The Relationship between the Victim and the Perpetrator in the Mediation Procedure

PhD. candidate **Fat MUSTAFI**[1]
Professor **Ismail ZEJNELI**[2]

Abstract

The victim and the victimizer or the criminal are often found in interactions and various interactive relationships The victim and the victimizer in some cases of victimization are always in some relationships and relationships from before, these relationships and relationships can be of various natures, in most cases they are parental relationships, marital relationships, cohabitation or engagement relationships, family or even neighborly love ties.Restorative justice is an approach to justice oriented towards the possible repair of damage caused by a crime or conflict. An essential element of restorative justice is the active involvement of parties, victims, perpetrators, and when appropriate, community members, who voluntarily come together with the help of a mediator to talk about the harm and its consequences, as well as to identify ways to repair them. Restorative justice aims to bring justice to people and considers participation as an important human value that connects people. The focus of restorative justice is on what people perceive as a fair and safe experience in the phase after a crime or conflict has occurred. The purpose of restorative justice is to create a safe environment for sharing feelings (such as fear, anger, sadness) that have arisen as a result of conflict or crime and to talk about possible solutions for repairing the damage.

Keywords: *restorative justice, mediation, victim, perpetrator*.

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1. Introduction

Mediation as a procedure is an alternative (method) of dispute resolution, an extrajudicial activity regulated by law that is carried out voluntarily by the parties.

Mediation provides citizens with a new alternative for resolving their conflicts and disputes, without resorting to the judicial process, at a much lower cost and for a much shorter time, transparently, where the parties themselves decide on obtaining the decision, the resolution of the case and the improvement of the reports.

Very often, people think that the only and most common form of dispute resolution is going to court, which makes a judicial decision on the case, applying legal procedures.

However, not every dispute must necessarily be resolved in court, as the parties to a dispute can often resolve their differences through mediation and avoid litigation.

Restorative justice, or as it is known otherwise, the reconciliation between the perpetrator and the victim, means the reconciliation and compensation of the perpetrator and the victim through mediation, the purpose of which is to achieve adequate compensation and the regulation of relations and a relaxed state between them.

Mediation is regulated in different forms in different countries based on the criminal legislation of the respective states as well as the regulation of the law on mediation, which offenses can be resolved through mediation according to their weight, as the Republic of Kosovo has that offense that passes the criminal sanction, that is, those sentenced to more than 3 years cannot be resolved through mediation, but only through the regular judicial procedure, i.e. the State Prosecutor

[1] Fat Mustafi - Faculty of Law, South East European University, Tetovo, North Macedonia, fm24754@seeu.edu.mk.
[2] Ismail Zejneli - Faculty of Law, South East European University, Tetovo, North Macedonia, i.zejneli@seeu.edu.mk.

and the Judge of the presented criminal case[3].

Restorative justice aims to give a voice to all individual stories and truths to identify points of understanding, sharing, repairing harm and allow parties to create their dialogical truth together.

The most common restorative justice practices are victim-offender mediation, restorative conferences, and peace circles. Victim-offender mediation brings together parties who have been directly affected by the crime in the presence of a mediator who encourages dialogue between them.

2. Historical development of reconciliation

Human society has always reacted to crime; crime and its punishment are phenomena that have accompanied it throughout its existence.

Among the first forms of reaction was 'Taloni', which was expressed in causing the culprit the same damage as he had caused someone else or revenge, which in the primitive community played the role of protecting one tribe from another.

Strengthening of the state and the transition from one stage to another of social development together, toghether with the perfection of the state was processed and further developed through these institutes of law and through the creation of criminal legislation[4].

The main forms of society's response to crime are divided into two periods:

1. Private reaction period and
2. Public-state reaction.

This type of private reaction is realized when two conditions are met:

When there are no laws and in cases where chaos or insufficiency of law prevails.

This form of reaction has prevailed and has appeared in the lives of different tribes all over the world in the form of a 'pain for pain' mentality, revenge, blood feuds, and composition (reconciliation with reward).

Initially, this reaction had an individual character, but later with the development of primitive society and the strengthening of socialization of life, blood-related communities created a common reaction not only to individual people, but also to the tribes that belonged to them, passing the reaction from generation upon generation[5].

Among the well-known forms of private feedback we mention:

Expulsion or banishment from the community, revenge and blood feud, composition or compensation. In this case, the person is forced to live alone, away from members of the family, group, or tribe. The decision for the expulsion could be given to a person, his co-workers, family members, or the whole tribe.

The debts were of different characters such as debt from the tribe, debt from the village, and debt from the territory. Revenge and blood feuds are characteristic of the Balkan countries.

Revenge is causing harm to a person or his property as a reaction to the damage that has resulted from him.

Blood vengeance is a type of revenge, but it consists of washing the blood of the murdered person, i.e. killing him or his family members[6].

Some codes that are mentioned have regulated to the smallest detail the reaction procedures and the relevant conditions of these reactions, such as: The Kanun of Lekë Dukagjini, The Kanun of Skanderbeg, The Kanun of Labëria, etc.

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[3] E. Sahiti & I. Zejneli, *E Drejta e Procedures Penale e R. Maqedonise*, Shkup, 2017, p. 75. See Sikorski, Christian von, and Melanie Saumer. 2020. "Sexual Harassment in Politics. News about Victims' Delayed Sexual Harassment Accusations and Effects on Victim Blaming: A Mediation Model." *Mass Communication and Society* 24 (2): 259–87. doi:10.1080/15205436.2020.1769136.

[4] R. Halili, *Penologjia*, Pristine: University of Prishtina, 2014, p. 27.

[5] Ibid, p. 30.

[6] R. Halili, *Viktimologjia*, Pristine, 2011, p. 54.

3. Principles of mediation

The free will of the parties. The mediation procedure takes place with the free will of parties, expressed orally and in writing, by the legislation in force.

Equality of the Parties. In the mediation procedure, the parties are equal and have rights and obligations in accordance with the legislation in force.

Impartiality and Independence. The mediator during the mediation procedure is completely independent and impartial.

Privacy and confidentiality. The public is excluded from the mediation procedure. The mediation procedure is confidential in nature. Statements and all other information related to the mediation procedure cannot be used as evidence in any other procedure without the approval of the parties. The mediator, the parties and their representatives are obliged to maintain the confidentiality of the mediation procedure unless the parties agree otherwise. The mediation agreement must be consensual[7].

4. Restorative justice in the legal aspect

Restorative Justice has started to be applied in our countries, specifically in South-Eastern Europe after the nineties and after changes in the Constitution and criminal legislation.

The main elements and purpose of Restorative Justice are:

- the fact that the crime and victimizing cases are considered as a conflict between individuals, which reflects in society and the state and not as a relationship between the state and the perpetrator or the state and the victim, the purpose of mediation has to do with the reconciliation of the perpetrator and the victim and the compensation of the victim in all cases, it also has as its purpose the powerful elements of Restorative Justice or Mediation, as these names are synonymous, is the creation of an atmosphere and environment suitable for achieving reconciliation and the creation of a normal state and sound between the perpetrator and the victim. The main goal of mediation is to achieve the measure of prevention or prevention of criminality and victimhood in general[8].

- the provisions of the Law on Mediation are applied in the mediation procedure in the contentious relations of the subjects of law in legal property, commercial, family, labor relations, other cases of property rights disputes, such as the rights related to profit of property rights through contractual relations or acquired through inheritance, bankruptcy procedures, other civil, administrative and criminal relations, in which the parties can freely dispose of their free will, in case it is not foreseen by a special law the exclusive responsibility of the court, the prosecution or another competent body.

The mediation procedure do not apply to cases related to domestic violence, by the Law against Domestic Violence, or to any dispute for which the exclusive responsibility of the court or any other competent body is foreseen.

Mediation in the criminal field is applied in cases where a fine and a prison sentence of up to three (3) years is provided[9].

Mediation is applied in relationships of various and contentious natures but is not limited to the types of disputes as in the following lists.

The initiation of Mediation Procedure can be initiated by parties, the court, the prosecution, or the competent administrative body according to the legislation in force.

Initiation by the parties is when the parties, on their initiative and voluntarily, request that

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[7] For a comparative view see De Mesmaecker, Vicky. 2013. "Victim-Offender Mediation Participants' Opinions on the Restorative Justice Values of Confidentiality, Impartiality and Voluntariness." *Restorative Justice* 1 (3): 334–61. doi:10.5235/20504721.1.3.334; Meyer, Silke, and Rose Stambe. 2021. "Increasing Compliance with Domestic Violence Protection Orders: Investing in Perpetrator Education and Support as an Investment in Victim and Family Safety." *Policing and Society* 32 (9): 1071–86. doi:10.1080/10439463. 2021.2016756; or Ranjan, Sheetal. 2019. "Domestic Violence Legislation in Greece: Analysis of Penal Mediation", *Women & Criminal Justice* 30 (1): 42–68. doi:10.1080/08974454.2019.1646192.

[8] V. Hysi, *Kriminologjia*, Pristine, 2010, p. 42.

[9] Ligji Për Ndërmjetësim Nr. 06/L-009, 2018.

their dispute/disagreement be resolved through mediation, without initiating court proceedings.

The initiation by the court, the prosecution, or the competent body is when the case is found/ presented in one of these institutions, the parties are instructed to try mediation and the relevant institution refers the case to mediation. Even when the mediation procedure has begun, either party may withdraw from the mediation at any time.

4.1. Benefits of restorative justice

Research results are consistent in reporting that at least 85% of participants express satisfaction after participating in a restorative justice program, which is a higher percentage compared to traditional criminal justice processes. The most common benefits mentioned by the participants are knowing and understanding each other's status, knowing each other's needs (support, protection, reintegration); emotional restoration, including feelings of respect and dignity, repair of the harm caused by the offense and (where possible) damaged relationships; empowerment, including repairing feelings of safety and control; reduction of fear about meeting each other; positive changes about the perspective of the world in general and of oneself; satisfaction and perception of justice, compared to the criminal justice system. Also, studies have found other, more important benefits for the justice system and societies in general: restorative justice offers victims a real experience of justice that facilitates their recovery[10], encourages desistance from crime, helps to create safer societies, and strengthens communities (helps to reintegrate perpetrators and support victims), but also this practice is used to prevent a place of conflict from turning into a place of violence.

5. Regulation of mediation according to the legislation of the Republic of Kosovo

Mediation in the resolution of criminal cases is also provided in the Code of Criminal Procedure of the Republic of Kosovo, mediation in criminal matters has been dedicated to a whole chapter such as chapter XXVII of the criminal code, according to article 228, the State Public Prosecutor can send a Criminal Report in Mediation at the Mediator licensed at his office for various Criminal Offenses Punishable by Fines or imprisonment for up to three years[11].

Based on the characteristics of the perpetrator, whether or not he is a recidivist, and analyzing his criminal behavior and past, a difference from other countries, in Kosovo domestic violence issues cannot be referred for resolution in Mediation as the law on Domestic Violence precisely forbids it.

Upon reaching mediation, the Public Prosecutor files the Criminal Complaint and the injured party does not have the right to initiate prosecution, which is provided in Article 62 of the Criminal Procedure Code.

In the Republic of Kosovo, the law on mediation for the resolution of conflicts and disagreements was drawn up in 2008, in which the rules of resolution of the commissions and their responsibility in the realization of the mediation process are provided.

This law regulates the manner, operation, procedure, and organization of mediation, the rights, duties, and responsibilities of mediators in order to facilitate access to the alternative resolution of disputes and contests and to promote their amicable resolution. The law is in compliance with Directive 2008/52/EC of the European Parliament and the Council of May 21, 2008, in some aspects of Mediation in civil and commercial matters[12].

The initiation of a Mediation Procedure is very clearly regulated and foreseen by Article 8 of the Law on Mediation[13], which states that the initiation of the procedure can be initiated when:

1. The mediation procedure can be initiated by parties, court, prosecution office or a competent administrative body, in accordance with the applicable legislation.

2. If the case is before the court, prosecution office or in the competent administrative body

[10] I. Zejneli, *Delikuenca e të miturve*, Universiteti i Evropës Juglindore, 2018, p. 142.
[11] The Criminal Code of Kosovo.
[12] R. Halili, *op. cit.* (2011), p. 165
[13] Law on Mediation No. 06/L-009 published in Official Gazette of the Republic of Kosovo No. 14/20 August 2018.

and the parties agree to undergo mediation, the court, prosecution office, or competent administrative body shall inform and instruct parties to the mediation procedure.

3. If one of the parties requests the other party to commence the mediation procedure, but the latter fails to respond to the invitation within fifteen (15) days from the date of receiving the request for mediation, it shall be considered as rejection to commence mediation procedures.

4. Kosovo Judicial Council shall issue a sub-legal act defining the procedure for referral of cases by the court under paragraph 1 of this Article.

5. Kosovo Prosecutorial Council shall issue a sub-legal act defining the referral procedure of Cases by the prosecution under paragraph 1 of this Article.

6. The Ministry of Justice shall issue a sub-legal act defining the self-initiated procedure of cases, as well as cases of referral by the administrative body under paragraph 1 of this Article.

7. Based on this Law, the agreement between parties to commence the mediation procedure, at any phase of the procedure before the competent court or any other competent body, shall be accepted.

Article 12 of Law on Mediation regulates the Development of the Mediation Procedure:

1. In case the parties agree to settle their dispute through mediation, the mediation clerk shall inform the initiating body, by submitting a copy of the signed agreement for the initiation of the mediation procedure, in which case the initiating body shall suspend the procedure until the expiration of the mediation period.

2. Parties in the procedure are free to decide on the development of the mediation procedure.

3. Parties are obliged to present in the most realistic and truthful way the circumstances of the contested case during the mediation procedure.

4. The mediation procedure is carried out by a single mediator, except for the cases when parties agree to have a co-mediator.

5. After signing the agreement for initiation of mediation, the mediator in accordance with the parties shall determine the time and venue of the mediation procedure.

6. If the mediator considers that it would be in favour of the mediation procedure, he may conduct separate meetings with the purpose of finding the alternatives for settling the dispute, but not the solution itself.

7. In addition to the parties, their representatives and the mediator, the mediation procedure can also be attended by a third party as well, upon the prior consent of the parties in procedure.

8. The third party participating at the mediation procedure is obliged to respect the principle of confidentiality of the procedure.

Termination and suspension o a procedure is done when the final agreement is reached or even for reasons when each of the parties withdraws from the desire to reach a final agreement or even in cases where we are dealing with the cancellation of the agreement reached at the mediation office and rejection and rejection by the Prosecutor's Office and the Court when they have known and abundant facts that the agreement was reached without the free and complete desire and will of the parties because they were pushed by force by other parties to reach the agreement in words**.** Article 17 provides several points for the termination and suspension of the procedure:

1. The mediation procedure terminates upon:

1.1. Reaching an agreement between the parties;

1.2. Withdrawal of any party, at any time during the procedure, stating that there is no interest in continuing the mediation procedure;

1.3. Confirmation by the mediator, after consultation with the parties, when it is considered that the continuation of the procedure is unreasonable;

1.4. Expiration of the legal deadline for reaching an agreement.

2. After completion of the mediation procedure, the mediator is obliged to inform the court through the clerk, prosecution office, or competent authority in writing regarding the termination of the mediation procedure in any case when the court, the prosecution office, or any other the competent body has a case file for which the mediation was carried out.

3. Upon completion of the mediation procedure, in cases of self-initiation, the parties must act

pursuant to Article 16, paragraph 3 of this Law.

4. The mediator and the parties may terminate the mediation procedure if during the procedure exist or appear reasons for questioning his impartiality.

5. The court or the prosecution office can cancel the agreement reached through mediation when it ascertains that such an agreement was signed in contradiction to the applicable Law and when the free will of parties in mediation has not been reflected.

6. Disputes that can be resolved by the mediation procedure

Mandatory mediation is a type of court-only referral process and only applies to certain types of Family Law and Property Law cases. In such cases, if the judge, in his or her discretion, believes that the dispute can be resolved through mediation, he/she will direct the parties to hold an initial meeting with the mediator and discuss whether the parties will try mediation of the dispute.

The parties are free to refuse mediation after the initial meeting with the mediator. However, if the parties choose not to try mediation, they must try it for at least 30 days from the day the judge referred the case to mediation before proceeding with court proceedings.

The types of disputes for which mandatory mediation must be applied are disputes from family relationships related to alimony cases, guardianship, contacts and custody of the child, division of joint marital property, property disputes related to rights and obligations from servitude rights, compensation for expropriated property.

The development of the mediation procedure is carried out with the help of a qualified and impartial third person, chosen by the parties themselves, who is a Mediator licensed by the Ministry of Justice. The mediation procedure is considered to have officially started on the date when the parties and the mediator(s) sign the agreement on initiating the mediation procedure. After signing the mediation agreement, the parties and the mediator will set the date and time for holding the mediation sessions. Procedures for mediation are developed and decided by the parties. The mediator is allowed to hold separate meetings with each party if he or she considers that it would be in the best interest of the continuation of the mediation procedure. The mediator is also allowed to propose options for resolving the dispute, but not the final solution, which must be agreed upon by the parties.

The mediation procedure is much faster than the court procedure. While a case can remain unresolved for years in the courts, Mediation can last **90 days or at most 120 days**. If an agreement cannot be reached within a single session or several sessions, then additional sessions will be held until the end of the stipulated period of 90 or 120 days. During this period, the parties can at any time choose to terminate the mediation procedures and return to the judicial procedure.

A mediator is a person who is certified and licensed as a mediator by the Ministry of Justice. Citizens can verify in the Public Registry of Mediators of the Ministry of Justice, if a person is a licensed mediator. If he/she cannot be found in the Public Register of Mediators, then he/she is not a licensed mediator.

The mediator has an important role in the process of communication and negotiation, guiding the parties towards finding the best solution for them. The mediator facilitates or helps the parties involved in the conflict to find a solution acceptable to the parties themselves, a solution that expresses their free will and is not imposed or manipulated while respecting the legislation in force in reaching the mediation agreement. The mediator does not have the power to decide the terms of the agreement or the resolution of the conflict according to his/her assessment[14].

The agreement reached between the parties in disputes referred by the court, has the power of an enforceable document after approval by the referring judge.

The agreement reached between the parties in the disputes referred by the prosecution has the power of an executive document after approval by the referring prosecutor.

For specific cases, the agreement that the parties reach through mediation with the signing of

[14] At a comparative level see Cuppini, Alessandra. "A Restorative Response to Victims in Proceedings before the International Criminal Court: Reality or Chimaera?", *International Criminal Law Review* 21, 2 (2021): 313-341, doi: https://doi.org/10.1163/15718123-bja10041.

the agreement by the parties and the mediator has the same effect as a final court decision and the power of an enforceable document. Also, it should be noted that in addition to physical presence, you can conduct mediation sessions virtually (online) through platforms that suit the parties and the mediator. One of the most used platforms is Jitsi Meet. This platform is an alternative way that allows you to avoid court hearings and resolve your case through online mediation.

7. Statistics related to agreements initiated for mediation

These statistics are presented based on the monthly reports reported by the managers of the Mediation Centers, then by the Referents assigned for mediation. Although mediation has started to be applied relatively late, statistics show that there is a gradual increase in the cases referred to the mediation procedure. So far, about 11,530 (not including 2016, in three regions) cases have been referred to the mediation procedure, and about 9,320 cases have resulted in the settlement of the dispute. What can be observed from these statistics are the results of successful settlement agreements. All the more reason to settle on mediation as an alternative to dispute resolution.

The following table gives you a better overview of the cases referred to in the mediation procedure for the periods 2012–2019, in Pristina[15]:

Pristina	**2012**	**2013**	***2014***	***2015***	***2016***	***2017***	***2018***	***2019***	**Total**
Cases Referred to by the Court	/	86	360	164	/	230	393	849	**2,082**
Cases referred by the Prosecution	1	74	88	267	/	38	156	293	**917**
Self-initiated cases	6	2	20	3	/	2	/	/	**33**
Total referred to Mediation	7	162	468	434	/	270	549	1,142	**3,032**
Totally resolved	3	145	346	515	/	351	539	947	**2, 846**
Totally unsolved	4	3	10	11	/	8	10	131	**177**
In progress (total figure varies)	/	/	/	/	/	/	/	64	**64**

The following table gives you a better overview of the cases referred to in the mediation procedure for the periods 2012–2019, in Gjilan[16]:

Gjilan	***2012***	***2013***	***2014***	***2015***	***2016***	***2017***	***2018***	***2019***	***Total***
Cases Referred to by the Court	70	70	133	203	194	158	49	424	**1,301**
Cases referred by the Prosecution	/	/	/	16	41	51	73	94	**275**
Self-initiated cases	/	/	/	18	13	8	2	/	**41**
Total referred to Mediation	70	70	133	238	248	217	124	518	**1,618**
Totally resolved	36	45	144	213	235	193	93	350	**1,280**
Totally unsolved	22	17	16	7	13	23	30	128	**256**
In progress (total figure varies)	1	9	14	4	0	1	/	40	**70**

[15] Agjencia e Statistikave të Kosovës, retrieved from www.ask.rks-gov.net.
[16] Ibid.

Table – cases referred to in the mediation procedure for the periods 2012–2019, in Prizren[17]:

Prizren	012	013	014	015	016	017	018	019	**Gjithsej**
Cases Referred to by the Court	/	/	24	94	1	26	187	684	1,016
Cases referred by the Prosecution	/	/	/	122	18	230	360	365	1,095
Self-initiated cases	/	/	/	3	/	/	/	/	3
Total referred to Mediation	/	/	24	219	19	256	547	1,049	2,114
Totally resolved	/	/	6	18	17	255	531	808	1,707
Totally unsolved	/	/	3	15	2	1	16	59	96
In progress (total figure varies)		/	7	6	/	/	/	110	123

8. Concrete mediation cases

We have elaborated an indictment filed by the Basic Prosecutor's Office of Gjilan against the defendant with the initials E.R, where the person in question committed the criminal offense of assault under Article 184 paragraph 1 of the Criminal Code of Kosovo, where after a verbal disagreement he had with the victim in a street with a name in the center of Gjilan got out of his car and slapped the victim in his car.

After the Prosecutor filed the indictment before the Basic Court, he made a request for the appointment of a public judicial hearing in which the Prosecutor of the Basic Prosecutor's Office Gjilan, the defendant E.R., the injured party as a witness K.H. and the following witnesses A.I, B.G., A.A. are invited, all from the city of Gjilan.

After the filing of the indictment, the parties began to adjust their relations and the perpetrator understood his action and expressed regret, understood the mistake as well as the criminal offense, where he wanted to finally adjust the relations with the victim, where he expressed the desire to apologize and compensate to the victim.

Together, they initiated the Mediation Procedure with the official Mediator licensed by the Ministry of Justice to hold the hearing where forgiveness and reconciliation were sought between the parties, while the injured party waived and did not request compensation for the bull, and with regard to the payment of tax for the office of the Intermediary in the number of 25 euros was paid by the perpetrator of this Criminal Offense.

9. Conclusion

In the mediation procedure, the issue is chosen in such a way that the decision is taken by the parties themselves, where the parties to the dispute choose one or more impartial person (the mediators) to help the parties to reach a mutually satisfactory solution to their dispute.

Conciliation with the victim and the perpetrators is not only applied in light crimes, but in some cases it can also be applied in cases of serious acts of violence, but we must always keep in mind that mediation between the perpetrator and the victim has as its final goal the regulation of relations between them and the compensation of the damage[18].

In all cases, we must bear in mind that mediation takes place at Mediation Offices licensed by the Ministry of Justice in the respective State.

[17] Ibid.

[18] At international see M. Kristen Hefner, Aneesa A. Baboolal, Ruth E. Fleury-Steiner and Susan L. Miller, „Mediating Justice: Women's Perceptions of Fairness in the Civil Protection Order Process", *Journal of Interpersonal Violence* 2021, Vol. 36(7-8) 3331–3352, DOI: 10.1177/0886260518775749 and Meredith Rossner and Helen Taylor, „The Transformative Potential of Restorative Justice: What the Mainstream Can Learn from the Margins", *Annual Review of Criminology*. 2024. 7:357–81, https://doi.org/10.1146/annurev-criminol-030421-040921.

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