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COMPARATIVE ASPECTS OF MEDIATION IN CIVIL LAW AND CRIMINAL LAW WITH A SPECIAL FOCUS ON KOSOVO

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ABSTRACT

Mediation as an alternative dispute resolution in Kosovo is in a summarized manner regulated by the Law on Mediation, although some related concrete issues are also addressed by the Criminal Procedure Code, the Law on Contested Procedure, and the Juvenile Justice Code. When it comes to civil disputes and criminal cases, this legislation contains, in addition to similarities, some substantial differences. The arguments for this are based on the analysis of legal solutions and practical cases of Kosovo. The analysis also includes the relevant laws of Albania and Serbia, which are more comparable to the legal system of Kosovo. The analysis points out the fact that although the Kosovo legislator followed the examples of other countries by establishing standardized rules for the implementation of mediation, it has nevertheless failed to do so in some aspects. This and other factors have influenced the implementation of mediation in Kosovo to be at low levels in practice. This paper addresses the common and distinctive points of legal solutions in Kosovo with Albania and Serbia, which govern mediation, and are applicable in resolving civil and criminal cases. It highlights the shortcomings law Kosovar therein contained and offers concrete ideas on how to remove them.

KEYWORDS: *Mediation, Party, Mediator, Civil, Criminal.*

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1. INTRODUCTION

Life experience teaches us that despite the progress made, no society has managed to avoid conflicts between people, which result in the violation of the rights or interests protected by law. Nevertheless, it is never impossible to create situations with a friendly social and legal environment that opens ways for a rapid and peaceful resolution of such conflicts. Mediation is one such way of resolving disputes in which a neutral third party assists disputing parties in reaching a voluntary and negotiated settlement of the dispute.

This out-of-court dispute resolution mechanism is quite effective because the third party is not allowed to make binding decisions. Mediation in Kosovo is being implemented, but not at the expected pace; therefore, now it is important to address the most disputable issues and explore the similarities and differences between authorized mediation in civil disputes and authorized mediation in criminal cases.

The purpose of this paper is to address the meaning, significance, effectiveness, advantages, and disadvantages, as well as the characteristics of mediation, always concerning the comparative aspects of civil and criminal law, elaborating them in legal terms and their implementation in the state prosecution offices and the basic courts at the national level. The methodology employed in this paper is based on the statistical method, which analyzes the official data on the implementation of mediation in the criminal and civil field in Kosovo during 2013-2018.

Through the method of studying individual cases, special criminal cases resolved through mediation were analyzed. A comparative method was also used, through which the given solutions of the countries that have established good practices in the implementation of mediation were analyzed. University papers and texts by various local and international authors, commentaries, and basic laws governing mediation in Kosovo and beyond were also consulted.

2. THE MEANING OF MEDIATION

There is interdependence in defining the meaning of mediation or, one may even say, coherent compatibility between legislation and civil and criminal law theory, even everywhere in the civilized world. In many countries, mediation is regulated by specific laws along with codes of civil and criminal procedures. In the *lex specialis* sense, mediation is defined as an out-of-court activity, in which the parties voluntarily seek the resolution of a dispute through a neutral third person (mediator), in order to reach an acceptable settlement of the

dispute[1]. Also, in terms of laws and codes of civil procedure, mediation is specified as an out-of-court activity for resolving disputes between the parties[2]. Similarly, in the criminal procedure code, mediation is addressed as an out-of-court dispute resolution procedure[3].

In civil law theory, on the other hand, mediation is treated as an institute of civil law – an out-of-court dispute resolution process in which an impartial third party (mediator) assists two or more parties to a dispute in an attempt to find a mutually acceptable settlement[4]. Whereas in the criminal law theory, mediation is treated as a criminal procedural institute that enables the alternative resolution of the criminal case between the subjects of law (the perpetrator and the injured party) out of court.[5]

Although the above (legal and theoretical) definitions differ in some essential aspects, for example, in civil law theory mediation is treated as an institute of civil law because of resolving civil disputes, while in criminal law theory, it is treated as a criminal procedural institute, namely an alternative procedure[6] in view of resolving the criminal case, in essence, mediation has a substantial unified meaning in both these areas.

At its core, mediation is an assisted procedural institute, a structured alternative process of resolving a civil or criminal case, officially voluntary and generally non-binding, led by a third party (mediator), who guides the parties to an agreement, which will resolve all or some of their disputes (in civil or criminal cases).[7]

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[1] Paragraph 1 of Article 1 of the Law on Mediation for Dispute Resolution of Albania, Law no. 10 385, dated 24.2.2011, hereinafter LNZMSH; article 2 of the Law on Mediation of Kosovo, Law no. Law no. 06/L-009, further LNK, Član 2 Zakon o posredovanju u rešavanju sporova, Zakon br. 55/2014, in the coming text as ZPRSS, etc.

[2] Paragraph 1 of Article 411 of the Law on Dispute Procedure of Kosovo, Law no. 03/L-006, hereinafter LPKK; article 25 of the Civil Procedure Code of Albania, Law no. 7905, further KPCSH, Zakon o parničnom postupku Crne Gore, Zakon br. 22/2004, further ZPPCG.

[3] Paragraph 5 of Article 232 of the Criminal Procedure Code of Kosovo, Code no. 04/L-123, hereinafter KPPK; paragraph 1 of article 64 of the Code of Criminal Justice for Minors of Albania, Law no. 37/2017, further KDPMSH; The Juvenile Justice Code of Kosovo, Code no. 06/L-006, further KDMK etc.

[4] Alika, T., Mediation as an alternative for dispute resolution, "Aleksandër Mojsiu" University, Durrës, 2014, pg. 19.

[5] Hajdari, A., Krasniqi, M., Mediation as a new approach to the alternative solution of the criminal case, Advocacy, Bulletin of the Chamber of Advocates of Kosovo, no. 13, Pristina, 2012, pg. 129 - 130.

[6] Sahiti, E., Murati, R., The right of criminal procedure, Pristina, 2013, pg. 328.

[7] Yael Teff - Seker, Peter C. Mackelëorth, Tomás Vega Fernández, John McManus, Jungho Nam, Arthur O. Tuda and Drasko Holcer, Do Alternative Dispute Resolution (ADR) and Track

3. SIGNIFICANCE OF MEDIATION

Mediation as an institute that enables alternative resolution of civil disputes and criminal cases is of great significance. Although the importance of mediation is multi-dimensional, it is considered to be mainly manifested in the following issues:

1. It has an effect on reducing the workload of prosecution offices and courts. Mediation has a direct effect on reducing the number of criminal and civil cases filed with the prosecution offices and courts, based on the fact that a considerable number can be resolved through this institute. This approach is of great importance given the fact that there are 440832 civil and criminal cases waiting to be solved in Kosovo courts.[8]
2. It reduces the cost of public money. – Procedures for resolving criminal cases and civil disputes through mediation are simpler and shorter than in cases where they become the subject of regular court proceedings. As such, mediation manifests direct effects in the reduction of the cost of public money, especially the cost of witnesses, experts, and lump sum, which are considered of particular importance given that Kosovo, but also many other countries, continues to have very limited state budgets.[9]
3. It increases civic awareness to comply with the law. – Some findings suggest that persons involved in disputes resolved through mediation much less often repeat such conduct that would result in violation, damage, or destruction of values protected by applicable laws, compared to those against whom regular court proceedings have been applied[10]. Thus, it is noted that many of them express an advanced approach toward respecting the law.
4. It motivates the parties to foster feelings of remorse for the damage caused. – During the implementation of mediation, the parties are asked to repent and apologize for the damage caused. Such an active approach is very effective in eliminating the feeling of revenge, which in some types of disputes and criminal cases continues to be present in a significant category of victims.[11]

Two Processes Support Transboundary Marine Conservation? Lessons from Six Case Studies of Maritime Disputes, Frontiers in Marine Science, 30 November 2020, pg. 2, Available at: https://www.frontiersin.org/articles/10.3389/fmars.2020.593265/full

[8] The statistical report of Court work, Yearbook 2015, Kosovo Judicial Council, Pristina, 2016, Available at: https://www.gjyqesori-rks.org/sq/kjc/report/list/1

[9] Annual budget of Kosovo for 2022 is 2 billion and 748 million Euro.

[10] Compare: Hajdari Azem (I), Juvenile crime in Kosovo 2001 - 2003, Pristina, 2004, pg. 76; Mlađenović V. Đorđević, Osnovi problemi criminalitya maloletnica, Belgrade, 2003, pg. 78.

[11] Compare: Hajdari, Azem (II), Mediation as an Alternative of Criminal Case Resolution in Kosovo, Social Science Review Vol. 3, Iss. 2, 2017, pg. 40.

5. It motivates the parties to cooperate with the state prosecutor and the courts and increases their level of communication. This motivation is a result of the advantages that mediation has compared to court proceedings and alternative procedures – advantages that are, inter alia, manifested in the increase of efficiency in dispute resolution. "In the case of resolving a dispute through mediation, the parties realize their interests faster, easier, and more satisfactorily than in cases where they are oriented to a judicial settlement of the dispute."[12]

4. CHARACTERISTICS OF MEDIATION

Mediation in both civil and criminal cases encompasses several features, which make it a sui generis institute of dispute resolution. Such features are considered the following:

a) Mediation in many cultures derives from customary law. – Numerous studies that deal with mediation present related data from the earliest times of the development of society, including Rome and ancient Greece, China, Japan, etc. In fact, the concept of mediation is considered to have derived from the Greek terms "mesitis", which refers to the female mediator, and "mesitaes", which refers to the male mediator[13]. Even in Latin, there are several terms related to mediation, such as: "mediare"[14], and "mediaus", the meaning of which is "to stand in the middle"[15].

It is important to note that the term mediation is synonymous with "middle" also in the Albanian language, which refers to people who enter into the middle of a conflict[16] in order to settle a dispute between them. It follows that mediation has a deep genesis in history. In some cultures, its origin is found in their customary laws. We find a similar situation with the Kosovo Albanian people when it comes to traditional mediation. Throughout history, mediation has, within the framework of domestic customary law, been used as a traditional instrument for the regulation of civil legal relations, and in part of the criminal legal relations related to interpersonal conflicts, revenge, and blood feuds.

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[12] Compare: Sahiti, E., Murati, R., Elshani, Xh., Criminal Procedure Code of the Republic of Kosovo, Commentary, Pristina, 2014, pg. 1165.

[13] Compare: Duss-von Werdt, Joseph: Einführung in die Mediation, Heidelberg, 2008, pg. 12.

[14] Compare: Gielkens Leo, Mehr als Sieg und Niederlage, Mediation als Erziehung zum Gewaltverzicht in der Jugendpastoral, Berlin, 2007, pg. 157.

[15] Compare: Pfeifer Wolfgang, Art. "Konflikt" In: Etymologisches Wörterbuch des Deutschen, pg.704.

[16] Bahtiri, B., Qerimi, I., Mediation as a Way of Alternative Resolution of Disputes in Kosovo, Iliria International Review 2014/1, pg. 293.

"Dispute resolution through traditional mediation in Kosovo came as a result of distrust in the state bodies of foreign rulers, which led to various disputes not being referred to the courts but referred to resolution through the elders instead. The dispute resolution through the elders was based on the institute of trust (the word given)[17]" and, as a solution of the time, it was included in the Kanun of Lekë Dukagjini[18] and other Albanian kanuns in Albania, Western Macedonia where Albanians live, etc.[19]

b) Scope of mediation. – Mediation as an institute for the resolution of parties' disputes in out-of-court ways manifests its scope in different dimensions when it comes to civil or criminal cases. Thus, in the civil field mediation results in having unlimited scope. This finding stems from the legal solutions that regulate the issue of mediation, which are applicable in Kosovo[20] and beyond[21]. Consequently, this instrument of dispute resolution between the parties can be applied effectively for the resolution of any dispute arising between the parties in the civil field (in property, commercial, family, and labor relations, in other cases of property right disputes, such as the rights on the acquisition of property rights through contractual relations or acquired through inheritance, bankruptcy procedures, and other civil relations), when there is an agreement between them for such an issue.

Unlike the civil field, in the criminal field in Kosovo and beyond, there are strict legal restrictions for the implementation of mediation. Thus, in Kosovo, mediation is applicable only for minor criminal offenses punishable by a fine or imprisonment of up to three years[22], whereas in Albania the mediation is foreseen as an opportunity for criminal offenses prosecuted by the injured party, which are punishable by a fine or imprisonment of up to four years[23]; in

[17] Ismajli, H., Sejdiu, F., History of the state and law, Pristina, 2005, pg. 37.

[18] Gjeçovi, Sh., The canon of Lekë Dukagjin, Pristina, 2001, pg. 68-69.

[19] Frano, I., Canon of Skanderbeg, Shkodra/Albania, 1993, pg. 120 - 126, The Law of Labëria collected by Ismet Elezi, The customary law of Labëria in the comparative plan, Tirana, 1994, pg. 106 - 107.

[20] Art. 2 par. 1 of LoMK.

[21] With no norms of the Law on Mediation and the Law on Dispute Procedure of Kosovo, there are no restrictions regarding the application of mediation when there are disputes arising between the parties that are of a civil nature. For this see paragraph 2 of article 2 of LOMA.

[22] Art. 232 par. 1 of CPCK. From scope of the law are excluded criminal offences related to domestic violence. Exceptions to this rule are criminal offenses related to domestic violence.

[23] Art. 2 par. 3 of L Paragrafi 3 i nenit 2 të LNZMSH, në ndërlidhje me nenin 59 dhe 284 të KPP.

Portugal[24], Turkey[25], etc., legal solutions provide for the possibility of referral to mediation for criminal offenses that are punishable by imprisonment of up to 5 years. Such restrictions are considered to be reasonable because it cannot be imagined for mediation to be applied for serious criminal offenses.

This means that this instrument is considered appropriate to be applied only to "criminal offenses which represent a lower degree of social risk, but which are extremely frequent in practice."[26] In fact, the new legal changes made in the Criminal Code of Kosovo, Albania, and other countries have made the punishments for many criminal offenses more severe, including those for which mediation is appropriate. Therefore, it is considered necessary to expand the possibility of mediation for criminal offenses punishable by a fine or imprisonment of up to five years.

c) Confidentiality of the data of the case referred to mediation. – Legal solutions of Kosovo and many other countries consider the data related to the case referred to mediation to be confidential.[27] These data include but are not limited to, the type and nature of the case (criminal offense, dispute, etc.),[28] the circumstances in which the offense or damage was caused, the personality of the parties and their level of responsibility, the conduct of the parties before and after the conflict has arisen, etc. Such data, but also other data related to the case subject to mediation, are not to be made public[29]. This means that they must be kept confidential by any authority involved in the mediation process.

As a matter of fact, the confidentiality of the mediation data means that any statement and any other information arising from the mediation procedure may not be used as evidence or data in any other procedure without the prior consent of the parties. All this is for the mediation to be successful, and for such data not to be used for harmful purposes concerning the parties in the court proceedings that could be applied in case of mediation failure.

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[24] Article 12 Law on mediation of Portugal, Available at https://www.arbitrare.pt/media/3128/la%C3%AB-on-mediation-_no-29-2013-19-april.pdf

[25] Article 253 of the Criminal Procedure Code. See: Mustafa Serdar, The principles and procedures of Penal Mediation in Turkish Criminal Procedural Law, Ankara Law Review, No. 8(2)/2011, pg. 164.

[26] Krasniqi, M., Several characteristics of mediation in criminal field in the Republic of Kosovo, International Comparative Jurisprudence, 2019, Volume 5, Issue 2, pg. 192.

[27] Paragraph 1 of Article 3 of the Civil Code.

[28] Hajdari, A., (III), Criminal Procedure Law, Special Part, Prishtina, 2013, pg. 121.

[29] Such data must be stored in relation to each of the parties or other persons outside the mediation procedures, except when the party whose data is made public or processed according to the legislation for the protection of personal data, has given approval her in writing.

d) The suitability of the case for mediation. –The referral of a civil or criminal case to mediation is provided as an opportunity and not an obligation for the prosecution office and the court. Therefore, the case prosecutor or the judge should make a detailed assessment of a case, taking into consideration whether or not the case is suitable for mediation. Thus, for example, when it comes to a criminal offense, the competent prosecutor or judge must, before referring the case to mediation, "assess, but without being limited to, the following circumstances: the type and nature of the criminal offense, the circumstances in which it was committed, the personality of the perpetrator, the consequences caused, his or her degree of criminal liability, as well as his or her conduct before or after committing the criminal offense"[30]

Thus, although for some criminal offenses, there are legally no obstacles to mediation (the amount of the punishment), for various reasons they are considered inappropriate to be referred to mediation. Such are considered the criminal offenses that harm the public interest, such as unauthorized possession of narcotics (Article 275), prohibited trade (Article 305), prohibited production (Article 306), smuggling of goods (Article 317), avoiding customs fees (Article 318), pollution, degradation or destruction of the environment (Article 347), illegal hunting (Article 359), etc. Although in civil cases, on the other hand, due to their nature, the law does not expressly provide for the rules of case suitability, and when it does, they are much more flexible, there is still (in some cases) the necessity to assess such suitability.

e) Efficiency of resolving disputes through mediation. – Mediation in its essence represents a highly efficient institute for resolving disputes between the parties. It is considered as such because, compared to court proceedings, it enables the resolution of disputes within a time limit that is much shorter than the time that standard court proceedings take. Thus, for example, in Kosovo in criminal and civil cases mediation must begin, be conducted, and end within 90 days[31], with the difference that in civil disputes the legislator has authorized the possibility of extending mediation for another 30 days, when such a thing is requested by the parties through their mediator for personal interests.[32]

Such a format of legal solutions related to mediation has directly dictated the efficiency of the practical implementation of this institute of dispute resolution. Thus, research conducted in Kosovo highlights the fact that "out of 300 cases

[30] Krasniqi, op., cit., pg. 192.

[31] This term is considered to be sufficient to carry out the necessary procedural actions until the agreement between the parties is reached, and it begins to run from the day the agreement is signed by the parties.

[32] Paragraphs 1 and 2 of Article 16 of the Civil Code.

where this institute has been applied in resolving criminal cases, in 280 of them the parties have reached an agreement within the first hearing. In 13 cases this was reached in the second hearing, and only in 7 cases the parties had to take part in three hearings to reach an agreement."[33] A more or less similar situation is considered to be present also in the resolution of civil disputes.

Based on this fact, it is considered that the increasing implementation of mediation is a matter of interest for litigants, courts, prosecution offices, and society in general. One of the methods to achieve this goal is by organizing various campaigns and other forms of awareness, which are necessary to inform society about mediation and its advantages. "This is necessary because, as evidenced by the various conducted surveys, most citizens do not know about mediation."[34]It follows that knowledge of the concepts of mediation is a precondition for advancing its implementation in practice, as the parties can be more active in the legal opportunities offered and propose mediation as a mechanism for resolving disputes between them only if they have prior knowledge of it.

f) Mandatory presence of the parties and the mediator in the mediation procedure. – The presence of the parties in the course of mediation is a decisive request of the legislator. Without their presence, one cannot even imagine the implementation of the mediation procedure. When a criminal case is involved, the perpetrator and the injured party must be present in the mediation procedure. If a civil case is involved in the mediation procedure, the two litigants must be present, namely the plaintiff and the defendant[35].

The presence of the parties in the mediation procedure is mandatory because the dispute that exists between them concerns the parties themselves. In fact, the parties may be represented by their authorized representatives, who may be their engaged attorneys[36], but they may not take any procedural action on behalf of the parties they represent without them being present[37]. In addition to the parties, the presence of the mediator in the mediation procedure also constitutes a mandatory condition.

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[33] Krasniqi, op., cit., pg. 195.

[34] Citizens are made aware of mediation through the campaign, Gazeta "Zëri", September 28, 2015, pg. 2, Available at https://zeri.info/actual/53288/citizens-u-vetedijuan-per-intermediation-permes-fushates/

[35] In addition to the parties, their representatives and the mediator, a third party may also participate in the mediation procedure, if the parties agree on this in advance, guaranteeing the confidentiality of the procedure. Article 12 of the Civil Code.

[36] Inga Žalėnienė, Agnė Tvaronavičienė, The main features and development trends of mediation in Lithuania: The opportunities for lawyers, Jurisprudencija/Jurisprudence, 2010, 1(119), pg. 233.

[37] Article 12 of the Civil Code.

This is due to the fact that his role in dispute resolution, following the principles of mediation, can only be fulfilled by his active participation in the procedure. He is the person who communicates with the parties, organizes joint and separate hearings, offers dispute resolution options, and even has a key role in reaching an agreement between the parties. All this activity which falls under his authority can be achieved only by him being the key person in the mediation procedure, without whom the implementation of such a procedure cannot even be imagined.[38]

g) Lack of strict procedural rules: Unlike court proceedings, mediation in both the civil and criminal fields is not characterized by the so-called strict legal rules. This fact is based on the solutions provided by the basic laws of Kosovo, which govern mediation, such as the Law on Mediation, the Criminal Procedure Code, and the Law on Contested Procedure. From the solutions that these laws offer regarding this procedural institute, it results that there is a lack of clear rules for the mediation procedure.[39] Such a situation has created room for the entities involved in mediation to set the rules for the implementation of such a procedure.

Therefore, it is "the parties who together with the mediator decide on the rules and the degree of formality of the mediation procedure."[40] Unlike legal solutions, the theory and practice of mediation have moved in a completely different direction.[41]They establish the rules based on which mediation is then applied. This means that "The rules of the mediation procedure can be approved

[38] In modern times, the so-called "Internet Mediation" (Dispute Resolution on the Internet) is receiving special attention, as it is increasingly being applied as a special form of mediation. In those countries where this type of mediation is practiced, contact with the party located abroad is made by the mediator mainly via video link. Internet mediation hearings are conducted via video conference or audio conference and may include traditional electronic forms such as email, fax, teleprinter, and telephone network. The document exchange process is also carried out through digital cameras and scanners. In this process it is necessary to ascertain the documents and prove their authenticity. Hörnle Julia. (2003). Online dispute resolution, The Emperor's New Clothes? International Review of Law, Computers-Technology, Volume 17, Issue 1, pg. 29. Online mediation has been practiced in North America since 1996 and is widely practiced in Australia, Tyler Melissa, Conley Tyler, Di, M. B., Developing an online mediation culture, The fourth generation of online ADR. International Conflict Resolution Centre, 2015, p. 3. As far as Kosovo is concerned, however, due to lack of experience and logistical conditions, this type of mediation is currently inapplicable.

[39] This is also the case in LNZMSH, LNS, etc.

[40] Osmani, V., Arbitration. USAID Mission in Kosovo, 2008, pg.8.

[41] This is also dictated by the principles on the basis of which mediation takes place. For this see: Latifi, Vesel, Elezi Ismet, Hysi Vasilika, Politics of combating criminality, Pristina, 2012, pg. 187 – 189.

by the agreement of the parties."[42] They are the ones to agree on the rules of procedure, which they determine in their written agreement.

Thus, they have the right to decide on the number of hearings they will attend (which depends on the existing needs and the complexity of the case), and they have every right to skip, by agreement, any stage of the mediation procedure, when they consider it not to be necessary in their case. Consequently, if the parties do not define the rules of procedure by agreement, it is the mediator who, under the applicable solutions, determines the course of the implementation of mediation. All this is logical given that "Mediation is an informal and confidential process in which the neutral party (mediator) assists the parties in understanding their interests."[43]

However, it should be borne in mind that in the absence of strict procedural rules, any rule created in connection with mediation either in theory or practice by the parties in coordination with the mediator must be in accordance with the basic principles of mediation guaranteed by law, which are: expression of the will of the parties, equality, objectivity, independence, confidentiality, and mutual trust.

h) Lack of mechanisms that guarantee the implementation of the mediation agreement. – Although Article 15 of the LMK provides that the mediation agreement has the power of an enforcement document and that the meaning of the enforcement document under paragraph 4 of Article 22 of the same law applies to the agreed agreement signed in the mediation procedure after the approval of the court, the Kosovo legislator has not managed to clearly address any mechanism that would guarantee the implementation of such an agreement. This means that it remains in the will of the parties that the manner of execution be specified in the agreement reached for the resolution of their dispute through mediation.

Therefore, the mediator has to inform the parties about this issue when consenting to resolve the dispute through mediation. When it comes to the issue of the implementation mechanism of the mediation agreement, it is worth noting that the Albanian legislator has provided an advanced solution. The Parliament of this country in paragraph 3 of Article 23 of the LMDRA, has provided that the execution of the agreement reached in the mediation procedure is performed by the "enforcement service". Consequently, in cases where one of the parties (the perpetrator or the person who caused the damage) refuses to

[42] Mazadoorian N. Harry, Mediation practice book: Critical tools, techniques and forms. Law First Publishing, 2002, pg. 507.

[43] Superior Court of California, Mediation handbook, 5th edition. Superior Court of California, 2007, pg. 2.

execute the obligation that is the subject of the mediation agreement, the other party (injured party) under Article 15 of the LMK may request the realization of his right in the enforcement procedure.

This right results from paragraphs 1-4 of this Article, according to which if one party does not fulfill the obligation defined in the agreement, the other party has the right to request execution in the enforcement procedure. All this is based on the fact that the written agreement (whether civil or criminal dispute) approved by the court is treated as an "enforcement document", and once approved by the Chief Prosecutor of the relevant prosecution office it is treated as a "final decision". But, to reach such an execution of the right of the injured party through the enforcement procedure, it is required that he address the reasoned proposal to the competent court or the prosecution office.

i) Manner of referring cases to mediation. – LMK, CPCK, and LCPK foresee three ways of referring cases to mediation. These ways of referral are a) referral by the court, b) referral by the prosecution office, and c) referral by the parties[44]. Such ways of referring cases to mediation are also recognized by the relevant laws of Albania, Serbia, and many other countries[45]. All three above-mentioned ways of referral are appropriate and applicable in addressing criminal cases, while only two of them, that is, referral by the court and referral by the parties are appropriate and applicable in addressing civil disputes.

This comes as a result of the difference that naturally exists when handling criminal cases compared to civil ones, where in the former the state prosecutor is considered to be the basic subject of the procedure with the authority to refer the case to mediation. It is worth noting that the above-mentioned ways of referring cases to mediation are understandable and enable the implementation of the principles of mediation, so that each on its own, or taken together, fully corresponds to the mission of this institute.

Common to all ways of referring cases to mediation is the fact that the parties agree to implement mediation. The only difference that exists in this aspect has to do with the court cases related to the so-called "mandatory mediation", which manifests itself in family disputes related to cases of alimony, guardianship, contacts, child custody, and division of joint marital property, property disputes related to rights and obligations deriving from servitude rights, and

[44] The parties can refer the dispute to mediation by proposing such a thing to the judge or prosecutor of the case, but they can also refer the case to a licensed private mediator, when they do not proceed with the case at all in court or in the prosecutor's office (self-referred); and they can refer the case for mediation to the unlicensed mediator based on customs and tradition, within the so-called "traditional mediation".

[45] Article 13 of LNZMSH.

compensation of expropriated property, in connection with which, after having informed the parties, the courts instructor oblige in the mediation procedure[46]. However, even in these cases, for mediation to be implemented, the consent of the parties is required[47].

5. ADVANTAGES AND DISADVANTAGES OF MEDIATION

Like any other mechanism with dispute resolution authority, mediation is characterized by various advantages and disadvantages. They are almost identical in the cases of mediation of civil and criminal cases. As will be seen below, the advantages of this mechanism outweigh the disadvantages. In summary, some of them will be addressed below.

5.1. SOME ADVANTAGES OF MEDIATION

Mediation has several advantages over standard court proceedings. Among the main advantages of this institute are considered the following: [48]

1. Mutual benefits of the parties: Unlike court proceedings, and perhaps any other alternative procedure where one of the parties shall always lose, in the mediation procedure both parties benefit[49]. All this occurs because the agreement that settles the dispute through mediation is the result of mutual compromises between the parties.

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[46] Paragraphs 1 and 2 of Article 9 LNK.

[47] In such cases, if the parties do not agree to resolve the dispute through mediation, then they can return to court proceedings. Therefore, the parties are not obliged to reach an agreement through mediation, without their consent.

[48] For the advantages of mediation, more broadly see: Spindler Gerald, Gerichtsnahe Mediation in Niedersachsen: Eine juristisch-rechtsökonomischeAnalyse, Abschlussbericht im Auftrag des Niedersächsischen Ministeriums für Justiz und des Niedersächsischen Ministeriums für Wissenschaft und Kultur, Göttingen, 2006, pg. 129-130; Möhn Heinz, Geschichte und Denkmodelle der Mediation, Berlin, 2012, pg. 51-52; Fritsch Martin, Mediation im familiengerichtlichen Verfahren, Hamburg, 2010, pg. 28; Weitz Tobias Timo, Gerichtsnahe Mediation in der Verwaltungs, Sozial- und Finanzgerichtsbarkeit, in: Schriften zum deutschen und europäischen öffentlichen Recht, herausgegeben von Steffen Detterbeck, Frankfurt, 2008, pg. 76; Restoring justice and mediation in resolution of criminal conflicts, Manual for judges and prosecutors, Tirana, 2007, pg. 71; Wenzel Claus, Konfliktbearbeitung durch Mediation aus berufspädagogischer Sicht. Theoretische Grundlagen, Qualifizierungsansätze und Umsetzungsempfehlungen für mediatives Arbeiten in der Schule, Kassel, (Univ., Diss. 2008), pg.112.

[49] For this, in more detail, see: “Elezi Ismet, Knowledge on Albanian criminal law, Tirana, 2003, pg. 46.

2. Flexibility: Mediation is considered to be a flexible institute since the parties, being assisted by their mediator, have wide options available to them in finding alternatives in trying to resolve the existing dispute[50]. In contrast, standard court proceedings and other alternative procedures do not provide for such possibilities. Controllability: Mediation, unlike court proceedings, is a mechanism controllable by litigants, as they have the main say in reaching or not reaching a mutual benefit agreement.
3. Non-specification of the place of mediation: Mediation can be carried out in any place which the parties together with their mediator consider appropriate. This is not the case with court proceedings and other alternative procedures in which mediation, as a rule, takes place in the facilities of the prosecution offices and courts. This advantage makes the parties involved in mediation feel relaxed and offers opportunities to pave the way and discuss a variety of dispute resolution alternatives.
4. Effective enforceability of the agreement: The agreement reached through mediation is considered an easy act to execute. It is treated as such, as the agreement reached through mediation, in comparison with the solutions deriving from court proceedings, does not constitute an imposed act. Rather, it is a mutual benefit act agreed upon between the parties. This makes the issue of damage compensation, but also other obligations for which the parties agree, much more efficient.[51]

5.2. DISADVANTAGES OF MEDIATION

In addition to the advantages, mediation in both civil and criminal cases has also some disadvantages. Among the disadvantages of mediation are considered the following:

1. Waste of time. – In cases when mediation results are unsuccessful, the time invested in reaching an agreement through this dispute resolution institute is considered time lost. In such cases, 90 days are lost, whereas in civil disputes this goes up to 120 days, which nowadays when considering the interests of the litigants, is not considered a short period. This state of failure, in almost all cases, turns the parties towards court proceedings and, in criminal cases even in the pre-trial procedure.[52]

[50] Hajdari (I), pg. 758.

[51] Sahiti *et al*. op., cit., pg. 570; Conflict Resolution and Dispute Reconciliation Foundation, Conflict Resolution and Dispute Reconciliation, Tirana, 2012, pg. 87.

[52] Compare: Weitz Tobias Timo, op., cit., pg. 78.

2. Lack of effective pressure on the parties. – Numerous studies that have been conducted concerning mediation point out the fact that it is by nature a mechanism that reflects the lack of putting effective pressure on the parties. This fact may increase the severity and duration of the conflict between the litigants[53]and may reflect in, inter alia, the emergence of the phenomenon of arbitrary exercise of rights.
3. The possible manifestation of the negative effects due to the failure to reach an agreement. In case of unsuccessful completion (without the fulfillment of the obligation for damage compensation) or termination of mediation in the criminal field, there may be negative effects for the perpetrator when assessing the court decision by the case judge, although it is not at all acceptable to do so[54], based on the fact that in contemporary society great achievements have been marked in connection with court proceedings in terms of their humanization.

6. SOME DATA ON THE IMPLEMENTATION OF THE MEDIATION PROCEDURE

To reach concrete conclusions and address useful recommendations for the relevant state institutions (mainly courts and prosecution offices) and society in general, by their using the results of this paper, it has been necessary to go through the mediation data that included a period[55] of six years (2013-2018)[56].

The focus on these six years is based on the fact that, in terms of practical application, this institute for resolving civil and criminal disputes has marked a strong trend of advancement. The presentation and elaboration of data related to mediation are done based on the report published by the Ministry of Justice, which reflects the activities of all courts and basic prosecution offices of Kosovo concerning this issue.

Below, in a separate table, will be presented the data on the number of civil and criminal disputes which the prosecution offices and basic courts of Kosovo

[53] Restoration of justice and mediation in the resolution of criminal conflicts, Manual for judges and prosecutors, Tirana 2007, pg. 36.

[54] Compare: Kaspar Johannes, Wiedergutmachung und Mediation im Strafrecht.Rechtliche Grundlagen und Ergebnisse eines Modellprojekts zur anëaltlichen Schlichtung, Bd.1,2004, pg. 267.

[55] Compare: Hajdari Azem (V), Mediation as an Alternative of Criminal Case Resolution in Kosovo Juvenile Criminal Proceedings, International Journal of Social Work, 2018, Vol. 5, No. 1, pg. 32.

[56] This is so far the only period for which the Ministry of Justice of the Republic of Kosovo has published the data related to mediation.

have resolved in general and those which have been resolved through mediation during the period 2013-2018.

Table 1: Data on the number of generally resolved disputes and mediated disputes

Year	Total cases solved	Cases solved through mediation
2013 – 2018	720405	10081

According to these data, the prosecution offices and the basic courts of Kosovo during 2013-2018 have solved 720405 cases of civil and criminal nature through the implementation of regular procedures and other alternative procedures, whereas 10081 cases were resolved through mediation[57]. As a result, the number in which Kosovo prosecution offices and basic courts used mediation to solve cases was many times smaller than the number in which cases were solved through regular procedures and other alternative procedures.

Given the many advantages that mediation offers, it would be preferable for it to be applied more often as a way of resolving disputes between the parties[58]. To reach this goal, although there has been an advancement over the years in the application of mediation, it is necessary to organize professional debates and roundtables, arrange relevant media campaigns, as well as to provide effective training about this institute for Kosovo prosecutors and judges. The following table presents the data on the cases referred to mediation by the courts and basic prosecution offices, as well as by the litigants for the period 2013-2018.

Table 2. Data on cases referred to mediation by authorized entities

Cases referred by courts	Cases referred by prosecution offices	Cases referred by parties	Total cases referred
8971	2062	148	11181

[57] Statistika për ndërmjetësimin, Ministria e drejtësisë e Republikës se Kosovës, available at https://md.rks-gov.net/page.aspx?id=1,155

[58] In Turkey, according to statistics published by the Ministry of Justice, only for the period January 2, 2018 to December 19, 2019, 739,255 employment disputes were referred to mandatory mediation. The success rate of these mediations is 65%. Regarding commercial disputes, in the period January 2, 2019 to December 19, 2019, 146,413 commercial disputes were referred to mediation. It is reported to have a 57% success rate in resolving such disputes through mediation. See: Efe Kınıkoğlu, Yiğit Parmaksız and Hande Solak, edition in Turkey, Practical Law Country Q&A w-006-5969, pg. 1 – 2.

According to these data, during the period 2013-2018, the basic courts have referred 11181 cases to mediation, the basic prosecution offices 2062 cases, and the parties 148 cases. These data prove that the courts have referred cases to mediation several times more than the prosecution offices, and much more when compared to the parties. This situation is understandable since the courts have such authority to, in addition to civil disputes, which dominate, refer to mediation also criminal cases. The small percentage of cases referred to mediation by the parties can, on the other hand, be explained by the lack of knowledge about mediation and the advantages that this institute has. In this regard, it is necessary to organize concrete media campaigns which would reach a large number of the citizens of the country to promote mediation.

In the following table, the data on the number of disputes resolved through mediation by prosecution offices and those resolved by the basic courts of Kosovo for the period 2013-2018 will be presented separately.

Table 3: Data on cases resolved through mediation in the prosecution offices and courts

Cases solved by prosecution offices	Cases solved by courts	Total cases solved through mediation
1674	8407	10081

According to these data, during the period 2013-2018, the basic prosecution offices have solved 1674 criminal cases through mediation, whereas the basic courts have solved 8407 civil and criminal disputes through mediation[59]. The data prove that among the disputes resolved through mediation by the courts over 95% of cases constitute civil disputes. As it turns out, the courts have solved many times more cases through mediation than the prosecution offices. This is explained by the fact that the courts, in contrast to the prosecution offices, in addition to having the authority to refer to mediation in both types of disputes (civil and criminal), have for some civil disputes favorable legal solutions in terms of enforcement of mediation (the so-called "mandatory mediation").

[59] In Turkey, according to statistics published by the Ministry of Justice, only for the period January 2, 2018 to December 19, 2019, 739,255 employment disputes were referred to mandatory mediation. The success rate of these mediations is 65%. Regarding commercial disputes, in the period January 2, 2019 to December 19, 2019, 146,413 commercial disputes were referred to mediation. It is reported to have a 57% success rate in resolving such disputes through mediation. See: Efe Kınıkoğlu, Yiğit Parmaksız and Hande Solak, edition in Turkey, Practical Law Country Q&A w-006-5969, pg. 1 – 2.

In the last table, the data on the number of criminal and civil cases resolved through mediation for the period 2013-2018 will be presented separately.

Table 4: Data on criminal and civil cases resolved through mediation

Criminal cases resolved	Civil cases resolved	Total cases resolved through mediation
1821	8260	10081

According to these data, during the period 2013-2018, the prosecution offices and the basic courts of Kosovo have resolved through mediation 1821 criminal cases and 8260 civil disputes[60]. As it turns out, the number of civil disputes is several times greater than the number of mediated criminal cases. This is explained by the fact that in comparison with criminal cases for which there are strict legal restrictions on the application of mediation (only cases of criminal offenses punishable by up to three years of imprisonment can be resolved through mediation, and mediation in cases of domestic violence is not allowed), for civil disputes not only are there no restrictions of this nature at all, but on the contrary the legislator favors their resolution through mediation[61].

7. CONCLUSION

The results of this paper prove that from the legal point of view regarding mediation, although Kosovo has made obvious progress in the standardization of laws, there are still some issues unaddressed, and some others that need to be addressed differently. This situation is highlighted through comparisons made between domestic laws and relevant laws of other countries, including Albania and Serbia. Therefore, unlike these two countries, which by law have clearly addressed the mechanism of overseeing the implementation of agreements reached through mediation, thus making the "Enforcement Office" responsible for such an overseeing, Kosovo has not provided any such mechanism, which is considered a legal shortcoming that should be fixed in the future, as there are many problems in the implementation of mediated agreements in practice since it depends on the will of the parties.

[60] Statistical reports on the work of the courts for the years 2013-2018, The Judicial Council of Kosovo. Available at https://www.gjyqesori-rks.org/raportet/. Work reports for the years 2013 - 2018, Prosecutorial Council of Kosovo, Available at https://prokuroria-rks.org/search?results=Raport+per+punen+e+keshillit

[61] Paragraphs 1 and 2 of Article 9 of the Civil Code.

The paper points to the fact that there are common points but also differences in terms of the options for the referral of cases to mediation when it comes to civil disputes and criminal cases. The most substantial difference is that in civil disputes there are no restrictive procedural rules regarding the referral of cases to mediation (there are even favorable and binding rules), while in criminal cases there are such rules, which are very strict by nature. Such are the criminal offenses punishable by more than three years of imprisonment, in Albania more than 4 years of imprisonment, while in Portugal and Turkey more than 5 years of imprisonment, as well as the criminal offenses which have as their object domestic violence, regardless of the punishable sentence.

These and other problems have resulted in such a situation that in Kosovo mediation is applied in relatively few cases, compared to many other countries. Therefore, to advance the implementation of mediation in the future, it is required that Kosovo continue to reform the legal system that regulates this institute, to expand the possibility of referring criminal cases to mediation for criminal offenses punishable by imprisonment for up to 5 years (since with the new Criminal Code there is an obvious increase in the amounts of sentences for most criminal offenses), to grant the possibility of applying mediation for criminal offenses of domestic violence (as mediation can be an effective institute of prevention and combating of such criminal offenses), to advance the knowledge of prosecutors, judges, and citizens about the advantages of mediation by organizing debates and professional conferences, as well as by organizing relevant media campaigns.

LITERATURE

1. Alika Taulant, Mediation as an alternative to dispute resolution, Universiteti "Aleksandër Mojsiu", Durrës, 2014;
2. Bahtiri B., Qerimi I., Mediation as a Way of Alternative Resolution of Disputes in Kosovo, Iliria International Review 2014/1;
   – DOI: https://doi.org/10.21113/iir.v4i1.66
3. Duss-von Werdt, Joseph: Einführung in die Mediation, Heidelberg, 2008;
4. Efe Kınıkoğlu, Yiğit Parmaksız and Hande Solak, ediation in Turkey, Practical Law Country Q&A w-006-5969.
5. Elezi I., Knowledge of Albanian criminal law, Tiranë, 2003;
6. Fritsch, M., Mediation im familiengerichtlichen Verfahren, Hamburg, 2010;
7. Gielkens Leo, Mehr als Sieg und Niederlage, Mediation als Erziehung zum Gewaltverzicht in der Jugendpastoral, Berlin, 2007;
8. Gjeçovi Sh., The canon of Lekë Dukagjin, Pristina, 2001;

9. Hajdari, A., Krasniqi, M., Mediation as a new approach to the alternative solution of the criminal case, Advocacy, Bulletin of the Chamber of Advocates of Kosovo, no. 13, Prishtinë, 2012;

10. Hajdari, A., (I), Juvenile crime in Kosovo 2001 - 2003, Pristina, 2004;

11. Hajdari, A., (III), Criminal procedure law, Special part, Prishtinë, 2013;

12. Hajdari, A., (V), Mediation as an Alternative of Criminal Case Resolution in Kosovo Juvenile Criminal Proceedings, International Journal of Social Ëork, 2018, Vol. 5, No. 1.
    – DOI: https://doi.org/10.5296/ijsw.v5i1.12785

13. Hajdari, Azem (II), Mediation as an Alternative of Criminal Case Resolution in Kosovo, Social Science Review Vol. 3, Iss. 2, 2017.

14. Hörnle, J., Online dispute resolution, The Emperor's Neë Clothes? International Revieëof Law, Computers-Technology, Volume 17, Issue 1, 2003.
    – DOI: https://doi.org/10.1080/1360086032000063093

15. Inga Žalėnienė, Agnė Tvaronavičienė, The main features and development trends of mediation in Lithuania: The opportunities for lawyers, Jurisprudencija/Jurisprudence, 2010, 1(119);

16. Ismajli, H., Sejdiu, F., History of the state and law, Pristina, 2005;

17. Elezi, I., The customary law of Labëria in the comparative plan, Tirana/Albania, 1994;

18. Kaspar, J., Wiedergutmachung und Mediation im Strafrecht. Rechtliche Grundlagen und Ergebnisse eines Modellprojekts zur anëaltlichen Schlichtung, Bd.1, 2004;

19. Krasniqi, M., Several characteristics of mediation in criminal field in the Republic of Kosovo, International Comparative Jurisprudence, 2019, Volume 5, Issue 2;

20. Latifi, V., Elezi, I., Hysi, V., Crime fighting policy, Prishtinë, 2012;

21. Mazadoorian N. Harry, Mediation practice book: Critical tools, techniques and forms. Law First Publishing, 2002;

22. Mlađenović V. Đorđević, Osnovi problemi kriminaliteta maloletnica, Belgrade, 2003;

23. Möhn Heinz, Geschichte und Denkmodelle der Mediation, Berlin, 2012;

24. Mustafa Serdar, The principles and procedures of Penal Mediation in Turkish Criminal Procedural Law, Ankara Law Review, No. 8(2)/2011;
    – DOI: https://doi.org/10.1501/Lawrev_0000000080

25. Osmani, V., Arbitration. USAID Mission in Kosovo, 2008;

26. Pfeifer, W., Art. "Konflikt" In: Etymologisches Wörterbuch des Deutschen;

27. Sahiti, E., Murati, R., The right of criminal procedure, Prishtinë, 2013;

28. Sahiti, E., Murati, R., Elshani, Xh., The Criminal Procedure Code of the Republic of Kosovo, Komentar, Pristina, 2014;

29. Spindler, G., Gerichtsnahe Mediation in Niedersachsen: Eine juristisch-rechtsökonomischeAnalyse, Abschlussbericht im Auftrag des Niedersächsischen Ministeriums für Justiz und des Niedersächsischen Ministeriums für Wissenschaft und Kultur, Göttingen, 2006.
   – DOI: https://doi.org/10.17875/gup2006-119

30. Mediation statistics, Ministry of Justice of the Republic of Kosovo, Available at https://md.rks-gov.net/page.aspx?id=1,155

31. Superior Court of California, Mediation handbook, 5th edition. Superior Court of California, 2007.

32. Tyler Melissa, Conley Tyler, Di, M. B., Developing an online mediation culture, The fourth generation of online ADR. International Conflict Resolution Centre, 2015.

33. Weitz Tobias Timo, Gerichtsnahe Mediation in der Verwaltungs, Sozial- und Finanzgerichtsbarkeit, in: Schriften zum deutschen und europäischen öffentlichen Recht, herausgegeben von Steffen Detterbeck, Frankfurt, 2008.

34. Wenzel Claus, Konfliktbearbeitung durch Mediation aus berufspädagogischer Sicht. Theoretische Grundlagen, Qualifizierungsansätze und Umsetzungsempfehlungen für mediatives Arbeiten in der Schule, Kassel, (Univ., Diss. 2008).

LEGAL ACTS

1. The Code of Criminal Justice for Minors of Albania, Law no. 37/2017;

2. The Juvenile Justice Code of Kosovo, Code no. 06/L-006;

3. Civil Procedure Code of Albania, Law no. 7905;

4. Criminal Procedure Code of Kosovo, Code no. 04/L-123;

5. Law on mediation of Portugal, Available at https://www.arbitrare.pt/media/3128/la%C3%AB-on-mediation-_no-29-2013-19-april.pdf

6. Law on budget allocations for the budget of the Republic of Kosovo for 2022, Law no. 08/L-066;

7. The Law on Mediation for Dispute Resolution of Albania, Law no. 10 385;

8. The Law on the Dispute Procedure of Kosovo, Law no. 03/L-006;

9. Law on Mediation of Kosovo, Law no. Law no. 06/L-009;

10. Zakon o parničnom postupku Crne Gore, Zakon br. 22/2004.

11. Zakon o posredovanju u rešavanju sporova, Zakon br. 55/2014.

OTHER SOURCES

1. Conflict Resolution and Dispute Reconciliation Foundation, Conflict Resolution and Dispute Reconciliation, Tirana, 2012;
2. Frano, I., Canon of Skanderbeg, Shkodra/Albania, 1993.
3. Citizens are made aware of mediation through the campaign, Gazeta "Zëri", September 28, 2015. Available at https://zeri.info/actual/53288/citizens-u-vetedijuan-per-intermediation-permes-fushates/
4. Work reports for the years 2013 - 2018, Prosecutorial Council of Kosovo. Available at https://prokuroria-rks.org/search?results=Raport+per+punen+e+keshillit
5. Statistical reports on the work of the courts for the years 2013 - 2018, the Judicial Council of Kosovo, Available at https://www.gjyqesori-rks.org/raportet/
6. Restoring justice and mediation in resolution of criminal conflicts, Manual for judges and prosecutors, Tirana, 2007;
7. Restoration of justice and mediation in the resolution of criminal conflicts, Manual for judges and prosecutors, Tirana 2007;
8. The statistical report of Court work, Yearbook 2015, Kosovo Judicial Council, Pristina, 2016;
9. Yael Teff - Seker, Peter C. Mackelëorth, Tomás Vega Fernández, John Mc Manus, Jungho Nam, Arthur O. Tuda **and** Drasko Holcer, Do Alternative Dispute Resolution (ADR) and Track Two Processes Support Transboundary Marine Conservation? Lessons From Six Case Studies of Maritime Disputes, Frontiers in Marine Science, 30 November 2020.
   – DOI: https://doi.org/10.3389/fmars.2020.593265