and before approaching public authorities for legal remedy. This provides special legal support to the development of mediation in various forms of social life.

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1. Antidiscrimination Law Official Gazette of the Republic of Serbia No 22/09
2. On May 5th 2010, the National Assembly of the Republic of Serbia appointed Nevena Petrusic as the Commissioner for Protection of Equality.
3. Law on Mediation — Official Gazette of the Republic of Serbia, No 18/05, Article 3
• The Law on Legal Proceedings. According to this Law, a court can refer the parties to mediation, if it considers that the dispute could be successfully resolved in that manner. The same Law permits the parties themselves to propose jointly that they try to resolve their dispute through mediation, during proceedings before the court (in this instance antidiscrimination proceedings) (Article 327).

• Institutional support to the use of ADR by the relevant ministries, which have started to regulate certain areas in which ADR is applied through laws, directives and rules of procedure. The Ministry of Justice supports mediation annexed to the courts, the Ministry of Labour and Social Policy supports family mediation, and the Ministry of Education and the Ministry of Youth and Sports support the peer/school mediation.

• International experiences. At the international level, over the last twenty years, ADR techniques have been used more and more frequently in the resolution of cases of human rights. Specialized literature related to restorative justice indicates the possibility of quality use of ADR in the field of discrimination prevention. The USA, Canada and Australia, have several decades of experience in the use of these techniques, which have allowed the resolution of certain very complex and systemic forms of discrimination, especially in the field of discrimination of ethnic minorities, racial discrimination, and gender-based discrimination. The experience from these countries’ institutions, and especially the Canadian experience, has helped us to explore the potential of ADR techniques in this area.

• Pilot project experience. One of the results of the Project Support to implementation of antidiscrimination legislation and mediation in Serbia was to initiate 15 pilot projects all over the country. There was excellent collaboration with civil society organizations and local institutions, and the results of their work have allowed us to get a deeper insight into the perspectives of the field of ADR use in Serbia.

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4 Law on Court Proceedings - Official Gazette of the Republic of Serbia, No 125/04, Article 327
2. Pilot Projects

In September 2009, a Fund for Pilot Projects for use of ADR in cases of discrimination was established. The Fund’s Call for Projects had the following priorities:

- allow the use of ADR in prevention, management and resolution of disputes caused by discrimination, at the local level, in Serbia;
- empower the relevant actors at the local level to improve their work with beneficiaries, i.e. discrimination victims, with the use of ADR;
- secure networking and improvement of collaboration between all the social actors in the fight against discrimination;
- collect relevant data and establish good practice that will serve as a basis for establishing a system of ADR services in cases of discrimination;
- by evaluating the projects, test the impact of the use of ADR techniques in discrimination cases, and on awareness raising among local people.

Based on the above mentioned priorities, the Fund financed the following project activities:

1. Public awareness raising with the objective to identify discrimination, encouragement of active attitudes towards discrimination cases with the recognition of ADR techniques as one of the ways to resolve the discrimination problem;
2. Empowerment of relevant social actors at the local level to improve their work with beneficiaries/discrimination victims with the use of ADR techniques;
3. Provision of ADR services in cases of discrimination.

The Fund for Pilot Projects financially supported 15 projects in total.

In the following table, we provide a list of organizations/institutions that received funding (with their partner organizations), a brief project description, and an overview in which of the three above-mentioned priority areas the project implemented its planned activities:
<table>
<thead>
<tr>
<th>Organization</th>
<th>Brief project description</th>
<th>Project partners</th>
<th>Pr.1</th>
<th>Pr.2</th>
<th>Pr.3</th>
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<tbody>
<tr>
<td>Mediation Center of the Republic of Serbia</td>
<td>Implementation of the basic training on mediation in Novi Pazar, and for the representatives of pilot projects who did not finish the basic mediation training beforehand.</td>
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<tr>
<td>Mediation Center of the Republic of Serbia</td>
<td>Opening of a Department of the Mediation Center in Novi Pazar, and provision of mediation services.</td>
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<tr>
<td>“Rainbow” Association, Sabac</td>
<td>Response to discrimination against LGBT person by the use of ADR methods. Within this project, a handbook on antidiscrimination and use of mediation was produced and distributed to healthcare professionals and social workers. Thematic workshops were organized for LGBT persons on the possibilities of mediation in the antidiscrimination area. The project was implemented in the Macva district.</td>
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<tr>
<td>Citizens’ Association “Center for Legal Studies Improvement” – CLSI Belgrade</td>
<td>Through this project, CLSI has organized thematic workshops which have contributed to provision of information to target groups about the Antidiscrimination Law, the use of legal protection, and the use of mediation in the field of discrimination prevention. These activities were implemented in Belgrade, Novi Sad, Kragujevac and Nis. The project put special emphasis on forms of discrimination cases, especially among vulnerable social groups, and on possibilities for the use of ADR techniques in resolution of practical problems.</td>
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<tr>
<td>Organization</td>
<td>Description</td>
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<tr>
<td>Citizens’ Association “Rainbow”, Ada and Mol</td>
<td>The project called Identify and accept the differences was focused on promotion of antidiscrimination and mediation among youth, through educational workshops targeting school age children, and through round tables targeting the parents. It was implemented in the municipalities of Ada and Mol.</td>
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<tr>
<td>Association for combat against AIDS “JAZAS”, Belgrade</td>
<td>The project called Empowerment for identification and resistance to discrimination against HIV vulnerable persons was implemented in Belgrade and Pancevo. This project included healthcare professionals and HIV vulnerable persons.</td>
<td>Ada, Belgrade</td>
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<tr>
<td>Network of Committees for Human Rights in Serbia, “CHRIS”, Nis</td>
<td>The objective of the Open Forum project was to present and explain the Antidiscrimination Law and mediation as a possible way of resolving disputes caused by discrimination to public services employees and NGO representatives, by organization of thematic seminars. These information-providing seminars were held in Novi Sad, Valjevo, Negotin, Nis, Novi Pazar and Bujanovac.</td>
<td>Nis, Novi Pazar</td>
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<tr>
<td>“From the Circle” organization for support and protection of rights of persons with disabilities in Serbia, Belgrade</td>
<td>The project called Things can be done in a different way had the objective to promote mediation as a manner for empowerment and protection of persons with disabilities, through implementation of workshops in Belgrade, Novi Sad and Kragujevac.</td>
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<tr>
<td>Organization</td>
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<tr>
<td>Citizens’ Association “Center for Independent Living of Persons with Disabilities of the Republic of Serbia”, Belgrade</td>
<td>Through implementation of thematic workshops, the project Use knowledge to combat discrimination against persons with disabilities aimed to inform persons with disabilities and their families about the laws that protect their rights, to teach them to identify discrimination and show them ways of reacting against it, such as using the ADR techniques, initiating a court procedure against discrimination, and submitting complaints to the Commissioner for Protection of Equality. The workshops were implemented in Belgrade, Jagodina, Leskovac, Smederevo, Sombor, Subotica and Cacak.</td>
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<tr>
<td>Citizens’ Association “Society for Cerebral Paralysis”, Novi Pazar</td>
<td>Through the project Life without discrimination the association provided information to members, their families and communities on antidiscrimination and mediation as a way to resolve disputes caused by discrimination. The promotion through media activities involved production and broadcasting of a TV clip and organization of thematic workshops and lectures. The project was implemented in Novi Pazar, Raska, Sjenica and Tutin.</td>
<td>“Young Lawyers of Serbia”, Novi Pazar branch</td>
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<tr>
<td>Citizens’ Association “People to People”, Belgrade</td>
<td>The Project Different in the same school aimed to empower elementary school first graders to identify discrimination and respect differences, to develop the teachers’ capacities, and to raise the awareness of local authorities of antidiscrimination and mediation as a manner of peaceful dispute resolution. Workshops for children and adults were implemented in the municipalities of Palilula, New Belgrade, and Ljig.</td>
<td>Municipality of Palilula, Municipality of New Belgrade, Municipality of Ljig</td>
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<td>Humanitarian Association &quot;Roma Brothers&quot; Pancevo</td>
<td>Within this project, the organization produced a documentary which describes the lives of children without parental care, indicates the most frequent discrimination situations that these children are exposed to, and explores the possibilities to use mediation as the manner of prevention and resolution of discrimination-based disputes. The documentary was filmed in Pancevo.</td>
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<td>Citizens' Association &quot;Kokoro&quot;, Bor</td>
<td>The objectives of this project were to inform people about the Antidiscrimination Law, to implement training on use of mediation in discrimination cases, and to provide mediation services in discrimination cases. This was to be accomplished through the media, thematic workshops, training and provision of mediation services. The project was implemented in the municipalities of Bor, Negotin, Majdanpek and Zajecar. The local governments have supported the activities in all four towns.</td>
<td>Citizens' Association &quot;Children's Joy&quot;, Zajecar</td>
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<td>Children and Youth Home &quot;Stanko Paunovic&quot;, Negotin</td>
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<tr>
<td>Citizens' Association &quot;Home of Good Hope&quot;, Belgrade</td>
<td>The aim of this project was to empower Roma children of school age to establish and nurture healthy relationships with their peers and school teachers, to identify discrimination and to resolve disputes caused by discrimination, with the assistance of a mediator (a third neutral party). The project is implemented in the Belgrade municipality of Rakovica, in which there is an informal Roma settlement.</td>
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Citizens’ Association “Roma Society” Prokuplje

By organizing outreach workshops, peer mediation training and round tables for parents and teachers, this organization has the objective to raise awareness on problems of discrimination in education, and on the possibilities for the use of mediation. The activities were mostly focused on the Roma population in Prokuplje, and they were combined with legal assistance and counselling services that this organization also provides to vulnerable categories of population.

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This table indicates the conclusion that there are significant differences between the civil society organizations that deal with human rights, and those that deal with mediation as their basic activity. The Call for Projects selected both types of organization, with the intention to observe which organizations see themselves, in the future, as mediation service providers in discrimination cases, and whose capacities should be further built (i.e. whether the mediation organizations should expand their activities to discrimination victims, or whether human rights organizations should build their skills in this regard). All thirteen civil society organizations which deal with human rights protection applied for implementation of activities that were categorized under the Call for Project’s priorities 1 or 2, i.e. for public awareness raising and empowerment of local institutions in the fight against discrimination with the use of ADR techniques, while only two organizations applied for implementation of activities within the priority 3, i.e. provision of mediation services. Both organizations have had previous experience in this area.

At the very beginning of project implementation, a training session on the use of ADR techniques was organized (negotiation and mediation in discrimination cases), with the objective of empowering the project implementers to realize the foreseen activities in a more efficient way.
3. Training on the Use of Negotiation and Mediation Techniques in Discrimination Cases

Bearing in mind that the use of ADR in the antidiscrimination area in Serbia is still in the experimental stage, and that the Antidiscrimination Law was only adopted recently, designing adequate training was a particular challenge for the team for ADR use in antidiscrimination. The group attending the training session consisted of pilot project representatives, representatives of certain ministries, and representatives of the Mediation Center of the Republic of Serbia. Some of the participants were very familiar with discrimination problems, while others had not dealt with this matter until then. Among the participants, there were trainers for basic training in the field of commercial mediation (Mediation Center representatives), and also those who did not have any previous experience or knowledge in the ADR field. The group had representatives from marginalized groups, i.e. Roma, persons with disabilities and LGBT persons. The group composition influenced the contents of the training session.

The goal of the training was to promote antidiscrimination legislation and ADR, and to contribute to the use of ADR techniques in discrimination cases.

The objectives of the training were:

- To strengthen the capacities of organizations/institutions to implement their project activities;
- To provide basic knowledge and skills for the use of negotiation and mediation techniques in discrimination cases;
- To inform the participants about antidiscrimination legislation and the use of ADR techniques in discrimination cases, and to create conditions for institutional support through networking of organizations and institutions interested in this topic. The training session was attended by representatives of the Ministry of Interior, the Ministry of Labour and Social Policy, and the Ministry for Human and Minority Rights.

As a member of the Team for ADR implementation in the antidiscrimination field, Dr Peggy Blair contributed greatly to the training design, with her international experience in this area.

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6 The training contents and methodology of work were developed by the ADR team which consisted of five domestic experts and an international expert who was in charge of the part of the training related to negotiation and mediation, which was based on the licensed Harvard methodology (the original material for exercise was translated into Serbian).
The team designed the training to last for 5 working days, with 40 hours of work, which is in line with the domestic Law on Mediation. The training was held from November 16th to 20th in Vrnjacka Banja.

Each working day consisted of two sessions, the morning sessions dealt with legal regulations, discrimination, stereotypes and prejudice, while the afternoon sessions were aimed at building negotiation and mediation skills.

During the training design, the team paid attention to have a balance between theory and practice, to include the participants as actively as possible, and to cover various modalities of studying.

**Specific parts of the training** were split into the following groups:

1. Informing the participants about:
   a. discrimination, as it is defined by the law;
   b. discrimination in Serbia;
   c. role of the institution of Commissioner for Protection of Equality;
2. Sensitizing the participants to identify situations/types/forms of discrimination;
3. Motivating for law enforcement;
4. Understanding the roles of negotiators and mediators, and also the advantages of the use of interest-based negotiations and mediation in discrimination cases;
5. Finding and developing one’s own negotiation style;
6. Acquiring skills to apply the following in discrimination cases:
   a. interest-based negotiation;
   b. mediation (between two or more parties);
7. Creating networks of professionals who will collaborate on the pilot projects, and in their future work.

The following exercises/role-plays were used:

1. **Price of Oil.** During this exercise, small teams preparing for negotiation work together and develop a negotiation strategy for zero sum situations. At the end of the exercise, the participants know how to use negotiations through collaboration and how to increase their possibilities by using interest-based negotiation. They also understand negotiation strategies and certain approaches to negotiations.

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7 Zero sum negotiations — it is about situations (in games, and in real life) when one party’s win automatically means another party’s loss, meaning that the overall sum of wins and losses equals zero. A real life situation that could serve as an example is selling used cars: as much as one party can win by lowering the price, the other party loses.
2. **Sally Swansong.** This exercise is about interest-based negotiation which takes place between two negotiators. It helps the participants to prepare for negotiations, as well as to learn how to apply the fair standard concept in negotiation, how to raise the gain based on the interest of negotiating parties, and how to build long-term relations through such negotiations.

3. **Construction in Bradford.** This exercise is about team negotiation. During this role-play, the participants are trained to develop negotiation strategies in small teams, and also to develop creative solutions in negotiations while paying attention to common interests.

4. **Food from Seoul in Urbana.** This role-play consists of two parties and one mediator. It helps both the mediators and the conflicting parties to learn how to negotiate in disputes that involve cultural differences and racism, through understanding of different perspectives from which the parties view the problem, and through the use of interest-based negotiation.

5. **Guatemala.** This is a simulation of mediation between five parties and one mediator. This role-play involves the issue of human rights violation, as well as accusations of discrimination, brought up by endangered minorities. The exercise teaches the conflicting parties and the mediator not to hide their interests, and to push the discussion forward in a productive manner, during one negotiation session between several parties, in relation to a matter that involves certain sensitive issues.

During the training, video-material was used to encourage discussion and learning by model. This material covered the following topics: prejudice and discrimination, so-called prisoners’ dilemmas, preparation of parties for negotiation, work with parties that express wrath and anger, and the importance of apologies in improvement of relations between two parties.

As for the contents related to discrimination, the following topics were treated:

1. The Antidiscrimination Law: the notion of discrimination, the bases of discrimination, the forms of discrimination, the protection against discrimination, and the institution of the Commissioner for Protection of Equality;

2. Stereotypes, prejudice and discrimination: contemporary knowledge of social psychology was used, and the participants were shown, through an exercise, how the stereotypization mechanism works, i.e. how people are prone to attribute positive features to their own group, and negative to another. They were also shown how to deal with stereotypes and prejudice when they encounter them in the negotiation and mediation processes;

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8 The prisoner’s dilemma is an example of a situation in which we do not have the zero sum result. Its title comes from real life, from a situation in which we have two crime perpetrators: if both do not plead guilty, there won't be enough evidence for a conviction; if only one pleads, s/he will receive a much less serious punishment than the other one; but if they both plead, both will receive severe punishment. This was used as a basis for a set of simulations in negotiation training aiming to show the importance of trust and collaboration.
3. Racism: the severe psychological effects that institutionalized discrimination may have on an individual were shown;

4. Hidden discrimination: the participants had the opportunity to analyze various examples of cases in which discrimination was not that obvious;

5. Practical exercise: the participants were split into groups and they were all given the same invented case of discrimination against Roma. They discussed and analyzed various ways of resolving this case;

6. Discrimination and mediation: various ways for cases to come to the mediation procedure were shown.

The comments in evaluation forms and the trainers’ experience during the training indicated the areas in which further theoretical training of participants should be organized, in order to help them in their future work. This is why the *Guide for the use of negotiation and mediation in cases of discrimination* was prepared, with the objective of allowing extended theoretical and practical training in this area, by any certified organization or institution, thus contributing to the number of experts who can successfully handle the resolution of disputes caused by discrimination with the use of ADR techniques in Serbia.
4. Guide for the Use of Negotiation and Mediation Techniques in Cases of Discrimination

In the first stage of the analysis, implemented in 2009, it was assessed that the following ADR techniques may be used for discrimination cases: mediation and conferencing (the latter is also known as “circle techniques” in the professional literature). Sometimes, these techniques have the characteristics of restorative justice. It was also assessed that mediation, as one of the most frequently applied ADR techniques, could certainly be a useful tool in discrimination cases, with obligatory adjustments to the basic model (the facilitating model, used by most practitioners in Serbia) to the specificities of discrimination cases.

However, when designing the training for the use of ADR in antidiscrimination, it was judged that negotiation techniques must be treated first of all, with special emphasis on interest-based negotiation, because negotiation is the basic technique for all the other ADR techniques, including the ADR techniques that would be applied in discrimination cases. Knowledge of negotiation techniques allows the practitioners to gain a better understanding of the conflicting parties, and enables them to develop, together with the parties, creative solutions based on fair standards and criteria.

The importance of mediation was confirmed after analyzing the results of the pilot projects. The analysis of resources and services concluded that in Serbia the most frequent ADR technique used was mediation, and that this technique was flexible enough for the basic facilitating model to be adjusted in line with the nature of a dispute, by introducing elements from some other ADR techniques.

The Guide for the use of negotiation and mediation in cases of discrimination, which was based on experience from the pilot projects, provides an extensive theoretical overview that follows and complements this report, by elaborating the two above mentioned ADR techniques (negotiation and mediation) in depth. Special attention was paid to the steps used in mediation, including advice to mediators on how to act ethically during the mediation process, and how to conduct mediation between several parties on the subject of conflicts based on racial, ethnic or other tensions. The internationally acclaimed “mediators’ code of conduct” and “mediators’ practice standards” were included as well, with the aim of assisting the mediators to successfully resolve possible conflicts of interest that may come up during mediation.

One should not neglect the fact that a significant number of professionals in the ADR area in Serbia have knowledge and skills related to restorative justice and conferencing. This is why, in the chapter that follows, the conferencing technique will be explained in more detail, because, alongside mediation, it is seen as the most appropriate ADR technique in resolution of disputes caused by discrimination.
5. Conferencing techniques as a potential approach to resolution of discrimination issues in our society

Written by Jelena Arsic

Given that discrimination is usually defined as groundless differences in the treatment of a person or a group on the basis of their personal traits, such socially unacceptable behaviour can lead to disputes and violations that endanger essential human rights and challenge the principle of equality of all society members. Violations (emotional, physical, property-related, etc.) consist of events in which one person or group caused damage or endangered the emotional/physical wellbeing of another person or group. On the other hand, a dispute is a situation of disagreement, in which parties have different goals and interests, and each party feels that it is entitled to what it wants to achieve. In addition to the usual legal protection tools, a suitable manner to resolve these socially adverse cases would be the conferencing techniques (also known as “circle techniques” or “group decision making”), which can be applied both in violation situations and in disputes between individuals or groups.

Conferencing techniques entail a process in which not only those individuals who are direct actors in a “problematic life situation” should participate, but also all the persons that are relevant to the conflicting parties, as well as all the persons influenced by such life situation, whose opinion and support could contribute to finding of a constructive problem resolution. The structure of the conferencing process allows the participants to identify the causes and consequences of the situation that led to a violation or dispute, and it encourages them to take a realistic view on the problematic event, though an analysis of the past, the present, and the future – so that the existing negative relationship can be transformed into a cooperation which will finally allow the selection of an appropriate resolution. The conferencing process is organized at a time and the location to suit the participants, and given that all the persons concerned with a certain problematic situation are involved in the resolution process, the practice confirms a high rate of success in implementation of resolutions selected by the process participants.

The concept of the conferencing technique was inspired by the Maori culture, and in its modern form, it was developed for the first time during the 1980s in New Zealand. Among other things, in 1989 New Zealand adopted a Law on Children, Youth and Family, which guaranteed the right to a family group conference (the Law explicitly mentioned this term) when dealing with problems concerning
children. This radically new approach was mostly aimed at resolving cases of neglected and abused children, and underage delinquency, with the use of conferencing techniques. In the late 80s and early 90s, under the influence of the New Zealand practice, the conferencing model became accepted in a number of countries in which legislation and practice recognized the value of conferencing in the resolution of various social and legal problems (such as Australia, USA, Norway, Holland and the UK). The tendency to adopt the conferencing model is ongoing, and in the past few years it is marked by a more frequent use in cases of domestic violence, underage delinquency, disputes and other socially unacceptable forms of behaviour in smaller communities, business environments, schools etc., in combination with some of the existing forms of legal and social protection. Due to the sheer number of areas in which the conferencing techniques are applied, these processes have a variety of different names. Among others, they are: community conferences, workplace conferences, juvenile justice conferences, restorative justice conferences, family group decision-making, etc. However, all of these processes share certain generally accepted standards of practice, and certain usual stages that make up the structure of the process regulated by conferencing techniques.

5.1. Standards of Use of Conferencing Techniques and the Basic Stages of the Process

Standards. In the core of the conferencing technique, there are certain principles and standards that define the framework of the process itself. The initial principle concerns the rights of the immediate actors in the event that caused the violation or dispute – they should propose the other persons who should be involved in the process. Usually, these persons are a part of their wider network of family and friends (cousins, friends, neighbours and other trusted people), they are also touched by this problem either directly or indirectly, and they can, with their position and influence, contribute to a decision that will secure a long-term problem resolution. In the same way, the conference participants have the right to have the process organized in such a way that it respects all the cultural, ethnic and other symbols and values. The conference participants select the time of the conference, the location at which it will be held (a family home of one of the participants, a local church, or another place that everyone is comfortable with), and the language of the process (which may be particularly important when certain participants are members of a minority language group).

The rule is that the conference should be chaired by an independent and unbiased person; a coordinator, who is not a professional from the social and legal protection system, but is a trusted person who has been through the appropriate training. The coordinator’s role is crucial in conference preparation, provision of all the necessary process-related information to conference participants, arrangement of participants’ attendance and finally, conference management and facilitation. Depending on the model, professionals engaged in the social protection system sometimes attend
the process (social workers, policemen, prosecutors, and in discrimination cases this could involve the Commissioner for Protection of Equality, the Ombudsman, and other persons, depending on the concrete case). Their role is to provide the participants with information from their scope of work, and therefore indirectly help in finding a resolution which is in the best interest of the discriminated person, and also the discriminator. When said professionals take part in the conferencing process, they do not have the right to make decisions. The only acceptable decisions and measures necessary for finding an adequate resolution and its implementation are those that are agreed by persons who are direct actors in the violation or dispute, and persons that they invited to participate in the decision-making process.

Conferencing is a private and confidential procedure. All the information given during the process is considered confidential and, in general, inadmissible as evidence in a potential court or administrative procedure later on.

The above stated standards, like other standards that regulate the conferencing techniques, aim to empower individuals and social groups to use their own forces to find a resolution that would allow removal or alleviation of negative effects caused by violation or dispute. This transfers the responsibility for problem resolution from public authorities back to individuals or groups, thus contributing to integration and reinforcement of social relations.

**Process stages.** The conference, essentially, is a meeting between members of a certain social network, professionals working in the social and legal protection system (in certain conferencing models) and an independent person – a coordinator. The meeting is preceded by certain preparatory activities undertaken by the coordinator (establishing a circle of persons who should be invited into the process, inviting these persons, providing the participants with information related to the process itself, establishing the time and location of the conference, securing all other conditions needed to make the process respond to the participants’ needs – e.g. assistance to arrive at the location, finding adequate premises, providing interpretation services, etc.). As we have already said, the persons who are direct actors in the problematic event (in discrimination cases, this would be the discrimination victim and the discriminator) are invited to nominate other participants in the conference – persons who are important to them as some sort of support during the process duration (relatives, friends, etc.), as well as other persons concerned with this concrete case.

During the conferencing process, the persons concerned with the problematic event have the opportunity to openly talk about it, in order to understand better what has really happened and comprehend the effect that the event had on each individual process participant, and then to jointly examine the potential resolutions, which could turn such an unacceptable life situation into a constructive relationship and decrease the chances of seeing the event repeat itself in the future. This most important process stage can unfold in the coordinator’s presence, or even without
the coordinator, as so-called participants’ private time (it all depends on the conferencing model). The final intention of all the participants is to reach an agreement, i.e. to make a decision on the problem resolution. If the professionals are involved with the process (which is a common practice abroad, when a public authority refers the case to conferencing), at the very beginning of the process, they provide the participants with information related to the case, explain the issues that should be resolved, and list the services from their scope of work that are available to the participants in problem resolution.

In the systems in which there is a practice of using the conferencing techniques, the conferencing process can be initiated by any public authority informed about the problematic case, as well as by the case actors themselves. In comparative practice, these are professionals working in the system of social and legal protection (e.g. professionals from social welfare centres, police forces, prosecutor’s office, and even courts). In Serbia, in the future, this could be the Commissioner for Protection of Equality (but also other public authorities that are a part of the system for protection against discrimination), if the basis for implementation of conferencing techniques would be secured in discrimination cases in our country. If, for example, the Commissioner (or some other authority) decides that it would be beneficial to refer a case to conferencing, he should give those involved the basic information on the process then discuss with them the possibilities of initiating the conferencing process, and finally, refer the case to a trained coordinator. Afterwards, the coordinator would have the opportunity to assess whether that particular case is indeed suitable for the conferencing process, and if the answer is yes, start with preparations. All this, however, requires adequate training of future conference coordinators/facilitators, and provision of the necessary administrative and technical capacity.

The conferencing techniques can be very useful in cases of violation followed by tension which has not yet turned into open conflict (such as social exclusion of a certain person or group, mocking, rejection, non-acceptance by a certain group, and other forms of intolerance). Conferencing techniques can act preventively (for example, work with a group which shows disrespect for differences, and thus prevents potential discrimination against persons who do not belong to the dominant group). On the other hand, the conferencing process is suitable to resolve disputes between individuals which have escalated into conflicts that involve a larger number of persons, as in cases of conflicts between groups. The conferencing process reinforces the sense of accountability to each other, it builds trust, and it contributes to cohesion in relations between individuals and groups. Finally, the above-mentioned techniques allow us not only to involve the direct actors in the discrimination case, but also others concerned with it, and they can influence the wider community by raising awareness on the inadmissibility of discrimination as a violation of the human rights of individuals or groups. By applying the conferencing techniques in discrimination cases, the victims would have the opportunity to get the respect and understanding that they need, and the
discriminators would be encouraged to take responsibility for the acts committed and they would become aware of the effects of their acts on others. The kind of communication facilitated by the conferencing process can make it possible to find a resolution acceptable to all the participants, in cases in which it can be applied.

Research on the effects of the use of conferencing techniques confirms that conferencing may transform existing or potential conflicts into an opportunity for systemic changes in cultural and social patterns. Taking into consideration such comparative experience, it seems that the use of conferencing techniques in discrimination cases in Serbia could also contribute to a higher degree of respect for human rights and social inclusion of marginalized groups, through empowerment of discrimination victims and better identification of discrimination and its negative effects by members of the dominant group.
6. Pilot Project Implementation

The implementation of the pilot projects started in December 2009, and evaluation and monitoring took place simultaneously with implementation. Monitoring of basic indicators (number of mediations held, beneficiaries and stakeholders' knowledge of the main topics, training and skills of persons employed in organizations for implementation of these techniques) took place through field visits by experts, periodical reporting, and structured interviews with employees and beneficiaries.

Conclusions reached through the analysis of collected data are grouped in two categories, in line with the established priorities of the Fund for Pilot Projects:

1. The degree of knowledge of antidiscrimination legislation among the general population in Serbia is low, and in many environments the representatives of local structures weren't familiar enough with this matter, in the sense of the legal framework, but also in the sense of law enforcement, as in identifying discrimination and reacting to it. Civil society organizations working on human rights protection, given the nature of their work, are familiar with the Antidiscrimination Law and legal framework, but they also face the challenge of adequate implementation of legislation. Marginalized groups are the least familiar with this matter, so generally speaking, they lack the knowledge to identify discrimination and realize their rights defined by this Law on that account.

When talking about the above mentioned categories, the situation is similar in relation to the use of ADR techniques, i.e. mediation (as the most frequently used technique in Serbia). If there is knowledge about mediation, it is mostly related to commercial mediation, i.e. mediation related to resolution of legal and property relations (especially in cases when lawsuits are ongoing for years), meaning that the general population mostly associates mediation with court proceedings. Marginalized groups mostly have no knowledge on mediation.

Given that out of fifteen approved projects, eleven were related to activities supporting the Call for Projects’ priority 1, i.e. awareness raising, and priority 2, i.e. training implementation, in the period from December to June 2009, significant results were achieved within these two priorities. About 4000 beneficiaries from 27 towns from all over Serbia (from the most northern municipality – Ada, to the most southern municipality – Prokuplje) have attended the outreach seminars, training, and presentations on the use of ADR in discrimination cases. Generally, the participants can be grouped into the following categories: children and adults, followed by professionals (municipality representatives, school staff, social welfare centre employees, judiciary representatives, civil sector representatives, healthcare workers, lawyers, journalists, policemen, etc.) and direct beneficiaries belonging to marginalized groups (e.g. persons with disabilities, LGBT persons, sex workers, school age children, pre-school and school age children of Roma nationality, children and youth without parental care, Roma living in informal settlements, etc.).
2. ADR techniques are recognized as a tool that will help the organizations and institutions that have participated in the activities to more efficiently work with beneficiaries, with more understanding, acting in a preventive manner when discrimination is concerned. For example, after the outreach seminars implemented by the Citizens’ Association “People to People”, whose target group were employees working in the municipal administrations of New Belgrade, Palilula and Ljig, the participants expressed their wish to undergo additional basic training in mediation. Children were another group of beneficiaries who were introduced to ADR techniques in discrimination cases within the project implemented by this organization. The project included first graders from three elementary schools (two in Belgrade and one in Ljig), and after the seminars were implemented, viewing the impact of such education on first graders, the school managers expressed their wish to continue with this kind of education with children of other grades.

3. Direct beneficiaries reacted very positively to the concept and use of mediation. The participants of the outreach workshop Antidiscrimination Law and the use of mediation for LGBT persons, organized by Citizens’ Association “Rainbow” from Sabac, said that, in discrimination cases, they would prefer mediation as the method to resolve the case, rather than going to the court. Certain victims of violence said that they would prefer to resolve their cases through mediation rather than in court. The main reasons for this, they said, are anonymity and the greater capacity of the mediation process to satisfy emotional needs and contribute to improvement of relationships. The main obstacle is the obligation to pay for the mediation (bearing in mind the price list of the Mediation Center, with the lowest fees for cases in which it is not possible to assess the value of the dispute — and hypothetically, discrimination cases would fall into this category — was 115 €, split equally between the two conflicting parties). Civil sector organizations do not have the funds to cover such expenses, while discrimination victims themselves, often coming from the most vulnerable socioeconomic groups, are not able to finance the mediation. The same group believed that the mediator cannot belong to the same group as the victim (in this case, an LGBT person), because it hinders neutrality in the process, and it may also make the discriminator hesitate to participate in the process. The mediator should not be sought in a Mediation Center department either, because the Center’s departments are usually located within the premises of municipal courts or other public institutions, and the participants believe that this would endanger anonymity and process confidentiality, especially in smaller towns.

4. When it comes to persons with disabilities, experiences here are rather unique. Since the Law against Discrimination Against Persons with Disabilities was adopted in 2006, and the civil society organizations were very dedicated in their engagement in its implementation by providing free legal aid to persons with disabilities, the preferred manner of resolution of discrimination cases is court. This is reinforced by the fact that, in such court proceedings, the persons with disabilities are free from payment of any kind of court expenses. A complicating circumstance in this process is that the courts often have an overload of cases, so it is not rare that a person has to wait for several years for the trial to begin. This is the situation assessment as given by the CSO “From the Circle”, located in Belgrade.
However, the managers of this organization were really interested in the use of mediation and, from the outset, even before the pilot project implementation, they used “informal mediation” in certain cases. For example, there was a situation in which the inhabitants of a district in Belgrade boycotted a group of women with disabilities who used to gather twice a day in a newly opened creative workshop, which was located in an adapted old garage. The local inhabitants believed that their children should not see persons with disabilities all the time in their area, because it may have a “demotivating” effect on their children. In order to express their disapproval, the inhabitants posted slogans such as “You’re not welcome here” and “Go Away!”, and after a while, they even started slashing the tires on the bus that drove the women with disabilities. “From the Circle” activists opted for a peaceful resolution of this situation. First, they printed extracts from the Law on Discrimination Against Persons with Disabilities and from the European Convention on Human Rights, and left this material in local mailboxes, thus sending a message that their behaviour was against the law. After that, the organization activists talked to those who were most stubborn ones in their beliefs. The result of this action was that the harassment stopped, and the awareness of some citizens was raised to the extent that after a while they started helping the women with disabilities. This organization and also the organization “Society for Cerebral Paralysis” from Novi Pazar, have shown a great interest in the possibilities for the use of ADR in discrimination cases. The managers of both organizations participated in all the training organized (the basic training on mediation and the specialist training on the use of ADR in antidiscrimination), and later on, through educational activities, the organizations informed a significant number of their members about this, which resulted in the resolution of several discrimination cases through mediation, even though these activities were not foreseen in the pilot project proposal. These mediations will be elaborated in detail in the following chapter.

5. Pilot projects that have trained the Roma population and local government representatives on Roma issues, such as “Home of Good Hope” from Belgrade or “Roma Society” from Prokuplje, recognized the huge potential of the use of ADR techniques in discrimination cases. The representatives of these organizations also went through all the training, and during the project implementation, they managed to resolve several discrimination cases through mediation.

6. The Civil Society Organization “Kokoro” from Bor made a significant contribution to the development of ADR techniques in the antidiscrimination sphere, by holding outreach meetings in Bor, Zajecar and Majdanpek. Given that this organization is certified by the Republic Social Protection Institute to implement training called *Use of mediation between underage perpetrators and victims*, through the activities of the pilot project, 44 persons from the above stated municipalities took the training. The project implementation resulted in mediations that took place in discrimination cases. Before the project implementation, the organization managers, with the support of UNICEF and the Ministry of Labour and Social Policy, went to the basic mediation training, the training *Use of mediation between underage perpetrators and victims*, and training for trainers in this area. Also, the organization managers went to a specialized training session *Use of negotiation and mediation in discrimination cases* at the beginning of the pilot project implementation.
7. The Negotiation and Mediation Center of the Republic of Serbia also made its contribution to promotion of mediation in cases of discrimination, by opening a department in Novi Pazar, and by organizing training in basic mediation: one was in Novi Pazar for twenty persons, representatives of local institutions, civil society, and marginalized groups, and ten representatives of the pilot projects.

8. Certain civil society organizations, which generally deal with antidiscrimination and protection of human rights from a legal perspective submitted project proposals which mostly suggested awareness raising activities related to the Antidiscrimination Law and to the use of mediation. However, these organizations retained a focus on antidiscrimination, instead of emphasizing mediation. It is interesting to note that these organizations did not send employees to the basic mediation training, while the specialized training on the use of negotiation and mediation in antidiscrimination was not attended by organization managers, but by other employees. These organizations did fully implement the project activities, but they did not show any particular interest in mediation, and during the pilot projects implementation process, they did not resolve or help to improve any real case or situation with the use of any of these techniques.

9. Through the outreach activities of pilot projects, as well as through implemented training, a significant part of the population (especially minority group members) improved the level of their knowledge in the sphere of antidiscrimination and mediation. However, even after the adoption of the antidiscrimination law, there are still some uncertainties related to how to recognize an act of discrimination. The use of mediation remains an area that will still be further specialized and developed.

10. The two organizations which have, during the Call for Projects, recognized their capacities to implement mediation in discrimination cases, and therefore proposed activities in the sphere of the third priority, are “Kokoro” from Bor and Mediation Center of the Republic of Serbia. Only “Kokoro” reported on the use of mediation in discrimination cases, and the use of some of the negotiation and mediation techniques in an informal context. It is encouraging, however, that some organizations that deal with human rights protection were also empowered to use the negotiation and mediation techniques in an informal context, even though it was not foreseen by their project activities, like for example “Roma Society from Prokuplje”, “From the Circle”, and “Home of Good Hope”. This proves that the successful use of ADR techniques does not have to be related only to the formal context, and that further capacity building of civil society organizations in this field is useful and desirable.

It can be concluded, based on the research results and the analysis of concrete cases, that certain discrimination situations can be resolved through mediation. The Fund for Pilot Projects created a network of organizations specialized in this area, and trained mediators who can become an excellent resource for further development in this area.
7. Examples of the Use of Negotiation and Mediation Techniques in Discrimination Cases During the Project Implementation

In this part of the text, there are examples of mediation as applied in certain discrimination cases by organizations implementing the pilot projects. The organizations themselves wrote the examples.

Example 1:

Direct mediation took place during the implementation of the project called Dialogue to Solution by Citizens’ Association “Kokoro” from Bor. Mediation took place between a person of Roma nationality and the managers of a local organization in which this person was employed. The reason for mediation was the Roma person’s opinion that he had been openly exposed to discrimination based on nationality and religion, for a longer period of time.

The claimant participated in an outreach meeting which was held as part of the Association’s activities during the pilot project implementation, and this empowered him to try to find a solution to his problem.

He addressed a member of the Project Team — a mediator, reporting that he felt that he wasn’t treated the same as the rest of the workers, which made it impossible for him to do his job properly. He mentioned that he didn’t have the basic working conditions and equipment (no computer, telephone, office materials, desk, chair…), and that, when the office premises were painted, his room was simply skipped. He said that he didn’t have a timeslot for preparation and implementation of the cultural contents that he was in charge of (practicing of folk songs and dances with Roma youth). He mentioned that, after persistent requests, he had been given a timeslot and allowed to use the joint hall and dressing room, but after the very first rehearsal, he was stopped from using these premises any longer. It was suggested that the Roma children should “practice during the weekends”, but that timeslot already belonged to rehearsals of the town’s amateur singers, and joint rehearsals were out of the question. For these reasons the Roma decided to drop their rehearsals. “It seems to me, because I’m Roma, I get less funding for my program, I’m never invited to office parties, and in my presence, they purposely badmouth the Roma. I don’t have my own computer, so if I want to use one, I depend on others, and I have to beg them. And Roma children cannot use the same dressing room as the others, because they allegedly do not meet the hygiene criteria…” he said.
After the case of possible discrimination was reported and this person confirmed his willingness to resolve the problem through mediation, the “Application for Mediation” form was filled in, the initial interview was conducted, appropriacy of mediation was assessed, and the mediators who had worked in co-mediation were appointed.

When they examined the case circumstances, the mediators separately conducted the first interview with the other party, explaining the case to the employees of the local institution in which the Roma person was employed. They assessed the case’s appropriacy for mediation (readiness to participate in mediation and take responsibility), they booked neutral premises for the process, and they also arranged when the direct mediation between the parties would begin. This is how the direct mediation process in the premises of the “Kokoro” organization was initiated.

Based on the information collected, the following conclusion was reached:

As the only member of the Roma national minority, this person found himself working in an environment that had employed a Roma for the first time, meaning that people did not have experience in communication, and they did not comprehend the position and vulnerability of minority group members. On the other hand, the Roma person in question saw every gesture, every word, every relationship within the office from the point of view of stereotypization of Roma population, which made it difficult for him to objectively view his own position in the office. Even when his superiors gave him normal, realistic requests, he wasn’t able to view the situation objectively, and so he believed that these requests were a consequence of discrimination and personal attacks. His personal view of the problem inhibited the existing potential, and an unconstructive approach to the problem hindered his efficiency, which resulted, eventually, in a direct and public attack on his superiors an incident which harmed the interpersonal relations in the office.

During the mediation process, both parties were allowed to present their view of the situation, without interruptions, by using the active listening technique, so that both parties could fully express their feelings and needs. The parties were guided to speak from the “I” position, without attacking each other, using the language of positive action. The reframing technique was used with the aim of giving the other party a clear and constructive message. The technique of asking questions and focusing on important aspects of communication was also used, with the objective of clarifying the facts and emotions, identifying the key problems, and painting a clear picture of the events (open, closed, guided, concrete questions which should clarify the issues). During the direct session, the parties were guided to use assertive communication, i.e. clear expression of needs and attitudes in a self-assured and calm manner that does not offend or disrespect the other party. The techniques applied also had the aim of balancing out the parties’ power (different positions within the office, nationalities, educational level…). During the entire procedure, the summarizing technique was also used after each party had finished with their presentation, in order to clarify the misunderstandings, prepare conclusions
and, eventually have the mediation work. The technique contributed to the fact that each party got to know the other party’s position, and it helped to emphasize a common interest, identify the points of agreement/disagreement, and list the things that should be done in order to reach an agreement. With the use of the negotiation technique, an agreement acceptable for both parties was reached.

These are the positive results of the mediation applied:

- Clarified and objectively viewed problem (the other party itself recognized the advantages of mediation);
- Better understanding of one’s own and other party’s positions;
- Improvement of communication and development of constructive dialogue skills; both parties have experienced this model of communication;
- Identification of prejudice and respect of differences;
- Recognition of benefits of mediation — as the parties said themselves: “We should talk like this in the future as well, openly and directly, without having a third, “malicious” party meddling…” or “I shouldn’t have said all those nasty things about the Director in public, on TV, perhaps I should have talked to her openly first, and now I’m very sorry, and I want to apologize to her…” (complainant), or “This is an excellent way to resolve certain situations, so I would like to go to training and learn the mediation skills…” (perpetrator) — and this means that the other party as well has recognized the advantages of mediation and expressed a need to undergo training in mediation skills, in order to apply them at a personal and professional level, and improve the quality of relationships in the office.

Analyzing the success of this mediation, the Association representatives concluded that, in their approach to the problem, it was very important that they had been sensitized on the issue of discrimination after all the training that they had attended, and that they had “an introspective approach to prejudice and stereotypes, which contributed to firmly establishing the approach of respecting the differences and decentralizing.” It was of utmost importance to know the institutional and legal antidiscrimination framework, which motivates and encourages the identification and resolution of discrimination cases. For the Association representatives, it was very important to hear the experience and the positive practice examples during the training, because it had an incentive effect on them, it spread a positive approach and it offered them a model for future use.

**Example 2:**

The mediation between a Roma woman and a healthcare institution in Prokuplje was implemented by the mediators from the “Roma Society” from Prokuplje. The basis for this mediation was a verbal
complaint from the Roma woman addressed to the organization, because she believed that she was discriminated against by the medical doctor working in the healthcare institution.

The case concerned a Roma family that has the status of IDPs from Kosovo, who were temporarily accommodated in an informal Roma settlement in Prokuplje, in which the living conditions were rather poor.

The family was barely making a living, and the husband, who was very ill, was trying to complete his medical file, in order to apply for a pension. The first step to do this was to arrange a medical examination in the healthcare centre in Prokuplje. Given that the husband, who submitted the pension application, wasn’t able to attend due to his poor health, with one day of delay, the wife came to the healthcare centre.

Given that this woman has a rather pale complexion, at first glance it is not possible to conclude that she is of Roma nationality. This is why, at first, the doctor in the healthcare centre treated the woman with respect. However, the doctor’s attitude and behavior suddenly changed when the woman admitted that she was unfamiliar with the procedures, but that she had already asked her Roma association for advice on what steps were necessary to help her sick husband.

The moment the doctor understood that this was a Roma woman, she changed her attitude and started shouting and calling her names, saying things like: “You Roma are such a pest, you just want things to be given to you”, and “Your husband has no right to a pension, you’d better go home”, and “You’re dirty and you’re making a mess”, and similar.

The Roma woman felt uncomfortable and discriminated against. The organization’s mediators, who had completed the specialized training on the use of negotiation and mediation in discrimination cases, as well as numerous training in the sphere of human rights, analyzed this situation after talking to the victim, and offered her the way of resolving the problem in a peaceful manner.

The organization members explained to the Roma woman, who thought herself to be victim of discrimination, the principles of assertive communication, i.e. a communication manner which is not offensive or disrespectful, and which openly expresses needs and requests, with the aim of balancing out the power between the parties with different positions, social standing and educational level. She was also informed about the Antidiscrimination Law, especially about the part related to the ban on discrimination based on personal traits and nationality.

The organization’s mediators, then, conducted an interview with the healthcare centre director, explained the case, and indicated that there was an alleged case of discriminatory behavior within his institution, which could even be legally prosecuted. However, they also emphasized that the victim was willing to resolve the matter in a peaceful manner. The director sent them to talk to the doctor who
was the alleged discriminator in this situation, and he also promised to have an internal investigation of the case within the institution, and if it turned out that the doctor in question did breach the code of conduct, she would be disciplined appropriately.

The mediators then talked to the doctor. When they explained the situation from the victim's point of view, the doctor understood that her reaction had been inappropriate and apologized to the victim through the mediators.

The two parties never met at a joint session. After this event, in line with the set standards, the husband of the Roma woman who had participated in the mediation managed to complete his medical file and established his right to a pension. The Roma woman was satisfied enough with the fact that she and her husband had been treated like any other citizens at the healthcare centre, and that the doctor had sent her an apology through the mediators.

The following techniques and skills, acquired during the mediation training, were used in this case:

- **Active listening technique**, the conflicting parties should listen to each other's view of the situation without interruptions;
- **Reframing technique** aiming to make the conflicting parties understand better both their own needs and the other party's messages;
- **Technique of asking questions and focusing** on important aspects of the problem with the objective of clarifying facts and emotions, identifying the key problems and making a clear distinction between discrimination as such and communication problems (open, targeted, concrete, clarifying and guiding questions . . .);
- **Positive action language technique** for empowerment for active participation in problem resolution and wording the needs clearly and calmly, respecting the position of the other party;
- **Summarizing technique** used after presentations, to clarify the situation and misunderstandings, as well as to draw conclusions. It contributed to establishing contact, emphasizing mutual interests and identifying the things that should be done in order to resolve the matter.

**Example 3:**

Mediation in a case of discrimination of a boy with dyslexia in high school, implemented by the Citizens' Association “From the Circle”.

A student with dyslexia failed his make-up exam in high school, and the teacher did not do anything to help him with the exam or make it easier for him, believing that the boy was not a person with a
disability and that he did not have any right on special treatment. Because he failed his exam, the boy had to retake the same class again.

The boy managed to enroll into high school thanks to a special recommendation from the Ministry of Education, because, due to his disability, he did not have enough points on the regular entry exam. Eventually, his parents came to the organization “From the Circle” in an attempt to annul the make-up exam and allow their child to continue with normal schooling.

Several interviews with the parents were held, with the objective of collecting all the relevant information about the child, his state of health, and events at school. It was necessary to resolve the problem in a relatively short amount of time, so that the boy could continue with regular schooling, and that is why the parents were told that court proceedings lasted too long and that it would be much more efficient to try to find an out of court solution. The parents were very hurt and they wanted a court decision that would confirm that their child’s rights had been violated, but still, they understood that an out of the court settlement was in their best interest.

The organization contacted the school authorities by sending them several letters, and tried to find a solution through dialogue. The school’s attitude was typical for such discrimination cases: they thought that they had done everything for the boy by allowing him to enrol in the school, and that it was his fault for not using the opportunity they had given him, without realizing that, when it comes to children with disabilities, the school must provide additional support. A very typical line could be heard: “We treated him exactly the same as all the other kids” – so it was necessary to explain to the school representatives the notion of hidden, i.e. indirect discrimination, according to Article 7 of the Antidiscrimination Law. During the interview, different negotiation and mediation techniques learned during the training were used. The process resulted in passing of a decision on annulment of the make-up exam, and the boy was given the approval to pass the exam under conditions adapted to suit his disability. He successfully passed the exam and enrolled into the second year.

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9 Article 7 of the Antidiscrimination Law: Indirect discrimination shall be deemed to have occurred if an individual or a group of individuals, on account of his/her or their personal characteristics, is placed in a less favourable position through an act, action or omission that is apparently based on the principle of equality and prohibition of discrimination, unless it is justified by a lawful objective and the means of achieving that objective are appropriate and necessary.
8. Overview

This report is the result of three trips to Serbia by Dr. Peggy Blair, a lawyer, mediator and trainer, retained by the UNDP as the International ADR Consultant to advise on the dispute resolution/mediation component of the Anti-Discrimination Project.

The methodology used in arriving at the conclusions and recommendations put forward in this report included a preliminary assessment and needs determination for training in ADR under the new anti-discrimination law in Belgrade and Novi Pazar in 2009. 10

Dr. Blair helped to deliver training to the fifty judges, mediators and community leaders who participated in a week-long training session in Vrnjačka Banja, and assisted in the preparation of a comprehensive Training Manual.

She returned to Serbia for a follow-up evaluation of the project in May, 2010. During that evaluation process, she met with participants involved in seven Pilot Projects in both Novi Pazar and Belgrade. This included a number of participants who had taken the specialized training and who provided valuable feedback as to its usefulness and efficacy.

The report takes the form of responses to questions raised by various participants involved in the mediation training and the new processes under development.

8.1. Is Mediation Suited to Anti-Discrimination Cases?

8.1.1. General Principles

Mediation can be used to settle anti-discrimination cases, but not in all instances. Mediators cannot automatically assume that a mediated negotiation is the best approach to take.11

In determining which cases to use to obtain such precedents, the strategic use of litigation is highly important. For example, in an interest-based negotiation, mediators and negotiators are usually

10  These visits included an interview with the Project Manager at “iz Kruga,” in Belgrade; with JAZAS, in Belgrade, with HIV vulnerable persons; in Novi Pazar, with officials involved in setting up the new branch office of the Centre for Mediation; with the Project Manager for the Drustvo za cerebralnu Paralizu in Novi Pazar; with CUPS in Belgrade and attendance at a Round Table held at the Centre for Mediation in Belgrade to discuss the use of mediation in anti-discrimination cases.
11  Christopher Moore, The Mediation Process (San Francisco: Jossey-Bass, 1996) at 100
warned to avoid addressing “rights-based” issues or those centring on different cultural values. Indeed, most discussions of alternative dispute resolution suggest that mediators deal only with interest-based settlements. 12 Susskind and Cruikshank write in *Breaking the Impasse*, for example, of the dangers attached to trying to build consensus in areas in which rights are involved.

If your dispute involves constitutional questions or revolves around definitions of basic rights, consensus may be unattainable. ... No proposal for compensation or mitigation, no linkage of issues or promises about the future will reach a consensus. The question is simply not amenable to consensus building. Until the constitutional or legal issue is settled, it would be fruitless to take up any distributional aspects of the dispute. 13

Some questions to consider in determining whether to litigate rather than mediate are as follows:

- How long will it take to settle the dispute in court vs. mediation?
- Is a rapid settlement desirable?
- Are there critical deadlines to consider?
- Do the parties need more time to mobilize resources?
- Is the conflict a ‘single encounter’ dispute, or does it occur in the context of an ongoing relationship?
- What effect will litigation/mediation have on public credibility?
- Will the selection of a particular approach affect future conflicts?
- What are the costs and benefits?
- What financial or emotional resources will be required in order to proceed? 14

In general, in the early stages of anti-discrimination laws such as those in Serbia, precedents set by the Commissioner of Equality or by courts can be very influential as they can set out the broad parameters of how the new law will be applied and interpreted. They can also have a broadly deterrent effect.

Guidelines should be developed as to when/whether ADR is appropriate, but these should be flexible enough to permit mediation to occur in any circumstances where it can be useful. 15

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The following guidelines, used by the Attorney General’s Office of British Columbia (Canada) may be helpful:

**Consider mediation when:**

- the people involved in the dispute are at least willing to meet and try to settle it
- parties want a flexible and informal process
- no party can get away with simply ignoring the problem
- other options for resolving the dispute are unacceptable
- each party needs something from the other
- both parties have an interest in maintaining a relationship (business or otherwise) after the dispute is resolved
- the dispute involves more than two people or businesses
- the case is complex and requires a creative solution
- the parties would prefer to settle the dispute in private
- there are clear issues to be resolved, such as those involving money, property, behaviour, rights or licences.

**Mediation is probably not appropriate when:**

- the parties to the dispute do not have the power to change things or to resolve the problem
- any of the parties are completely unwilling to consider working toward compromise
- a party is challenging the validity of a law
- an issue of law needs to be settled to govern future legal cases or serve as a legal precedent
- people not directly involved in the dispute may be unreasonably affected by the outcome of mediation
- the issue is one that should be debated in the public eye
- there is fear of violence between any of the parties. ¹⁶

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8.1.2. Litigation vs. Mediation in the Serbian Context

In the Serbian context, there are four broad categories in which mediation may be less preferable than having a court decision. In each case, there must be strong facts supporting the point that is to be established. The precedential value of such cases is very high, but ‘bad facts make bad law.’

Litigation may be preferable to mediation in the following instances:

1. **Where a deterrent is required.** The confidential nature of mediation in such circumstances prevents a deterrent otherwise. An example of where mediation might not be appropriate is where a case involves violence or hate crimes. In the Serbian context, this might be, for example, crimes directed against the Roma, or the gay community. In such cases, restorative justice within the criminal process might be a better option than mediation.

2. **Where there is ambiguity in the law that requires interpretation.** Only the courts can resolve such issues, although the Commissioner could issue interpretation bulletins indicating how she believes the law should be applied. In the Serbian context, the new law may require interpretation at various stages of its application.

3. **Where the same complaints are arising over and over again and a precedent would help resolve many of them.** In these circumstances, it is better to pick one case that is representative of the others, and have the courts issue a binding decision. This could, for example, be the case where transportation of disabled people is an ongoing issue, or where schools are refusing to mainstream students because of disabilities.

4. **Where the problem requires changes to be made or laws to be amended that cannot be achieved by the parties themselves.** An example of this is discrimination based on laws that fail to recognize same-sex marriage. This is not something that can be changed by mediation, as it is unlikely that the people with the authority to effect outcomes such as amending legislation would be participants in the mediation.

Generally speaking, all other cases are amenable to mediation if the parties agree to mediate. In particular, in cases that are unique (rather than wide-reaching), that invoke a need for confidentiality or protection of a vulnerable complainant (e.g. cases based on gender or sexual harassment) 17 or that are best suited to a case by case approach, mediation is appropriate. The same applies where the facts invoking the claim do not have a larger public interest or where the claimant simply does not, for reasons of health, age, vulnerability, or the nature of the complaint, wish to be involved in court proceedings.

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17 These may require co-mediation and extensive use of premediation meetings and negotiations, see H. Ganlin, “Mediating Sexual Harassment,” in R. Shoop et al eds. *Sexual Harassment on Campus* (Toronto: Simon & Schuster, 1997) at 191.
The claimant may also not wish to be identified publicly, or may wish to use a process that is confidential. However, mediation has no precedent value whatsoever, unless the parties agree to waive confidentiality. There may be circumstances in which the parties would agree to such a waiver as being in their interests: e.g. a bus company that agrees to install ramps for wheelchair access may want the public to know about its willingness to accommodate. In all other instances, if a public precedent is desired, mediation may not be the best option.

8.1.3. What Matters Are Best Suited for Mediation?

Most employment related cases (usually the majority of complaints) such as those involving denial of promotion, racial taunts, sexual comments, refusal of employment due to disability and harassment, are well-suited to mediation. So are the majority of school-related complaints such as bullying, denial of access due to disability, racial discrimination etc. These are cases that are capable of being resolved by the parties directly without government involvement.

Any cases that do not involve appropriation of government funds, and that do not require laws to be changed, or Parliamentary or electoral approval, can be mediated. Participants must have the authority to resolve the problem being mediated or to easily obtain it. If they do not have that, mediation cannot be successful.

8.1.4. What Matters Are Not Well-Suited to Mediation?

As noted earlier, mediation is not always the best mechanism to resolve disputes that arise from systemic or widespread discrimination, or where the same issues arise repeatedly. Sometimes it is better to have a court decision than to confidentially mediate case after case if there are going to be thousands of similar situations arising. The court can set a precedent which is simply more efficient than a case by case approach.

Mediation is also not the best choice when criminal behaviour is alleged, for example, rape. Restorative justice measures after charges have been laid, in which the perpetrator admits wrongdoing and agrees to alternative measures, can be effective in such circumstances. 18

However, mediation of certain serious criminal matters may be inappropriate because in such matters, the state itself has an interest in the outcome beyond that of the victim. Public interest may require that such matters be dealt with through the criminal justice system.\textsuperscript{19}

Less serious matters involving youth offenders (examples being graffiti, or theft from stores) could be mediated or be the subject of restorative justice measures, such as a job requirement to work in the same store that was vandalized or paint over graffiti. However, because of the public interest, such programs should be developed with local judges and prosecutors and coordinated with existing court programs.\textsuperscript{20}

Hate crimes would be inappropriate for mediation because the public interest is again greater than the private interest in a confidential resolution.

Child pornography is another example where mediation would be inappropriate for the same reason; sexual abuse of children is another.

In such cases, the deterrent effect is more important than the individual resolution of the cases. Confidentiality is not desirable: there is a public component to the outcome needed to deter others.

\textbf{8.1.5. At What Point in the Process Should Mediation Be Attempted?}

Generally speaking, mediations can be conducted before, during or even after court proceedings. Conflict resolution attempts can be informal first, and become increasingly more formal as required. For example, there can be informal discussions in an attempt to settle a dispute. If those are unsuccessful, facilitated discussions with the assistance of a third party can be attempted. If these do not work, mediation can be attempted. If that fails, and court pleadings are filed, the court can attempt to mediate the dispute through case management. Most cases settle on the steps of the court house, just before trial. But mediation can also be used to implement court decisions. In many cases, the court decision is the start of negotiations, not the end of them.

A case must be ‘ripe’ for mediation; in other words, damages must be quantifiable, physical harm must be known and expert reports must be completed. However, the parties can come to mediation before those things are completed, agree on what steps should be taken, and agree to return later, once they are done.

\textsuperscript{19} M. Umbreit, “Mediation of Victim Offender Conflict,” (1988) \textit{Journal of Dispute Resolution} 84 at 103-105

If a test case is pending, the parties may still wish to mediate if the risk of loss to either party is very high. If a resolution is interest-based and better than the likely outcome to one or both parties, then mediation is a good option. However, the outcome will be confidential, which must be taken into account. The benefit of mediation when successful is efficiency as opposed to uncertainty.

8.2. Who Should Manage the Mediation Process?

8.2.1. Role of the Office of the Commissioner for Equality

For reasons of neutrality and efficiency, it is suggested that it would be preferable if the new Commissioner’s Office can ‘triage’ cases to determine which ones should go to hearings and which might be amenable to mediation.

Where mediation is offered to claimants, the new Office could keep track of settlement agreements and make sure that agreements are consistent with the overall objectives of the new law and that the playing field is level. 21

The Commissioner’s Office can also set up a roster of experts. These could be external (as is often the case in Canada), staff mediators, or mediators seconded through other agencies (for example, the Centre for Mediation). The Commissioner’s Office would be able keep the roster of mediators up to date in developments in international and domestic law22 and involve them in training from time to time to build on the specialization, while the association of the mediators with the Commissioner’s Office would add to the appearance of neutrality and impartiality required for this function.

For example, the Canadian Human Rights Tribunal ‘triages’ cases that might be appropriate for mediation. The Chief Commissioner assigns a mediator from panel members (the Ontario Human Rights Tribunal does the same). Until recently, those members were external and part-time, and formed a roster of approved, qualified members who were appointed for fixed terms based on their backgrounds and sensitivity to human rights issues. 23

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21  The Ontario Human Rights Commission sets out, on its website, how it supervises the mediation process to ensure fairness. See http://www.ohrc.on.ca/en/commission/complaint_processing_guides/complaintsprocedure/qsmediation/view

22  An example of how this can be done is a binder of loose-leaf decisions that can be updated regularly with new cases, guidelines, relevant comments from articles, etc. It could also include guidelines for the ethical conduct of mediators, draft settlement agreements, confidentiality agreements and so on, updated and replaced as necessary.

23  For details of the Canadian Human Rights Commission processes, including referrals to mediation, see http://www.chrc-ccdp.ca/publications/1999_ar/page11-en.asp
The Commissioner is best positioned to ensure not only that mediated agreements are fair but that the public interest is taken into account and that agreements are consistent with the overall objectives of the new law.\textsuperscript{24}

\section*{8.2.2. Should the New Commissioner be an Expert in or Activist in Human Rights?}

The first Commissioner is going to be involved primarily in educating the public about the new law, setting up the new process, establishing rules of procedure, negotiating funding, etc.

It is important in the early stages that the new Commissioner be someone trusted by government, since much of the early duties will require that support, financially and legislatively. The new Commissioner must be able to negotiate this new role cautiously and carefully.

It is important that the new Commissioner receive unqualified public support so that the credibility and integrity of the office is not undermined. This is so regardless of who is appointed.

A good administrator, able to negotiate among competing interests, may be more important for this first appointment than an expert in human rights and discrimination issues. An activist appointment could be counter-productive if it causes government and business to be sceptical of the neutrality of the office. In some ways, the second appointment will be more important than the first.

\section*{8.3. Mediators}

\subsection*{8.3.1. Should Mediators be Specialists in Human Rights?}

In discussions with various parties, the issue arose as to whether mediators working in the field of anti-discrimination need to be experts in human rights.

It is suggested that it is not necessary that they be so. In fact, neutrality could be an issue if a mediator comes from a highly activist background or is perceived as too closely connected to any of the parties. A mediator should not be too closely associated with the kind of issue he or she has been asked or assigned to mediate. If mediators are too closely aligned to governments or NGOs, they may not be acceptable to the parties or seen as credible.\textsuperscript{25}

\textsuperscript{24} The Centre for Mediation has excellent mediators who should be considered for secondment to the new roster of mediators. Their knowledge and skill is impressive. However, it is in the public interest to resolve human rights disputes through separate, dedicated funding for this purpose. That funding is not currently available to the Centre (see below, Funding).

\textsuperscript{25} A mediator Code of Ethics is essential, as are training and Standards of Practice. For a discussion of these, see Christopher Moore, \textit{The Mediation Process}, at 354.
However, anti-discrimination mediators should be trained in human rights and sensitive to these, as well as trained in how to mediate human rights disputes. They must be free of stereotypes, and understand that certain terminology is considered offensive to some groups. They must be sensitive to human rights issues e.g. not use inappropriate language, touching, etc.

It is also helpful if they specialize in such mediations. As mediators who specialize in anti-discrimination cases, they will develop a body of expertise and knowledge that other mediators not specializing in this area will not have, including, for example, knowing how certain kinds of cases have been settled in the confidential mediation process so that they have a sense of fair standards when mediating similar cases.26

### 8.3.2. Is it Necessary for Mediators to be Lawyers?

This is a question that has been the subject of considerable debate. The Society of Professionals in Dispute Resolution (SPIDR) has on two occasions released reports expressing its views that the mediation role should not be restricted to lawyers.27

In the opinion of the author, the answer is also ‘no;’ however, human rights mediators will need to have a good understanding of the new law and of mediation as well as group problem-solving. They will also need to understand issues around discrimination, as well as the ethics of mediation (e.g. neutrality, disclosure of conflicts of interest). Lawyers and judges are not always the best mediators as they are used to being involved in adversarial proceedings and telling the parties they represent or that appear before them what to do.28 Mediation, particularly in the human rights context, is an entirely different process.

In terms of needing a legal background in order to produce a binding agreement, the mediator generally only prepares Minutes of Settlement (or a simple agreement, depending on circumstances) that reflects the intention of the parties. The parties should always have independent legal advice, or the mediator could be drawn into court concerning interpretations of the legality of these contracts, which would violate mediation confidentiality. Where legal issues need to be addressed, it is always preferable that a lawyer other than the mediator be involved anyway.

If the parties are represented by lawyers, and legal documentation is required, their lawyers can draft the legal documents. If not, the parties can be advised to take the Minutes of Settlement or agreement to

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26 See Constantino and Sickles Merchant, *Designing Conflict Management Systems*, at 147 for a list of factors to take into account when designing appropriate training.

27 Cris Currie, “Should a Mediator Also be an Attorney?”, August, 2000 mediate.com http://www.mediate.com/articles/currie.cfm

28 See, for example, Teresa V. Carey, “Attorneys in Mediation: For Better or for Worse,” http://www.mediatortraining.com/pages/z_attorneys_in_mediation.html
legal counsel for drafting. Alternatively, there could be someone in the Commissioner's Office (or in the Centre for Mediation) assigned to review agreements to make sure that they meet the required legal tests.

The question was raised as to whether a lawyer should be mediating, since a settlement agreement reached through mediation is a binding contract and one of the parties may renege. Should that happen, the party who is aggrieved can sue on the settlement or ask for the mediation to be resumed. But in most cases, the agreement reached is carried out by the parties: people who are satisfied with the outcome of a mediated process tend to keep their word.

Furthermore, there are circumstances in which it would be useful to have a mediator who is a professional with expertise in the subject matter of the dispute other than law. For example, a dispute over whether a bus is wide enough for a wheelchair or how much it might cost to install a ramp in a building could be mediated creatively by someone with engineering or architectural or construction experience.

It is best to have a roster of mediators with a broad range of experience and let the parties choose who best fits their needs. As long as the mediator is respected and acceptable to the parties, his or her professional background is less important that his or her skills. As was explained by local authorities in Novi Pazar, mediation is well-suited in that area, as the community used to turn to respected elders and leaders to assist them in resolving disputes previously.

8.4. Who Should Pay for Anti-Discrimination Mediations?

It is recommended that the government fund these particular mediations.

In a commercial mediation, where legal action is the only other option, having the parties pay the direct costs of mediation makes sense since the alternative is a costly and expensive lawsuit that could take years to settle. However, the same business considerations do not apply in many anti-discrimination cases. Human rights cases do not engage private commercial interests, or if they do, not exclusively. Like criminal prosecutions, they engage the public interest as well as that of the alleged victim and alleged perpetrator.

The Centre for Mediation's focus, for example, has been on civil/commercial litigation, and participants are charged user fees. As noted, charging fees for mediations form barriers that would exclude the disadvantaged groups that the new law is supposed to protect.

Nor is it fair to ask the commercial sector to pay higher fees in order to provide anti-discrimination mediation services pro bono, since there is a larger public interest in redressing discrimination that
is shared by, and is important to all sectors of Serbian society. Access to human rights and anti-discrimination should not be funded by a tax on business alone.29

It is suggested that the government should make sure that these mediations are subsidized to the fullest extent possible by secure public funding. The costs of mediations will be more than offset by lower court costs attributed to a higher rate of settlement than is currently the case. Costs of counsel, judges, clerks, transcripts and facilities should be greatly reduced. Mediation will achieve settlements more quickly that court proceedings.

Given the objectives of the law, the government should be called on to fund the programs required to achieve them, rather than the private sector or the parties themselves.

Complainants should not face additional barriers to the use of a system that is intended to help redress their already disadvantaged circumstances.

Unlike other kinds of mediations, it is suggested that there should be no costs/fees charged in mediations under the new law. Once the complaint has been ‘triaged’ and determined to be one that is appropriate to mediate, a mediator should be available for the parties at no charge. This person can be selected from a roster or be assigned to them if they cannot agree on a suitable mediator from the roster.

8.5. Should Mediations be Voluntary or Mandatory?

In Canada, certain jurisdictions require that all legal actions be mediated.30 However, it is suggested that anti-discrimination mediations should either be voluntary or if mandatory for the alleged perpetrator, then voluntary at the instance of the alleged victim.

In commercial matters, or in other matters were court actions are commenced, mandatory mediation is often the only way to get the parties to attempt settlement. Mandatory mediation makes sense in the commercial/private sector for economic reasons. Since the cost of court proceedings is so high (judges, clerks, facilities, security, transcripts, legal fees, etc.), mandatory mediation makes sense in the business context.

29 A ‘Centre for Commercial and Human Rights Mediations’ could be seen as being in a conflict of interest because commercial interests are generally private while discrimination complaints involve the public interest.

30 In Ontario, for example, as of July, 2010, under Rules of Court, all claims must go through mandatory mediation before they can be set down for trial. See http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/

Under this program, settlement of the lawsuit is not considered to be the only positive outcome of a mediation. A mediation is considered successful even if the parties do not settle but gain a better understanding of the other side’s position, if they have narrowed the issues or settled some of the issues, or if they have agreed on a process to resolve issues later in the proceedings. Lawsuits that do not settle at mediation continue through the court process.
But anti-discrimination complaints are different. They can be investigated by the Commissioner of Equality without going to court. The claimant in a human rights case may not wish to go to court for personal reasons, such as age, severe disability, or a desire not to be identified. They may wish to try mediation because they believe it will be faster, and confidential. Because of the personal aspects of discrimination, those claiming to be victims of it should not be forced to mediate. The safety of the victim and the potential for revictimization suggests that mediation should be voluntary, or at least, should proceed at the option of the victim.

As noted, human rights complaints involve the public interest, much in the same way that criminal charges do. However, mandatory mediation usually has a costs component.

Complainants in discrimination cases are frequently highly disadvantaged groups/individuals. Requiring them to mediate and pay fees to do so places an inordinately high barrier to their participation, and has the potential to further victimize them.

Voluntary mediation makes far more sense, provided the costs of mediation are properly funded by government.

**8.6. Special Factors That Apply to Discrimination Mediations**

**8.6.1. Power Imbalances**

The standard formal mediation model that is usually applied to commercial or civil litigation mediations is sometimes not suited to such cases. Confidentiality and power imbalances can often play a role.

Opening statements can sometimes become an opportunity for participants to restate positions that are racist or homophobic or otherwise insensitive to the victim of the discrimination, leading to revictimization.

Mediation in these cases may require the mediator to meet privately with the parties before and in the early stages of the mediation, working with them until they can safely meet in the same room, and sometimes conducting the entire mediation through separate caucuses.

An informal approach that focuses on the source of the problem and engages the parties in problem-solving can also be highly effective in individual cases where there are a number of parties and a need to collaborate on the result.
The Alberta Human Rights Commission (Canada) provides an excellent overview of the issues that can arise in this kind of mediation, as well as four case studies on how race, sexual harassment, disability and religious discrimination, can be mediated. 31

8.6.2. Multiple Parties

Where there are multiple parties, a mediator is essential. In fact, where there are more than two or three participants, a mediator is more likely to be successful than a hearing process. A skilful mediator will allow everyone to have an opportunity to be heard rather than having to sit through a very structured examination or cross-examination process that can be frustrating and limiting.

Lines of communication in larger groups can be very difficult and almost impossible without a mediator to assist. Imagine a table with six people all trying to communicate with one another at the same time: one simple misunderstanding can be sufficient to derail the negotiations. However, a mediator can set ground rules, and make sure that everyone has a chance to speak, to listen, to respond and to clarify misunderstandings.

The more parties involved in a dispute, the greater the formality that may be needed to ensure that all parties have an equal chance to participate without interruption, and to be heard. A formal mediation process, with opening statements, in such circumstances, may be required initially, but smaller working groups tasked to deal with specific issues are often the only way in which such discussions can be fruitful.

8.6.3. Systemic Issues

It is possible to resolve systemic issues through mediation, provided the people with the requisite authority to address change are willing to participate. For example, if the government is willing to sit down with NGOs to change legislation, and is willing to commit to those changes, a court order is not needed. The parties can also agree that getting a court order by consent will be part of a settlement agreement. In general, court should be the last resort, not the first option, particularly since a court decision can be ambiguous, limited, or simply advise the parties to negotiate. If the case is strong enough, it may be advantageous to the party who risks loss to negotiate.

8.6.4. Informal Conflict Resolution

During Dr. Blair’s final visit to Serbia, participants who had taken the specialized training in mediation/human rights, uniformly agreed that it had helped them to resolve issues that arose creatively and competently. These participants were not mediating formal disputes, but rather, as respected leaders within their own communities, were in each instance resolving problems before they escalated into a conflict.

Formalized mediation should not take the place of, or discourage, such efforts.

The Commissioner’s Office can play an important advocacy role in continuing the efforts that have begun to empower community groups to resolve their problems without resorting to the courts, by offering ongoing training in negotiation and informal mediation techniques to community leaders, NGOs and others who may be called on to assist in resolving cases of discrimination.
9. Conclusions and Recommendations

A number of Pilot Projects are underway or have been completed in Serbia; participants are enthusiastic about the use of mediation as a means of resolving complaints about discrimination and preventing matters from escalating into litigation. Not all cases of discrimination, however, are suited to mediation, in the Serbian context. Some cases should go to litigation, in the early stages, so that precedents can be set. In the criminal courts, new processes involving restorative justice measures, may be useful.

- Guidelines should be developed as to when/whether mediation is appropriate, including what kinds of cases should and should not be mediated, and how criminal matters will be addressed. Cases involving systemic discrimination, and multiple parties, should not be excluded from mediation under these guidelines.

Mediators should be drawn from various backgrounds. They can be community leaders, respected elders, lawyers, judges, or members of NGOs. However, they should receive specialized training in human rights and ethics, and the new Commissioner’s Office should be involved in managing the roster of mediators, collecting statistics, and ensuring that the law is applied fairly.

- Mediators under the new law should be trained in human rights.
- A Mediator Code of Ethics and Standards of Practice should be developed to guide formal mediations. However, mediators need not necessarily be lawyers. Nor should the mediation process become so formalized that it excludes informal dispute resolution processes at the community level.
- The new Commissioner’s Office should manage the roster of mediators. It should ‘triage’ cases to determine which ones should go to hearings and which ones might be amenable to mediation. This Office should keep track of settlement agreements and make sure that agreements are consistent with the overall objectives of the new law and that the playing field is level.

Given the nature of discrimination, the new mediation process must be designed to avoid revictimization.

- Mediations should be voluntary. If mandatory for the alleged discriminator, they should nonetheless be voluntary for the victim; otherwise, there is the potential for revictimization to occur.

Unlike other mediations, it would be unfair to place the burden of matters which affect the public interest on the shoulders of the participants when it comes to costs.

- Given the public interest in human rights, the Serbian government should fund the cost of mediations under the new law.
Some of the questions which inspired the elaboration of this book are:

Može li se medijacija uspešno primeniti u slučajevima diskriminacije u Srbiji?

Postoje li domaći kapaciteti za njenu primenu i kakva su dosadašnja iskustva?

Koja materija nije pogodna za ovu vrstu medijacije?

Da li bi u ovoj oblasti medijacija trebala da bude dobrovoljna ili obavezna?

U kom trenutku procesa bi trebalo pokušati sa medijacijom?