

POSITION AND ROLE OF MEDIATOR IN THE MEDIATION PROCEDURE – A COMPARATIVE OVERVIEW BETWEEN KOSOVO, ALBANIA, AND MONTENEGRO

Egzonis HAJDARI

Assistant professor, AAB College, Faculty of Law, Kosovo
E-mail: egzonis.hajdari@aab-edu.net

Vaxhit SADRIU

PhD, “Kadri Zeka” University, Gjilan, Kosovo
E-mail: vaxhid.sadriu@uni-gjilan.net

Azem HAJDARI

Full professor – University of Prishtina “Hasan Prishtina” Kosovo
E-mail: azem.hajdari@uni-pr.edu

Abstract

The role of the mediator is essential in the implementation of the mediation procedure. Taking this fact into consideration, the laws of contemporary countries have paid special attention to specifying its position within this alternative dispute resolution procedure between the parties. The purpose of this study is to reflect the role of the mediator in the mediation procedure in Kosovo and ascertain the adaptability of Kosovo's legal solutions that address the mediator's position with the solutions of other Western Balkan countries, especially the relevant laws of Albania and Montenegro, countries with which Kosovo has multidimensional ties, but which, compared to Kosovo, are some steps ahead in the Euro-Atlantic integration processes. Furthermore, the results of this study suggest that the Law on Mediation of Kosovo should be amended concerning the role and conditions required for licensing mediators.

***Keywords:** Role of Mediator; Mediation; Mediation Procedure; Kosovo; Albania; Montenegro.*

1. Introduction

From a legal and theoretical point of view, the mediator is considered a key subject in the implementation of the mediation procedure. The role of the mediator in mediation is manifested directly in the process of communication and negotiation, orienting the parties towards finding the best solution for both of them. Based on this fact, contemporary states, including Kosovo, Albania

and Montenegro, have paid special attention to the issue of defining the criteria for selecting a mediator, the principles on which the work of the mediator should be based, mediator selection and engagement procedure within concrete cases, specification of his/her rights and obligations and cases of revocation of the mediator's license.

It should be noted that so far studies on the position and role of mediator in Kosovo and in the Western Balkans, in general, have been lacking. In fact, this issue has been addressed only briefly in the context of few studies that have focused on the entirety of the mediation procedure.

During the analysis of the position and role of the mediator in Kosovo, some legal shortcomings will be identified, but also some advantages of addressing it in the legal aspect, of course by putting these advantages in the discourse of the mediation laws of Albania and Montenegro. Legal, comparative and analytical methods were used during the preparation of this paper.

2. Definition of mediator

Defining a mediator¹ cannot be imagined without considering the way of defining mediation.² In the relevant legislations of different countries and in legal theory there are various definitions for mediation.³ However, in a more general perspective, it is "Specified as an assisted procedural institute, namely as a structured alternative dispute resolution process, formally voluntary and generally non-binding, led by a third party (mediator) who instructs the parties towards an agreement that will resolve all or some of their disputes (civil or

¹ Mediation, in addition to arbitration, constituted pre-trial methods of resolving disputes that were expressed in different societies. An exclusive and well-known example of the earlier application of alternative methods is the legend of King Solomon (Nosyreva, 2005, p. 20).

² The interconnection between mediation and mediator has an all-dimensional scope, including historical interconnection. There is evidence of mediation since antiquity (e.g. China, Japan, Greece, Rome), although there are opinions which conceptually relate the idea to ancient Greek, with the terms: "mesitis", which refers to the female mediator, and "Mesitaes" which refers to the male mediator. In Latin there are a number of terms related to mediation and the mediator, such as: "mediare", "mediaus", meaning "standing in the middle". Even in the Albanian language the term mediation has the synonym of "middle", which refers to people who get into the middle of a conflict, to resolve a dispute aroused between the various parties. (Compare: Duss-von Werdt, 2008, p. 12; Gielkens, 2007, p. 157; Pfeifer, 2009, p. 704; Bahtiri and Qerimi, 2014, p. 293).

³ In civil legal theory it is treated as an institution of civil law that is the function of resolving disputes between the parties, while in criminal legal theory it is treated as a criminal procedural institute, respectively an alternative procedure that function to resolve the criminal case, but in essence in both of these areas mediation has a substantially unified meaning (see: Krasniqi & Hajdari (2012, pp. 129 – 130); Salihu (2018, p. 23)).

criminal cases)” (Teff-Seker et al., 2020, p. 2). Such a notion proves the great importance that the mediator has in defining mediation.

In mediation, the role of the mediator is to lead the mediation procedure (Žalėnienė & Tvaronavičienė, 2010, p. 234). Similarly, both in relation to mediation and regarding the mediator in legal⁴ and theoretical terms, different definitions are encountered. According to the Law on Mediation of Kosovo “The mediator is the third, impartial person, licensed by the Ministry of Justice, who is selected to mediate between the parties in order to resolve disputes, in accordance with the principles of mediation” (Judicial Council of Virginia, p. 1). The Law on Mediation and Dispute Resolution of Albania states, “The mediator is a third person who in the exercise of his function, ensures the resolution of the issue with efficiency, justice and impartiality, as well as professionally and without prejudice to the parties or the issue that is the object of mediation”⁵ And according to the Law on Mediation of Montenegro “The mediator is a third person who conducts the mediation procedure in the manner agreed by the parties”.⁶

Even in legal theory, there are different definitions regarding the mediator. According to a general definition “Mediator is a third party which plays a central role in keeping open, continuous and undistorted channels of communication between the parties who are in a dispute and who are trying to resolve that conflict” (Jönssö & Aggestam, 2009, pp. 33-51). According to another definition that is considered more acceptable “Mediator is an independent person, third party and with a key role in the mediation procedure, who guides and assists the parties (parties to the conflict, respectively the party that caused the damage or the perpetrator and the injured party) in reaching an agreement that will resolve all or some of their disputes (Hajdari, 2013, p. 121).

3. Qualifications and personality traits of the mediator

The mediator is the main subject in the mediation procedure. As such, it is expected that in the relevant laws by which contemporary states regulate this alternative procedure, as well as legal theory, it is important to meet the requirements such as: some specific conditions related to the qualification as

⁴ According to the Virginia Code § 8.01-581.21, “Mediator means an impartial third party chosen by agreement of the parties to a dispute to assist them in mediation.” For this see also solution § 8.01-576.4. Standards of ethics and professional responsibility for certified mediators, Office of the Executive Secretary of the Supreme Court of Virginia, p. 1. Available at <https://www.vacourts.gov/courtadmin/aoc/djs/programs/drs/mediation/soe.pdf>

⁵ Article 3 of Law No. 10 385/2011 on mediation in resolving disputes.

⁶ Article 23 Zakon br.29/12 o mirovanje.

well as some features that make him/her convincing and reliable for the entrusted work.⁷

Referring to paragraph 1 of Article 22 of the Law on Mediation of Kosovo, in order for a person to be licensed as a mediator, he/she has to fulfill some conditions, such as: a university degree, full capacity to act, and successfully passed the mediation training, including the resolution of practical cases within training and under the supervision of a licensed mediator, not be convicted of a criminal offense and has a high professional reputation and moral integrity. The Minister of Justice licenses a person as a mediator after they have been certified as a mediator.

In Albania, referring to paragraph 1 of Article 5 of the Law on Mediation and Dispute Resolution, in order for a person to be licensed as a mediator, he/she needs to have completed the Bachelor degree, has reached the age of 25, must not have been convicted of intentionally committing criminal offences, and has completed the training and vocational training program for mediators. Pursuant to paragraph 2 of Article 4 of the same Law, the Licensing Commission established by the Ministry of Justice⁸ registers a person as a mediator after he/she has been licensed for such a duty.

In Montenegro, the criteria and features of mediators are regulated by the Law on Mediation. Article 12 of this Law states that, for the person seeking to be certified as a mediator, he/she must have graduated from the faculty of law, has at least five years of work experience and has successfully passed the mediation training, must not have been convicted of a criminal offence that makes them unsuitable to mediate and has not been assigned the security measure that prohibits them from performing a profession, activity or duty. Pursuant to Article 20 of the same act, a person can exercise the duty of mediator after being registered in the relevant Register of the Ministry of Justice.

The legal solutions of these three states provide for similar and distinct criteria, which a person is required to meet in order to be licensed and registered as a mediator. Similar criteria are those that refer to professional training (the person must have graduated from faculty of law), successful completion of mediation training and not being convicted of a criminal offence (with the difference that Kosovo provides this prohibition for every criminal offence,

⁷ In Kosovo according to article 25 par. 1 of the LM, for individual cases, after the prior consent of the Ministry of Justice, according to the condition of reciprocity, a foreign citizen can also serve as a mediator. In Albania (Article 5 par.1 of the LMDR) also provides the possibility for a foreign citizen to be a mediator, for whom conditions and implementation of the licensing procedure similar to those of the Albanian citizen are required. Meanwhile, in Montenegro (Article 29 par 2 and 4 LM) a foreign citizen can also be a mediator, but only in disputes with a foreign element. It is considered that the solution provided by the law in Albania is much closer to the developing trends and globalization, and should be the model for Kosovo and Montenegro.

⁸ This Commission according to paragraph 2 of Article 4 of the Law on Mediation and Dispute Resolution consists of two representatives of the National Chamber of Mediation and three representatives of the Ministry of Justice.

Albania provides that the offence was committed intentionally, while Montenegro provides that the offence is such that it makes it inappropriate to exercise the role of mediator, which is considered the best solution).

The law of Kosovo considers the criterion of possession of the ability to act (which is considered a better criterion than the age provided in the case of Albania) and that of possessing a moral and professional reputation (not having a past that makes him / her unsuitable and having shown dexterity in resolving disputes with the participation of another mediator). In the case of Albania, the distinguishing criterion from the legislation of Kosovo and Montenegro is the possession of the age of 25 (considered consumed by the criterion of graduation of a faculty).

In the case of Montenegro, there are two distinguishing criteria from those of Kosovo and Albania. These criteria relate to the possession of 5 years of experience and non-imposition of a security measure that prohibits the performance of the profession, activity or task, which are considered pragmatic solutions that reflect on a better performance of the mediator. Perhaps it would be good in the future to include this requirement in the law of Kosovo and Albania.

The legal solutions of these three states relate the exercise of the activity of a mediator after licensing to the need to register such a person as a mediator. In Kosovo and Montenegro, the registration is done by the Ministry of Justice, without any specification of whose duty it is, while in Albania it is done by a commission set up by the Ministry of Justice consisting of two representatives of the National Chamber of Mediation and three representatives of the Ministry of Justice, which is in fact considered the most adequate solution.

4. Principles on which the activity of the mediator is based

The principles taken as a whole represent the basic rules and orientations, the rails on which a court procedure is built, a procedural institute. Whatever such principles are, so will be such a procedure or institute (Hajdari, 2014, p. 57). Therefore, the principles on which the activity of the mediator is based cannot be different, much less contrary to the principles of mediation. They should provide leadership and advisory positions for the parties (Mediators Ethics Guidelines, p. 2). Nevertheless, the following treatments will reflect some of the basic principles on which the mediator's activity is based, seeing them in the light of the mediation laws of Kosovo, Albania and Montenegro.

In Kosovo, the activity of a mediator is based on the following principles: a) The principle of independence, which accords and guarantees the mediator of an activity is unaffected by the referrer (prosecution and court), parties or anyone else (Sahiti & Murati, 2013, p. 130). (The principle of independence in the activity of the mediator is provided in Article 6 of the law of Kosovo, Article 3 par. 2 of the law of Albania and article 8 par. 1 of the law

of Montenegro.) b) The principle of impartiality, meaning the activity of the mediator should be characterized by lack of sympathy, antipathy, bias, prejudice, influence, pressure, intimidation, or interference, by anyone for any reason (Islami et al., 2003, p. 53). (The principle of impartiality is incorporated jointly with the principle of independence and within the same provisions in the laws of these three states.), c) The principle of equal treatment of the parties, which grants the parties an equal position in the mediation procedure so that all the activity of the mediator is required to be applied in the direction such that he ensures completely equal treatment. (The principle of equal treatment of the parties is provided in Article 5 of the Law of Kosovo, Article 3 par. 1 of the law of Albania and article 8 par. 3 of Montenegro specified as "principle of fair action for each party".), and d) The principle of confidentiality of the mediation procedure, according to which the activity of the mediator is characterized by non-disclosure and care of non-use in any other procedure of the parties' statements, except when their consent exists.⁹ The principle of confidentiality is provided for in Article 7 paragraph 3 of the law of Kosovo, and Article 7 of the law of Montenegro. The law of Albania does not address this principle. However the Albanian law has marked a step forward, based on Article 3 par. 2, in which the Albanian legislature has accommodated the principle of efficiencies and that of professionalism as principles that elevate the concepts of the activity of the mediator. The principle of efficiency requires that the activity of the mediator result in a qualitative and successful realization of the mediation procedure (Sokoli, 2014, p. 32), while the principle of professionalism requires that the activity of the mediator result in a qualitative realization and high professional standard of the mediation procedure.

5. Mediator selection and appointment procedure

Given the critical role that the mediator plays in the mediation process, their selection is a topic that attracts great attention (Alexander et al., 2014, p. 1). Consequently, the selection and appointment of the mediator is specified through special procedural rules. Such rules aim to ensure procedural efficiency and consideration for human rights in the conduct of mediation. This procedure, according to the law of Kosovo, Albania and Montenegro, is initiated through information and instruction given to the parties by the prosecution and the court in cases when they have the consent to proceed with the case through mediation.¹⁰

Although the parties have also been granted the right to seek mediation as an alternative in resolving a dispute. According to article 10 par. 1 of the law of Kosovo, article 4 par. 4 of the Law of Albania and article 14 par. 1 of the

⁹ Article 7 of LM.

¹⁰ In such a situation, in cases of forced mediation, the parties must meet with the mediator and they are given 30 days to try to start mediation, starting from the day when the judge obliges the parties to try mediation.

Law of Montenegro, the parties are those who have been granted the right to select a mediator. They make this selection based on the register of mediators licensed by the Ministry of Justice. According to the law of Kosovo, the mediation clerk is obliged to immediately contact the selected mediator, asking him to confirm within three days the availability to receive the case. If this deadline is not met, the mediation clerk should contact the other mediator. If the other mediator does not confirm the fact that he accepts the case within three days from the day of the summons, the mediation clerk is required to inform the parties and present to them the list with the names of other mediators as a choice. If they fail to make such a selection within three days, then the mediation clerk will select the mediator according to the order of the region covered by the court or prosecution.¹¹ In the case of Albania law, after the referral of the case for mediation by the prosecution or the court, one of the parties to the dispute may propose to the other party the resolution of the dispute through mediation by proposing to it a mediator, while the other party is required to state this within a period of 30 days from the date on which the invitation was sent or within the time limit specified in the invitation.

In such cases, the procedural body suspends the trial by assigning the parties a deadline for reaching an agreement in accordance with the nature of the dispute.¹² In the case of the law of Montenegro, one of the parties can propose to the other party the resolution of the dispute through mediation by proposing a licensed mediator, while the other party regarding this proposal is required to declare within 30 days from the day of receiving the proposal or within the other deadline specified in the proposal; otherwise, if the other party does not respond, the proposal is considered rejected.¹³ Viewed in this regard, the legislature of this country provides that in the case of pending court proceedings, if the parties cannot agree on the mediator, they may propose to the court to appoint a mediator from the list of mediators. If the court proceedings are not on-going and the parties cannot agree on a mediator, the parties may propose that the Mediation Centre appoint a mediator from the list of mediators.

The relevant laws of these three countries provide that the appointment and selection of the mediator belongs to the parties to the conflict. The difference is that the law of Kosovo assigns an important role in appointing a mediator to the mediation clerk, the law of Albania leaves this issue entirely up to the parties' competencies, and the law of Montenegro offers a solution, according to which, when the parties do not reach an agreement, they may

¹¹ When the parties agree to engage co-mediators in the mediation process, the co-mediator is proposed by the mediator selected by the parties with their prior consent. The procedure for selecting a co-mediator is the same as selecting a mediator.

¹² The invitation to mediation, filed by a party to the dispute, does not automatically prevent this party from initiating legal proceedings or arbitration in connection with this dispute, due to the expiration of the deadlines for filing a lawsuit.

¹³ Unless the parties agree otherwise, it is considered that they have reached an agreement on mediation and the mediator. See Article 28 par.2 ZPCG.

propose to the court or the Mediation Centre to appoint a mediator from the list of mediators. The solutions of Kosovo and Montenegro in terms of selection and appointment of mediators seem more approximate (the difference lies in the setting of deadlines), where those of Montenegro and Albania seem more logical, and those that best serve the concepts of the mediation procedure in comparison with the solutions of Albania, which can refer to amendments and supplementations based on the models of these two countries or even models of other countries.

6. The role, rights and obligations of the mediator

6.1 Role of the mediator

Given the key authority in the mediation procedure, it is clear that the role of the mediator turns out to be large. In fact, they have a variety of roles, including educational, interpretive, information exchange, guidance for the needs of the parties, etc. (Sheldon, 2019, p. 13). Indeed, the role of the mediator in mediation is manifested directly in the process of communication and negotiation by orienting the parties towards finding the best solution for them.¹⁴ Such a position of the mediator is also reflected in the legal solutions and legal theory of Kosovo, Albania and Montenegro, which reflect the authority and its rights and obligations in mediation. The role of the mediator turns out to be evident from the moment of appointment, respectively their election, until reaching an agreement between the parties through which they resolve their dispute.

Thus, the mediator is required to inform the parties before starting the mediation procedure about the principles, rules, costs of the procedure and the legal effects of the mediation agreement;¹⁵ to continue with the signing of the agreement for initiating the mediation procedure when it also starts contacts with the parties involved in the conflict¹⁶ in order to find alternatives for resolving the dispute; and to reach the peak when they manage to reconcile the parties and sign the agreement through which they resolve their dispute¹⁷ and

¹⁴ Who can be a mediator and what is his/her role, the Kosovo Judicial Council. Available at <https://www.gjyqesori-rks.org/ndermjetesimi/>

¹⁵ The agreement reached has the force of a court decision and is binding on the parties to the dispute and only on the object of the agreement.

¹⁶ See Article 11 paragraph 1 of the LMK, Article 17 of the LNZMSH and Article 25 ZPCG.

¹⁷ In practice, the skills of mediators are distinct. All this is reflected in the role they can play in the success of reaching an agreement, or even its failures, and this is certainly reflected in the mediation procedures implemented in Kosovo, Albania and Montenegro.

processes it (the agreement) for notification to the prosecution or the referring court.¹⁸

6.2 Mediator rights

The concretization of the role of mediator is based on a series of rights and obligations which are granted to him by the relevant laws of Kosovo, Albania and Montenegro. The focus of this paper will be on four of the rights of the mediator presenting in these laws:

a) Determining the time and place of the mediation - Although the legal solutions of Kosovo, Albania and Montenegro do not specifically specify, according to legal theory, it is up to the mediator to determine, in consultation with the parties, the place and time of implementation of mediation. Consequently, it is expected that he will propose to the parties the place and time that best suits their interests.¹⁹ There is no legal obstacle for mediators to conduct mediation sessions by choosing platforms that they think are more suitable to the parties.²⁰

b) Presentation of ideas and ways of resolving the dispute - This is a special right of the mediator that corresponds to the expectation of him being skilled and professional, in order to succeed in finding the right alternatives that guarantee the achievement of the agreement between the parties to the conflict.²¹ His ideas should help the parties to reach functional solutions that are in the best interest of their common interests, reduce the extent of conflicts between the parties, improve communication between them and promote the development of perspective processes for themselves (Hajdari, 2016, p. 606). Nevertheless, it is clear that the parties are independent in deciding the issue.

c) Contacting the parties to find alternatives for resolving the dispute - In order to reach a resolution in the existing conflict, the mediator has been granted the opportunity to develop concrete contacts with the parties involved in the conflict. Legal solutions in Kosovo, Albania and Montenegro²² offer all the possibilities to develop contacts with both parties simultaneously, but when they deem it necessary, they can also hold separate meetings with them. Such

¹⁸ The mediator also has a specific role in informing the referring authorities of the failure to reach an agreement, in order to open the way for them to proceed further in the case.

¹⁹ The place of application of mediation can be the headquarters of the mediator and any other environment. While the time of implementation of mediation is expected to be not related to any other obligation of the parties and the mediator, for example, work, or vocational training.

²⁰ Virtual mediation sessions, Kosovo Judicial Council. Available at <https://www.gjyqesori-rks.org/ndermjetesimi/>

²¹ Given that this is a flexible procedure, it is quite clear that alternatives to resolving the dispute can also come from the parties involved in the conflict.

²² Article 12 par. 6 of the LMK, Article 18 par. 1 of LNZMSH and Article 25 par. 2 ZPCG.

meetings usually take place when joint meetings turn out to be protracted, inefficient and unsuccessful in reaching an agreement (Hajdari, 2016, p. 608).

d) Remuneration for the work done - In the entirety of the rights of the mediator, the remuneration that belongs to him for the implementation of the mediation procedure occupies an important place. According to article 19 par.1 of the law of Kosovo, article 9 par.1 of the law of Albania and article 39 pa. 3 of the law of Montenegro²³ the remuneration for the implementation of the mediation procedure is paid to the mediator by the parties involved in mediation.²⁴

6.3 Mediator obligations

In addition to rights, mediators also have a number of obligations. The obligations assigned to mediators by the relevant laws of different countries, in their entirety, serve the efficiency of the procedure, and in particular serve the concept of realization of the rights of the parties involved in mediation. Among the most important obligations of the mediator are considered to be:

a) Respect for legal solutions - The mediation procedure, like any other procedure that is a basis for resolving disputes between the parties, is regulated by concrete and substantive legal norms. The norms related to the activity of the mediator are of an imperative nature. This means that the mediator, in the exercise of authorized actions, has the obligation to respect each legal solution related to mediation and the exercise of his responsibilities.

b) Avoidance of conflict of interest - For the mediator to be able to implement mediation with objectivity and impartiality, he must not have any conflict of interest in relation to the case (case and parties). This means a lack of sympathy, antipathy, bias, prejudice, non-objectivity, “deficiencies which can lead to an avoidance of anything that serves any interest of any of the parties.” (Hajdari, 2013, p. 98). All this makes clear the fact that the neutrality of the mediator towards the parties is important. For such purposes, the law of Kosovo (Article 18), the law of Albania (Article 11) and the Regulation of the Montenegro Mediator Training Program (Article 3 par.1. 5 and par.2.3) explicitly require the avoidance of conflict of interest.

In the case of Kosovo and Albania, the relevant laws require the mediator to take care of the avoidance of conflict of interest throughout the mediation procedure, with the obligation that when such a conflict exists, they should immediately terminate such a procedure. In the case of Montenegro, the

²³ See also Article 10 ZPCG.

²⁴ According to the law of Kosovo and the law of Montenegro, the parties make the payment of the remuneration for intermediaries jointly and proportionally, while according to the law of Albania, they make the remuneration in question in the manner specified in the mediation agreement signed by them. Of course, each of these solutions finds the desired format of implementation, but I consider that the solution of Albania offers greater functionality, as they solve the issue in question when they conclude the mediation agreement.

above regulation (the law does not go at all into addressing the conflict of interest) obliges that, on the first day of training of mediators, they be notified of the duty of avoiding such conflict, without giving any other explanation, including one that would reflect an obligation to terminate the mediation procedure. However, the law of Montenegro, in article 8, imposes the obligation on the mediator to have an impartial approach to the parties. Regarding this issue, the model followed by Kosovo and Albania, compared to that of Montenegro, are considered clearer and closer to the spirit of this alternative procedure.

c) Maintaining data discretion - As a rule, mediation is a transparent procedure. The parties are more open in presenting the facts related to the existing conflict between them. Therefore, with the aim that they do this through the disclosure of even the smallest details of the circumstances related to the dispute, and on this basis to create the conditions for shaping the best ideas of dispute resolution by the mediator, the laws of Kosovo, Albania and Montenegro explicitly require them to maintain the discretion of the mediation data.²⁵

Montenegrin law obliges the mediator to destroy any entries made in the mediation procedure after its completion, which is considered a proper solution,²⁶ and the laws of Kosovo and Albania allow the possibility of non-compliance with this obligation when the parties agree, which, in case of failure of mediation, data may be functional in standard criminal proceedings when it is authorized to be applied.

d) Vocational training - A successful mediation requires knowledge, dedication and professionalism from the mediator. The relevant laws of Kosovo, Albania and Montenegro have imposed the obligation on mediators for vocational training. Specifically, the law of Kosovo (article 20 par.2) obliges mediators to continuously attend trainings to be enriched with new knowledge for the practice of mediation; the law of Albania (article 5 par.1.ç) within the conditions for mediators, requires them to have completed vocational training programs, and the law of Montenegro (Article 13 par. 1 and 2) also requires mediators to complete the relevant training program. The solutions of Albania and Montenegro address the issue of vocational training of mediators only in terms of stages until a person is licensed and registered as a mediator and not continuing education, while the law of Kosovo, which in this regard is considered more advanced, sees the issue of vocational training from the prism of the future, particularly the training of mediators in new knowledge of the developments of law and science.

e) Informing the court and the prosecution about the termination and completion of mediation – It is required that the mediation procedure be concluded within the deadlines set by law. The law also defines the actions to

²⁵ The mediator, who during the exercise of his duty, illegally reveals the official secret or in any form abuses the official duty is subject to criminal liability (Article 26 of the LMK).

²⁶ Article 7 par.2 ZPCG.

be taken in situations when these deadlines pass without any result. In response to this, the legislatures of different countries, including Kosovo and Albania, have determined the obligation of the mediator to inform the referrer concerning the termination and completion of mediation. The law of Kosovo (Article 17 par.2) obliges the mediator through the mediation clerk to inform the prosecution and the court about the termination and completion of the mediation procedure, "respectively for the successful completion and failure of reaching an agreement" (Sahiti, 2014, p. 571). The law of Albania (article 11 par. 6) obliges the mediator to inform the court, the prosecution and the arbitration concerning the completion of the mediation procedure. The law of Montenegro (article 35) specifies the ways to terminate the mediation without defining at all the obligation to inform the referrer, although article 9 par.2 of this law clearly admots to the possibility of applying the court procedure when the mediation agreement fails to be reached. In the case of Kosovo and Albania, this obligation for the mediator seems clear, while this does not seem so in the case of Montenegro, an issue which could be resolved in the framework of amendments and supplementations to the relevant law.

f) Respecting the deadlines for resolving the dispute - The laws on mediation of Kosovo, Albania and Montenegro provide concrete deadlines within which the issues referred for mediation should be resolved. The deadlines of the mediator are considered to be of an imperative nature, which means that they must be complied with. This is due to the fact that their issuance, except when their extension may be authorized, has the effect of terminating the mediation procedure without results. Therefore, it is the mediator who should take care of respecting such deadlines, anticipating his activities in a timely chronology within the compiled mediation plan.

g) Sending the signed agreement to the prosecutor's office or court - The agreement reached and signed by the parties is equivalent to a court decision. Being such, it is natural that the legislature in Kosovo, to some extent also in Albania and indirectly in Montenegro, by law provide for the obligation of the mediator to send such an agreement to the referrer. Viewed in this regard, the law of Kosovo, Article 15 paragraphs 1 and 2, which is more advanced in this matter, defines the obligation of the mediator to send the the agreement, signed by the parties, to the court and the prosecution. The law of Albania (article 22 par. 4) stipulates that a copy of the agreement be kept by the mediator, who is obliged to administer it, which, although not stated decisively, implies that they will also notify the referrer, respectively the court or the prosecution. The law of Montenegro (Article 9) in the way it is formulated, only leaves the possibility of understanding the obligation of the mediator to send the signed mediation agreement to the referrer, as the issuance of deadlines for reaching the agreement and the termination of the mediation procedure leaves the possibility of conducting proceedings before the prosecution or the court.

An obligations of the mediators refers to the issue of respect for human rights specified in the relevant international acts. This is essential as insecurity and human rights violations will undermine confidence in the peace process

and may affect the dissolution of any agreement (William, 2005, p.3; Bush, 1989, pp. 259-260).

7. Revocation of mediator's license

The importance of the personality of the mediator in the mediation procedure has dictated the need for the law, in addition to specifying the concrete conditions for licensing, to determine the conditions for its delicensing. Kosovo, Albania and Montenegro with their respective laws have clearly defined the cases in which the license of the mediator can be revoked. According to the law of Kosovo (article 22 par. 5), the Minister of Justice will revoke the license of a mediator if criminal proceedings have been initiated against him; if he has been convicted by a final judgment of a criminal offense; or has committed a serious violation of the Code of Ethics. Such a decision is of a final nature for the administrative procedure. According to the law of Albania (article 6 par. 1) the Commission for Licensing of Mediators will revoke the license of a mediator in cases when they resign at their request from exercising the profession of mediator; when they lose or are limited in their ability to act; when convicted by a final decision of a criminal offense committed intentionally; or when they violate the provisions of this law or the Code of Ethics. According to Montenegrin law (Article 17 par. 1), the Ministry of Justice will revoke the license of a mediator if it is not renewed in a timely manner; at the request of the mediator; when it is proven that at the time of issuing the license the mediator had not met the conditions for licensing, when it is proven that the mediator no longer meets the conditions for mediation and if it is proven that the mediator performs work in violation of the law.

As it turns out, the law of Albania and Montenegro have a much greater approximation in terms of specifying the conditions of license revocation, compared to the law of Kosovo which in this respect is much more general. A combination of these conditions, taking measurable criteria from each of these countries would be the appropriate solution in specifying the license revocation conditions. Thus, from the law of Kosovo and Albania, I consider important the consideration of the criterion of being convicted by a final court decision for a criminal offence and the violation of the Code of Ethics, which should be a serious violation. Meanwhile, the following criteria are considered by the law of Albania and Montenegro, as a combination that serves a proper solution: the request of the mediator, the expiration of the license, the loss of the ability to act, the non-fulfilment of the licensing conditions at the time of issuance of the license, verification of non-fulfilment of conditions at the time of license revocation, and when the mediators exercise their duty in violation of the law.

8. Conclusion

The results of this study prove that from the legal point of view, in terms of position and role of mediator, although Kosovo has made amendment. This situation is highlighted through comparisons made to the law of Kosovo with the law of Albania and Montenegro. The study notes that the role of the mediator in the mediation procedure is key in achieving the resolution of the parties' disputes. Such a role turns out to be evident from the moment of appointment of the mediator until the eventual agreement between the parties.

The study also highlights the fact that Kosovo has marked great success in adapting domestic law to EU standards, and that, in the context of the issues addressed, it has accorded a number of advanced legal solutions, even beyond those of Albania and Montenegro. Despite this, it is evident that the law of Kosovo, in some cases, contains less advanced solutions than the law of Albania and Montenegro. Unlike Kosovo, Albania and Montenegro, as criteria for licensing a person as a mediator, require the ability to act and the possession of a moral and professional reputation, while only Montenegro provides as criteria of five years of experience and not imposing any security measure that prevents them from performing their profession, activity or duty, which are considered as advanced criteria that in content would enrich Kosovo law.

Also, when it comes to the working principles of the mediator, although the laws of these three countries contain similar principles, the law of Albania provides the principle of efficiency and professionalism of the mediator, which is considered a valuable principle that would be good have included in the law of Kosovo and Montenegro. Even on the issue of the mediator's obligation to maintain the discretion of the mediation data, it is considered reasonable for Kosovo law to adapt the solution contained in the Montenegrin law which obliges the mediator to destroy any notes made in the procedure of mediation after its completion, rather than leaving the possibility of their use (although this in Kosovo is allowed only when the parties agree to do so).

Finally, in connection with the revocation of the license, the two criteria for revoking the license defined by the law of Kosovo do not cover all the important criteria. It would be preferable for Kosovo in the future to include in its law some additional criteria contained in the law of Albania and Montenegro. Such criteria might include the request of the mediator, expiration of the license, loss of ability to act, non-fulfilment of licensing conditions at the time of issuance of the license, verification of non-fulfilment of conditions at the time of license revocation, and when the mediators exercise their duty in violation of the law.

References

I. Books and Journals

- Alexander O., Alan W., Jan O., & Kristofer M. (2014). Selecting your mediator and drafting the mediation agreement, Global, (11).
- Bahtiri, B. and Qerimi, I. (2014). Mediation as a way of alternative resolution of disputes in Kosovo. *ILIRIA International Review*, 4(1), 291-322.
- Bush, R. A. B. (1989). Efficiency and protection, or empowerment and recognition: The mediator's role and ethical standards in mediation. *Fla. L. Rev.*, 41, 253.
- Duss-von Werdt, J. (2008). Einführung in die Mediation, Heidelberg.
- Gielkens, L. (2007). Mehr als Sieg und Niederlage: Mediation als Erziehung zum Gewaltverzicht in der Jugendpastoral (Vol. 11). LIT Verlag Münster, Berlin.
- Hajdari A. (2013). The right of criminal procedure, The special part, Prishtina.
- Hajdari A. (2014). The right of criminal procedure, General part, Prishtina.
- Hajdari A. (2016). The code of the Penal procedure, Commentary, Prishtina.
- Islami, H., Hoxha, A., & Panda I. (2003). *Criminal procedure, Commentary*, Tirana, 2003.
- Jönsson, Ch., Aggestam, K. (2009). Inforcore Definitions "Mediator", Hellenic Foundation for European and Foreign Policy, pp. 33-51, Greece.
- Judicial Council of Virginia (2011), Retrieved on 12.08.2022, from: <https://www.vacourts.gov/courtadmin/aoc/djs/programs/drs/mediation/soe.pdf>
- Krasniqi, M., & Hajdari, A. (2012). Mediation as a new approach to the alternative solution of the criminal case, Advocacy, Bulletin of the Chamber of Advocates of Kosovo, no. 13, Prishtina.
- Mediators Ethics Guidelines. Retrieved on 21.06.2022, from: <https://www.jamsadr.com/mediators-ethics/> (Retrieved on: 21.06.2022).
- Nosyreva, E. I. (2005). Alternativnoe razreshenie sporov v SSHA [Alternative Dispute Resolution in USA]. Moskva: Gorodec.
- Pfeifer W. (2009). Art. „Konflikt“, In: Etymologisches Wörterbuch des Deutschen.
- Sahiti E., & Murati R. (2013). *The right of criminal procedure*, Prishtina.
- Sahiti E., Murati R., & Elshani Xh. (2014). Code of Criminal Procedure of Kosovo, Commentary, Prishtina.
- Salihu I. (2018). Criminal law for minors, Prishtina.
- Sheldon, S. (2019). *Reframing the Role of Mediator – Part 2*, Mediators' Many Hats, International Academy of Mediators, p. 13. Retrieved on

- 12.06.2022, from: <https://iamed.org/archive/reframing-the-role-of-mediator-part-2-mediators-many-hats/>
- Sokoli, A. (2014): *Administrative Procedural Law*, Prishtina.
- Standards of ethics and professional responsibility for certified mediators, Office of the Executive Secretary of the Supreme Court of Virginia.
- Teff-Seker Y, Mackelworth PC, Vega Fernández T, McManus J, Nam J, Tuda AO and Holcer D (2020) Do Alternative Dispute Resolution (ADR) and Track Two Processes Support Transboundary Marine Conservation? Lessons From Six Case Studies of Maritime Disputes. *Front. Mar. Sci.* 7:593265. Doi: 10.3389/fmars.2020.593265
- Who can be a mediator and what is his role. The Judicial Council of Kosovo. Retrieved on: 01.07.2022, from: <https://www.gjyqesorirks.org/ndermjetesimi/>
- William G. O'Neill (2005). *Mediation and Human Rights*, Available at <https://www.hdcentre.org/wp-content/uploads/2016/07/MediationandHumanRights-July-2005.pdf> (Date accessed: 03.08.2022)
- Žalėnienė, I., & Tvaronavičienė, A. (2010). The Main features and development trends of mediation in Lithuania: the opportunities for lawyers. *Jurisprudencija*, (1, 119), 227-242.

II. Laws

- Law No. 10 385/2011 on mediation in the settlement of disputes in Albania, Republic of Albania.
- Law no. 06/L-009 on Mediation in Kosovo, Republic of Kosovo.
- Zakon br. 29/12 o mirovanje Crne Gore (Law No.29/12 on retirement, Republic of Montenegro).