RESTORATIVE JUSTICE UNDER THE LEGISLATION OF THE REPUBLIC OF KOSOVO

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ABSTRACT

Objectives: Restorative justice is also recognized and applied in Kosovo legislation and practice. As a process of involvement in the agreement of the perpetrator and the victim, always with the commitment and support of the mediator, its goal results in the achievement of compensation in relation to the victim. Therefore, its main goal remains the restoration of justice and the elimination of the damage caused as much as possible.

Methods: To achieve the state objective in this scientific paper, I will use a legal-normative method, statistical method.

Result: In addition, we must emphasize that mediation as an alternative procedure for resolving disputes between subjects, namely as an extrajudicial activity, offers the possibility not only of solving the presented problem quickly, but at the same time is a direct contributor of creating a relaxing relationship between the parties involved in this whole process.

Conclusion: In conclusion restorative justice has a wide application in the legislation in force in the Republic of Kosovo in the criminal field and the application of restorative justice is being implemented more and more, because it is showing a legal effect for many reasons; the parties are not taking much time in solving their cases, the parties are free to choose the mediator and they are free to decide where the meetings will be held, and the other advantage is that the mediation agreement has the legal force of a judicial decision and produces legal effect and is enforceable.

Keywords: Restorative Justice, Compensation, Kosovar Practice, Legislation of The Republic of Kosovo.

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e a outra vantagem é que o acordo de mediação tem a força legal de uma decisão judicial e produz efeito legal e é executória

**Palavras-chave:** Justiça Reparadora, Compensação, Prática Kosovar, Legislação da República do Kosovo.

**JUSTICIA RESTAURATIVA CON ARREGLO A LA LEGISLACIÓN DE LA REPÚBLICA DE KOSOVO**

**RESUMEN**

**Objetivos:** La justicia restaurativa también se reconoce y aplica en la legislación y la práctica de Kosovo. Como proceso de implicación en el acuerdo del autor y la víctima, siempre con el compromiso y apoyo del mediador, su objetivo se traduce en el logro de una indemnización en relación con la víctima. Por lo tanto, su objetivo principal sigue siendo la restauración de la justicia y la eliminación de los daños causados en la medida de lo posible.

**Métodos:** Para lograr el objetivo estatal en este trabajo científico, utilizaré un método jurídico-normativo, método estadístico.

**Resultado:** Además, debemos enfatizar que la mediación como procedimiento alternativo para resolver disputas entre sujetos, es decir, como una actividad extrajudicial, ofrece la posibilidad no solo de resolver el problema presentado rápidamente, sino que al mismo tiempo es un contribuyente directo de crear una relación relajante entre las partes involucradas en todo este proceso.

**Conclusión:** En conclusión la justicia restaurativa tiene una amplia aplicación en la legislación vigente en la República de Kosovo en el ámbito penal y la aplicación de la justicia restaurativa se está implementando cada vez más, porque está mostrando un efecto legal por muchas razones; las partes no están tomando mucho tiempo en resolver sus casos, las partes son libres de elegir al mediador y las partes son libres de decidir dónde se celebrarán las reuniones, y la otra ventaja es que el acuerdo de mediación tiene la fuerza legal de una decisión judicial y produce efecto legal y es ejecutable.

**Palabras clave:** Justicia Restaurativa, Indemnización, Práctica Kosovar, Legislación de la República de Kosovo.

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**1 METHODS APPLIED IN THIS STUDY**

- Normative legal method - in this paper I will use this method because through it I will describe in details the legal numbers which address the matter of restorative justice for which criminal offense is allowed the application of restorative justice.

- Statistical method - In this paper, I will also use statistical methods where I will present data in tabular form on how restorative justice is applied in the courts of the first level or basic courts in Kosovo.
1.1 Research Plan

1.1.1 This research is divided into two main chapters


In this context, through our study, in the following we will present: what is restorative justice, what is its legal basis, the purpose but also the areas of justice where this justice can be applied, in which situations it is allowed to use such a legal possibility of choosing disputes between subjects, as well as how this form of dispute resolution is applied in Kosovo practice.

2 Introduction

More and more people are talking about restorative justice because there is always access to the justice system in alternative ways and not in the classic way, and this is best done with the application of restorative justice where both active subjects participate in this process, such as the person who considered the perpetrator but also the injured party. (Flora, Miami| v.12, n. 3| pages: 01-15| e02459 |2024). There have been initiatives to write about restorative justice since the end of the 20th century, but after the nineties, a wider movement has been observed to give the definition of restorative justice that has to do with the reconciliation between the perpetrator and the victim by establishing reconciliation between the two parties, we can also achieve the victim's compensation through the application of restorative justice.

Even in the international field, since the end of the 20th century, the first initiatives for restorative justice have started; the Committee of the Council of Europe for Restorative Justice has issued a special recommendation for mediation in the criminal sphere. This committee has approved the regulation according to the sign 99/19 of September 15, 1999, with which regulation has defined the exact notion of mediation, giving explanations regarding the functionality of mediation, the services that mediation offers and the realization of mediation. (Recommendation no. 19/99 of the Committee of Ministers of the Council of Europe, 1999)

Europe's final report on restorative justice and crime prevention, published in 2010, places special emphasis on restorative justice, especially for minors, through this procedure it
is insisted that minor’s repair the damage caused and not be punished, so always showing a special care in the criminal procedural position when dealing with minors. (Final report of the European project Restorative justice and crime prevention, 2010, p. 3)

Restorative justice has not been an unknown term for the citizens of Kosovo because since olden days there have been reconciliation efforts between the perpetrator and the victim and the phenomenon of reconciliation between the two parties and compensation has also been discussed in Albanian customary law as in the canon of Lek Duklagjini, Canon of Laberia, etc.

The restorative justice gradually has begun to take a very important place in Kosovo legislation, both in the material and procedural criminal field, but the application of mediation also takes an important place in the civil field, especially in family matters. Mediation has been mentioned in many university books, a special chapter on mediation has been dedicated to better understand the concept and importance of restorative justice. Achieving reconciliation between the perpetrator and the victim and compensating the victim, with their free will, which is a condition to achieve the goal of mediation, we can say that the postulates of restorative justice are met. (Victimology Ragip Halili, 2010, p. 164)

3 RESTORATIVE JUSTICE UNDER THE LEGISLATION OF THE REPUBLIC OF KOSOVO

3.1 RESTORATIVE JUSTICE ACCORDING TO LAW ON MEDIATION

In the Republic of Kosovo, restorative justice has been written in many scientific books in the legal field, however the biggest progress in terms of restorative justice has been made in 2008, by structuring all the legal norms regarding restorative justice, also seeing that the citizens as well as the law enforcement bodies are becoming more and more familiar with the mediation procedure, it was deemed very necessary to expand this law with some articles, and thus, on August 20, 2018, the new law on mediation is published in the official newspaper.

This Law regulates the manner, functioning, procedures and organization of mediation, as well as the rights, duties and responsibilities of mediators in terms of facilitating access to alternative settlement of disputes and contests, and also promotes their amicable settlement. The provisions of this Law shall be applied in mediation procedure of contested relations of subjects of the law in legal-property, commercial, family, labour relations and other cases of ownership disputes such as rights related to acquiring ownership rights through contractual relations or rights acquired by virtue of inheritance, bankruptcy procedures, and other civil,
administrative and criminal relations. In family matters, especially child custody and alimony, the provisions of this law are binding, which means that it obliges judges to refer these cases to mediation procedures.

How can the mediation procedure be initiated - this law has given many answers regarding many questions that can be raised related to restorative justice. According to the mediation law, the mediation procedure can be initiated by the parties themselves, which are otherwise known as a self-initiated procedure, by court and by prosecution office.

The mediation is conducted by the independent mediator. These sessions are held in the places where the parties themselves choose, but they can also be held in the mediator's office. Reaching the mediation agreement is a great triumph for the parties themselves as well as the mediator.

The purpose of the law on mediation in its application in judicial practice reflects the fact that the crime and the victimizing case is considered as a dispute between individuals, which reflects in society and the state, not as a relationship between the state and the perpetrator or the state and the victim. The goal of mediation is to reconcile the perpetrator and the victim and to compensate the victim for the damage caused. Creating an atmosphere and environment suitable for achieving reconciliation and creating a normal and healthy state between the victim and the perpetrator. The agreement reached in a peaceful way for adequate compensation eliminates the possibility of the recurrence of hostilities and the appearance of a chain of new crimes between them. The successful implementation of restorative justice can also be considered a preventive measure against criminality and victimhood in general. (Law on mediation, 2018, p. 49)

4 THEORETICAL FRAMEWORK

Criminal Offenses suitable for mediation. In the criminal field, restorative justice or mediation is a new institution of resolving disputes between parties outside the court. Mediation is considered as an alternative procedure for resolving disputes between the perpetrator and the victim. This procedure can be applied to criminal offenses which are not punishable by more than three years, (excluding cases of Domestic Violence). (Sahiti.Ejup, 2016, p. 330)

The mediation procedure in the criminal case can be initiated, before the indictment is filed, according to the prosecutor's assessment, considering the circumstances and nature of the case, is it appropriate to refer to the mediation procedure, while after the indictment is filed
according to the judge's assessment, with the proposal of the prosecutor or with the proposal/agreement of the injured party and the defendant to resolve their case in the mediation procedure, refers such matter to mediation. (Azem Hajdari, 2022, p. 448).

The mediation shall be conducted by an independent mediator. The mediator shall be obliged to accept a case referred by the state prosecutor and shall be obliged to take measures to ensure the contents of the agreement are proportionate to the seriousness and consequences of the act.

An agreement may only be reached through mediation with the consent of the defendant and the injured party. On receiving notification that an agreement has been reached, the state prosecutor shall dismiss the criminal report. While upon receiving the agreement, the judge issues a Decision where he accepts the agreement and closes the case. The mediator is obliged to constantly inform the prosecutor or the judge in the event that the mediation procedure fails, and in cases where this procedure fails, the case is returned to the prosecutor or judge and the case starts over by the prosecution or court. Therefore the Criminal Procedure Code of Kosovo, as well as the law on mediation, has given a three-month deadline for reaching an agreement. (Criminal Procedure Code, 2012, p. 104).

Restorative justice application is not allowed for every criminal offense, therefore in this paper I will list the criminal offenses provided in the Criminal Code of the Republic of Kosovo that can be considered more eligible to be referred to mediation. (https://www.gjyqesori-rks.org/mediation/?lang=en, n.d.)

- Threat, article 181 par.1 and 2 of the CCRK;
- Harassment, article 182 par.1;
- Assault, article 184 par.1;
- Light bodily injury, article 185 par.1;
- Participation in a brawl, Article 187;
- Coercion, article 192 par.1;
- Violation of the right to strike, Article 221;
- Misuse of the right to strike, Article 222;
- Theft of services, Article 314;
- Misappropriation of another’s property, Article 318;
- Taking possession of movable property, Article 319;
- Forest theft, Article 349;
- Destroying, damaging or removing public installations, article 357 par. 2;
- Failure to avoid danger, Article 362;
• Endangering public traffic, article 370 par.1;
• Failure to participate in averting a public danger, Article 405;
• Removing or damaging official stamps or marks, Article 406;
• Taking or destroying official stamps or official documents, Article 407;
• Self justice, article 410 par.1 as well as other criminal offenses that are considered suitable for mediation (Criminal Code of the Republic of Kosovo, 2019).

4.1 IMPLEMENTATION OF RESTORATIVE JUSTICE IN JUVENILE CRIMINAL CASES

The mediation procedure or restorative justice takes an important place in cases where we are dealing with juvenile delinquents and according to court practice in these cases this procedure is proving to be quite successful because juveniles are not being stigmatized through prosecutorial and judicial procedures, because for their age the very fact that they are in front of a prosecutor's office or a judge is challenging enough for them to cope with these situations. Therefore, as in many countries of Europe but also of the world, more and more juvenile cases are being referred to mediation procedures due to the fact that it is a more affordable procedure for juveniles and they are freer to express themselves before the mediator. As we wrote above in this paper, even in cases involving juveniles, mediation sessions can be held outside the institutional offices for mediation, for the purpose that minors are not caused psychological distress and are as free as possible in reaching an agreement between them.

Therefore, restorative justice or mediation holds an important place in the legal provisions, especially in the Juvenile Justice Code, respectively, Article 9 talks about mediation and how this procedure should be developed. Initially, the state prosecutor for minors shall propose mediation if he considers that it will be more appropriate given the nature of the criminal offense, the circumstances in which the criminal offense was committed, the history of the minor, the possibility of returning to normal relations in between the minor and the injured party, the possibility of reducing the damage of the injured party, the possibility of rehabilitating the minor and re-integrating him into society. Mediation shall be proposed to the parties in the procedure if they have expressed their consent for mediation. (Juvenile Justice Code, 2010)

The juvenile and the injured party by agreement shall assign the mediator, in case they are not able to reach an agreement, the mediator by a decision shall be appointed by the juvenile State Prosecutor from the list of mediators in compliance with the Law on Mediation as well as with the provisions of the present Code.
The mediation procedure for minors has shorter time limits until reaching an agreement. The time limit for reaching an agreement according to the juvenile justice code is thirty (30) days. If the mediation procedure is unsuccessful, then the proceeding shall continue from where it was suspended. The mediation procedure for juveniles is charge free for the parties. The costs of the mediation procedure, including payment of the mediator, whilst in cases when the mediator is appointed by the State Prosecutor for juveniles, the costs of the procedure shall be paid from the budget of Kosovo Prosecutorial Council.

The mediation procedure shall be finalized when: mediation is completed successfully; the timeframe of thirty (30) days has passed; mediator considers that continuing the mediation procedure is not possible or unreasonable; the juvenile or injured party states that they want to terminate the procedure.

When mediation is successful, the criminal report shall be dismissed by a ruling and the State Prosecutor for juveniles shall inform the parties about their decision. In case the parties reach an agreement on compensation of the damage, then it shall be submitted to the Juvenile State Prosecutor, and if he approves it, the agreement shall constitute an executive title and shall be executed in compliance with the applicable Law. (Juvenile Justice Code in Kosovo 2018, 2018, p. 7). Restorative justice for minors is called Diversion and from this part of the it is achieved that there is no judicial process that minors are not excluded from trial processes, but through diversions of approval between the minor child who is presented as an active subject and the injured child. (Reba Yulia, Miami| v.12, n. 1|pages: 01-22|e02456|2024)

4.2 IMPLEMENTATION OF RESTORATIVE JUSTICE IN THE FIELD OF CIVIL LAW IN KOSOVO

Mediation and restorative justice, or better to say, judicial reconciliation, is also widely used in civil disputes, such as property disputes, family matters, child custody and alimony matters, administrative matters, etc. For family, child custody and alimony matters, the provisions of the law on mediation have an obligatory character, which means that this provision obliges the courts to refer these matters to mediation procedures. Civil judges may refer cases for mediation until the preparatory session at the latest. As in the criminal field, also in the civil field, the resolution of the dispute through mediation can be proposed by the involved parties if they agree. Such a proposition the involved parties can do any time until the end of the main hearing session. (Abdullah, 2007)
In court settlement can be included the entire charge or just a part of it. The court brings an order and approves legal settlement. The settlement is included in the minutes of the meeting. The court settlement is concluded at the moment when the parties read minutes of the meeting on settlement and sign it.

Can the court settlement be annulled; the provisions of the law on contested procedure clarify this part that the Court settlement can be attacked only by claim. Court settlement is annulled if it reached by flattering, deceit, or force. Court settlement is annulled also if in it took part a party with no procedural capability, if such a party was not represented by a legal representative, or the person did not have necessary authorization to act on special procedures. The legal deadlines for submitting the law-suit for the annulment of the court settlement must be respected; Appeal about the court settlement annulment can be raised within thirty (30) days from the moment it is known about the cause of annulment, and the last time during 1 year from the day when the court settlement ended. (Law on contested procedure, 2008, p. 81)

4.3 MEDIATION IN COURT PRACTICE

With the issuance of the new law on mediation, a great deal of work has been done in terms of the legislation of the state of Kosovo, because through the application of this law in the applicable legal institutions, the number of cases is being reduced and procedural efficiency is being achieved and the saving of time that citizens are satisfied with this procedure because their cases are being resolved.

As for the implementation of mediation or restorative justice in the judicial system, it is still not being implemented at the appropriate level by the judges of the Basic Courts of Kosovo. Civil field judges traditionally refer fewer cases to mediation and are more reluctant to implement restorative justice because there are several factors that are influencing the lack of proper implementation of mediation, and I am listing a few:

• Lack of referent mediation officers in the courts/prosecutors for the acceptance of referred cases, the administration of the referral process and follow-up procedures of the mediation related to the court/prosecutors;

• Creation and provision of work spaces within the courts/prosecutors' offices for mediation; the work of the mediation referent and the administration, the conduct of mediation sessions and procedures related to the court/prosecutor's office.
Below I will elaborate in tabular form in the Basic Courts in several cities of Kosovo such as: Ferizaj, Gjakova, Gjilan, Mitrovica, Peja, Pristina, Prizren for the time period of 2019 the number of referred, resolved and unresolved cases in mediation.

### Table 1

**Summary of year 2019 Mediation Statistics**

<table>
<thead>
<tr>
<th>Basic Courts »</th>
<th>Ferizaj</th>
<th>Gjakova</th>
<th>Gjilan</th>
<th>Mitrovica</th>
<th>Peja</th>
<th>Pristina</th>
<th>Prizren</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>REFERRED TO MEDIATION</td>
<td>654</td>
<td>234</td>
<td>518</td>
<td>516</td>
<td>848</td>
<td>1142</td>
<td>1049</td>
<td>4961</td>
</tr>
<tr>
<td>RESOLVED IN MEDIATION</td>
<td>638</td>
<td>210</td>
<td>350</td>
<td>507</td>
<td>404</td>
<td>947</td>
<td>880</td>
<td>3936</td>
</tr>
<tr>
<td>UNRESOLVED IN MEDIATION</td>
<td>9</td>
<td>8</td>
<td>128</td>
<td>9</td>
<td>444</td>
<td>131</td>
<td>59</td>
<td>788</td>
</tr>
</tbody>
</table>

From this table it can be seen that the basic courts of the city of Pristina mostly referred cases in the mediation procedure, then we have the court of Prizren, which is the second from the basic courts that referred cases to mediation, the third is the basic court in the city of Peja, which has referred cases in the mediation procedure after Peja, we have the basic court of the city of Ferizaj, then of the city of Gjilan and finally we have the basic court of Gjakova. The total number of cases sent to the mediation procedure by the basic courts in the above mentioned cities is 4961 (four thousand nine hundred and sixty one) cases. (md.rks-gov.net, 2020)

The total number of cases solved in this procedure in the basic courts in the above mentioned cities is 3936 (three thousand nine hundred and thirty-six) cases and the total number of unresolved cases in these courts is 788 (seven hundred and eighty-eight).

The spread of COVID-19 has limited the operation and outputs of a number of departments and sectors, and in some cases has resulted in the suspension of their activities. As a result, the 2020 mediation statistics have not yet been fully and properly collected and confirmed. But the findings from the interview and the communication of the publisher with the designated mediation referents in six Basic Courts and the Basic Prosecutor's Office show that, in the period January - March, there were approximately 1392 cases referred by the Basic Courts and the Basic Prosecutor's Office to mediation at the country level from which about 828 have been successfully mediated and around 75 have not had a successful conclusion, the remaining number of cases are in process. ((http://mediation-mitrovica.org/-Veshtrim-dhe-Rekomandime.pdf, 2020, p. 39)
5 CONCLUSION

As we could see in this paper, restorative justice has a wide application in the legislation in force in the Republic of Kosovo in the criminal field and the application of restorative justice is being implemented more and more, because it is showing a legal effect for many reasons; the parties are not taking much time in solving their cases, the parties are free to choose the mediator and the they are free to decide where the meetings will be held, and the other advantage is that the mediation agreement has the legal force of a judicial decision and produces legal effect and is enforceable.

At the moment when a legal case in the criminal aspect to which I am focused more on in this paper is concluded according to restorative justice where the perpetrator and the victim are able to agree in the mediation procedure, that is, the agreement is reached and signed by both parties and the victim is compensated, then we have a legal success because the case has been successfully concluded.

The application of restorative justice finds also a special and very important place in the cases dealing with minors, that this procedure has shown very good results, that the legal effect has been achieved in the prevention of crime, which is also the duty of justice. In the judicial practice in Kosovo in criminal cases, it is constantly seen that restorative justice is being used more and more every day because it is showing good results and the number of court cases is being reduced the more restorative justice is being applied.

However, presenting civil cases are presenting as an issue because the judges do not have the courage to refer these cases in this procedure, therefore we are giving some recommendations that should be followed by the legal actors.

6 RECOMMENDATIONS

- Judges of the Basic Courts must respect the provisions of the Law on Mediation that deal with mandatory mediation, which obliges them to refer certain cases of a civil nature to mediation;
- Presidents of Basic Courts and Chief Prosecutors of Basic Prosecutions should encourage judges and prosecutors to generally refer more cases to mediation;
- The Judicial Council of Kosovo and the Basic Courts must undertake the necessary measures to recruit and/or appoint mediation referents (with sole responsibility for mediation). The number of mediation referents should be increased both in the courts
and in the prosecutor's office in proportion to the workload. External actors/partners can help in this direction through various trainee programs located at mediation "points" within courts and prosecutor's offices;

- Basic Courts and Basic Prosecutor's Offices must provide suitable and sufficient work spaces for mediation related to the court/prosecutor's office (where they are missing).

- By the end of 2023, the Ministry of Justice and external actors/partners should engage and organize capacity building training for Kosovo's licensed mediators;

- Mediators should be more proactive towards the Ministry of Justice, especially when the last mentioned requests information and data in order to create an adequate and representative registry of mediators;

- Those who provide mediation must report on a regular basis to the Kosovo Judicial Council, the Kosovo Prosecutorial Council and the Ministry of Justice and, when they do so, must meet high reporting standards;

- The Judicial Council of Kosovo, the Prosecution Council of Kosovo, the Ministry of Justice and external actors/partners that support mediation should, independently and in cooperation, work to promote mediation and highlight its advantages. This can be done through social and traditional media, various conferences, discussions, round tables, street actions, university lectures, etc;

- Mediation services of courts, prosecutors’ offices, and mediators should be monitored in accordance with the principle of confidentiality and frequent reports to document recent developments, guarantee quality, identify challenges and suggest possible improvements.

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