ALTERNATIVES FOR RESOLVING CRIMINAL CASES: MEDIATION IN THE LAWS OF KOSOVO AND NORTH MACEDONIA WITHIN THE CONTEXT OF INTERNATIONAL STANDARDS

Qebir AVZIU[1], Besar KRASNIQI[2], Valeri QATANI[3]

[1*]*Faculty of Law, University of Tetovo, North Macedonia*
[2]*Faculty of Law, University of Tetovo, North Macedonia*
[3]*Faculty of Law, University of Tetovo, North Macedonia*
[*]*Corresponding author e-mail: v.qatani252094@unite.edu.mk*

Abstract

This paper addresses mediation as an alternative method for resolving criminal cases—a topic of current relevance—aiming to clarify the definition of mediation, as well as its role, functions, types, and effectiveness. Fundamentally, the study analyzes mediation as an alternative to traditional criminal proceedings within the context of positive law, comparing the legal approaches of Kosovo and North Macedonia. It seeks to identify normative gaps, practical implementation challenges, and opportunities for harmonization with international law. Furthermore, by identifying legal loopholes and practical application issues, the paper aims to propose methods for ensuring the effective and practical implementation of this procedural alternative. Through a comparative analysis of how this alternative procedure is applied in criminal cases in Kosovo and North Macedonia, the study clarifies the legal framework and the practical application of the law regarding mediation for offenders. Examining and analyzing two different sets of domestic legislation highlights the extent to which mediation procedures are effective. Furthermore, it considers how the application of international legal norms influences the functioning of rules within these states' domestic legal systems.

Keywords: mediation, positive law, Kosovo, North Macedonia.

Introduction

This paper addresses mediation as an alternative method for resolving criminal cases—a topic of current relevance—aiming to clarify the definition of mediation, as well as its role, functions, types, and effectiveness. Fundamentally, the study analyzes mediation as an alternative to traditional criminal proceedings within the context of positive law, comparing the legal approaches of Kosovo and North Macedonia. It seeks to identify normative gaps, practical implementation challenges, and opportunities for harmonization with international law. Furthermore, by identifying legal loopholes and practical application issues, the paper aims to propose methods for ensuring the effective and practical implementation of this procedural alternative. Through a comparative analysis of how this alternative procedure is applied in criminal cases in Kosovo and North Macedonia, the study clarifies the legal framework and the practical application of the law regarding mediation for offenders. Examining and analyzing two different domestic legal frameworks highlights the extent to which mediation procedures are effective. Furthermore, the study considers how the application of international legal norms integrates with the functioning of rules within these states' domestic legal systems.
The paper also aims to address mediation from the perspective of restorative justice and to evaluate its relationship with traditional punitive justice, emphasizing the protection of the parties' procedural rights, the principles of voluntariness, confidentiality, and impartiality, as well as the professional role of the mediator.
In particular, the study seeks to assess mediation's impact on empowering the victim through active participation and the possibility of compensation for damages, as well as on the rehabilitation and reintegration of the offender. Simultaneously, it examines mediation's contribution to cost-efficiency regarding procedural expenses, the reduction of caseloads in courts and prosecution offices, the acceleration of case resolution, and the enhancement and strengthening of public trust in the justice system. The paper also aims to assess the criteria and

circumstances determining the suitability of a case for mediation, as well as the potential of this mechanism to prevent the recurrence of conflicts and promote a more effective and humane approach to handling criminal cases.

The Conpecept of Mediation

The term "restorative justice" was first used by Albert Eglash (an American psychologist) in 1977 to describe approaches within the field of criminal justice. Today, both the concept itself and its substance attract significant interest from critics and analysts—particularly as a growing number of them highlight the term's shortcomings within the justice system.
Some authors interested in restorative justice have linked the evolution of these ideas to several factors, such as: grievances expressed against the traditional penal system by victims or professionals; the failure of punitive sanctions and custodial sentences; the rising influence of the victims' rights movement; the costs associated with the legal management of delinquency; and court caseload backlogs."[1].
The author who first employed this concept, through which he identified three distinct paradigms of justice: the distributive paradigm, the punitive paradigm, and the restorative one[2].
In contrast to the punitive paradigm—through which the author Englash emphasized punishment for the offender—and the distributive paradigm—which focuses primarily on the rehabilitation of the offender—the paradigm of "restorative justice" is based on the idea of addressing the situation of the victim[3]. Although Eglash initially limited restorative justice by equating it with the notion of restitution, the concept has since been redefined and expanded to encompass new forms within the paradigm articulated by the author[4].
The legal community was highly skeptical and harshly critical when the judge in the widely publicized, high-profile trial of Derek and Alex King—accused of murdering their father in Florida—ordered the appointment of a mediator to negotiate the boys' sentences after setting aside the jury's second-degree murder verdicts against both of them.[5].
Through an analysis conducted by Jeff Latimer and his colleagues regarding the restorative justice model, it was revealed that some restorative justice concepts originate in traditional conflict-resolution practices specific to indigenous cultures, while others draw upon religious principles—such as forgiveness and reparation—shared by various religious and denominational groups that were involved in the development of early restorative justice programs[6].
The same authors have argued that, in contrast to the traditional justice system—under which every criminal offense is viewed as an affront to the State—the restorative justice model proposes a different definition of criminal behavior: "a criminal offense is, first and foremost, a conflict between people that causes harm to the victim, the community, and the offender.""[7].
A victim's feelings of fear and anger can often be alleviated by the opportunity to meet and confront the offender, ask questions, express themselves regarding the harm inflicted, and—where warranted by the nature of the damage—receive material compensation. During the meeting, each party is given the chance to describe the events in their own words. They are permitted to ask questions and discuss matters such as restitution, apologies, material

[1] Jean-Paul Jean, Gaelle Deharo, La justice en perspectives. Justice „reparatrice", justice „restaurative", Ecole Nationale de la Magistrature, Mission de Recherche Droit et Justice, faqe 19
[2] Dumitru-Virgil Diaconu, Medierea în cauzele penale / Mediation in criminal cases, C.H. Beck Publishing House, Bucharest, 2012, faqe 6
[3] James Dignan, Understanding Victims and Restorative Justice, Open University Press, 2005, faqe 94
[4] Luminita Dragne, Anamaria Tranca, Medierea în materie penală / Mediation in Criminal Matters, Universul Juridic Publishing House, Bucharest, 2012, faqe 56
[5] Brett Norman, Mediation to Chart Unfamiliar Course, PENSACOLA NEËS J., Oct. 18, 2002.
[6] Chiriac, L., & Blaj, S. B. (2016). Settlement vs. mediation in the criminal trial. Journal of Romanian Literary Studies, 8, faqe 599–603
[7] Jeff Latimer, Steven Kleinknecht, Les effets des programmes des justice reparatrice: analyse documentaire sur larecherche empirique, 2000, faqe 6; http://canada.justice.gc.ca/fr/ps/rs/rep/2000/rr00-16a.pdf

compensation, or rehabilitation needs. Consequently, it is argued that victim-offender mediation fosters a greater understanding of the victim's needs and emotions without disregarding those of the offender.

As the restorative justice system has developed in Germany, there has been a gradual shift away from the traditional concept of criminal punishment toward mechanisms aimed at the constructive resolution of conflicts arising from criminal offenses.In this context, the mechanism of victim-offender reconciliation (VOR) is considered one of the most important instruments of restorative justice, as it offers the parties involved the opportunity to participate directly in the process of identifying the consequences and causes of the criminal offense[8]. This approach is grounded in the principle of the offender's individual responsibility, encouraging them to acknowledge and accept the consequences of their unlawful actions while simultaneously taking concrete steps to redress the harm caused.

While the traditional penal model focuses primarily on the relationship between the state and the offender, the restorative system places the victim at the center of the process.

In his scholarly work, Rössner emphasizes that these mechanisms create a more suitable environment for conflict management and resolution than the traditional justice system, as they foster cooperation, communication, and mutual understanding among the parties. Consequently, the inclusion of reparation for the harm inflicted upon the victim within the restorative system contributes to a resolution that is fairer and more acceptable to all parties involved. Thus, restorative justice not only addresses the response to the criminal act but also facilitates the restoration of social harmony and fosters an awareness regarding the prevention of future unlawful conduct. Given the importance attached to this mechanism within the context of criminal proceedings, German legislation has formally incorporated it into its legal framework. Specifically, Article 46a of the German Criminal Code (Strafgesetzbuch – StGB) provides for the possibility of a sentence reduction—or even the waiver of a sentence altogether—when the offender makes every possible and serious effort to reconcile with the victim and demonstrates a constant willingness to compensate for the harm caused. Thus, it is evident that these procedures are not merely social alternatives for resolving criminal cases, but also legal instruments of particular importance to contemporary criminal justice policy.

Mediation Models

The key models relevant to the mediation process here include the restorative justice system and the evaluative case management model—both of which emerged within the context of criminal matters. As distinct models, each possesses unique features, differing areas of focus, divergent philosophies, and separate negotiation frameworks; naturally, the differences are evident and will be elaborated upon. Most literature regarding mediation in the criminal justice arena focuses on restorative justice programs, such as those involving victims and offenders.[9] ("VOM").

VOM programs generally focus on a restorative justice approach, whereas the traditional criminal justice system focuses on punitive justice or the imposition of punishment. Under the punitive model, a crime is viewed as a violation of state laws, and the state is regarded as the victim, to whom the offender owes the obligation to serve a sentence[10].

Restorative justice programs aim to resolve criminal conflicts in ways that the key parties involved—both the victim and the offender—acknowledge and accept as fair. "Forgiveness"—both as a concept and as an act—is central to, yet a subject of debate among, restorative justice

[8] Rössner, D. (1999). Mediation as a basic element of crime control: Theoretical and empirical comments. Netherlands Criminal Laë Revieë, 3(1), fq. 211–220

[9] Andre R. Imbrogno, Recent Development: State v. Tolias, 1999, 14 OHIoST. J. ON DISP. RESOL. 699, fq. 705-06

[10] Katherine L. Joseph, Victim-Offender Mediation: Ëhat Social & Political Factors Ëill Affect Its Development?, 11 OHIO ST. J. ON DiSP. RESOL. 207, 216 (1996).

scholars. When enacted, forgiveness holds the potential to bring closure to the case or conflict, allowing both the victim and the offender to move forward with their lives. "Forgiveness" represents a state of mind held by the victim, involving aspects directed both inwardly (for the victim's own sake) and outwardly (toward the offender). From the perspective of the victim's rights and personal interests, forgiveness entails a willingness to relinquish the right to harbor resentment, pass negative judgment, or maintain an indifferent attitude toward the person who has unjustly violated a guaranteed right.

As one judge observed, criminal mediation efforts are "driven by necessity, the rising caseload... and [the recognition that] it is a better way to get the job done." Case management mediation offers “another window into the court besides jury trials.”

The case management model requires neither of these. Under this model, a neutral third party typically intervenes in the process at the request of the parties and/or the court, after initial attempts at negotiation or plea agreements have failed. The mediator is brought in with the conviction that a neutral third party can help the parties overcome the impasse and reach a resolution. The exact process varies by case; however, most pre-sentencing mediations follow the "shuttle diplomacy" model. In contrast, the "caucus" model is rarely used in VOM programs.

The case management model currently used in some states, such as Idaho, focuses on the retributive justice paradigm, with the prosecutor acting as the primary negotiating party at the mediation table opposite the represented defendant. While victims and family members may be present for at least parts of the conference—and some victim-offender dialogues are theoretically possible—in practice, the session resembles a facilitated plea negotiation more than a VOM process. If the victim and offender reach an agreement, this is considered merely an added benefit. Healing relationships is a potential side effect of the case management model, but it is not the primary focus.

Mediation in Kosovo

In 2008, the Law on Mediation was enacted in the Republic of Kosovo, laying the initial groundwork for institutionalizing mediation as a legal process in the country. Mediation as a mechanism has received support from various donors—such as USAID, UNDP, and CSSP—thereby enabling citizens to access mediation services more easily and quickly.

Mediation as a procedure began to be operationalized in 2012 with the opening of mediation centers in the Peja, Gjilan, Gjakova, and Ferizaj regions, followed by the establishment of centers in Prishtina, Prizren, and Mitrovica.

To ensure the sustainability of the mediation system in Kosovo, the Judicial and Prosecutorial Councils appointed officials in 2017 responsible for administering cases referred to mediation within basic courts and basic prosecution offices. The new Law on Mediation, which entered into force in 2018, introduced innovations to the mediation process by establishing provisions for mediation referral officers and opening mediation offices within Basic Courts and Basic Prosecution Offices; it also introduced provisions regarding mandatory mediation and the enforceability of agreements reached through mediation proceedings.

The appointment of mediation officials within Basic Courts and Basic Prosecution Offices has fostered the self-sustainability of the mediation system—independent of the presence or absence of donors—while placing special emphasis on improving services, the quality of mediation, and access to justice. The current status of mediation in Kosovo has led to an increase in referred cases, establishing it as a highly efficient and important process for resolving disputes among the citizens of Kosovo. The results achieved thus far provide further justification for the continued operation of mediation.

The provisions of the Law on Mediation apply to mediation proceedings concerning disputes between legal entities involving property-related, commercial, family, and labor matters, as well as other property law disputes—such as those regarding the acquisition of property rights through contractual relationships or inheritance—bankruptcy proceedings, and other civil, administrative, and criminal matters where the parties are free to exercise their autonomy of will, provided that a special law does not mandate exclusive jurisdiction for a court, the public prosecutor's office, or another competent authority.

Mediation and mediation proceedings, as provided for under Kosovo legislation, shall not apply to cases involving domestic violence—in accordance with the Law on Protection from Domestic Violence—or to any dispute where exclusive jurisdiction is assigned to a court or another competent authority. In criminal matters, mediation applies to cases punishable by a fine or by imprisonment of up to three (3) years. Mediation applies to various types of contentious relationships and is not limited to specific categories of disputes.

Mandatory mediation is a process initiated solely by the courts and applies only to specific types of family law and property law cases. In such instances, if the judge, at their discretion, believes the dispute can be resolved through mediation, they will direct the parties to hold an initial meeting with the mediator to discuss whether to attempt mediation.

The parties are free to decline mediation following the initial meeting with the mediator. However, if the parties choose not to attempt mediation, they must wait at least 30 days from the date the judge referred the case for mediation before proceeding with court proceedings. The types of disputes subject to mandatory mediation include: family law disputes concerning alimony, custody, child visitation and support, and the division of joint marital property; as well as property disputes regarding rights and obligations related to easements and compensation for expropriated property.

The first mediators were licensed in 2011, and there are currently around 180 mediators across Kosovo licensed by the Ministry of Justice—representing diverse professional backgrounds—who are ready to provide mediation services for dispute resolution.. In the realm of criminal law or legislation, cases involving criminal offenses punishable by a fine and/or imprisonment of up to three years—excluding, by law, cases of domestic violence—may be referred to mediation. Such referrals occur either prior to the filing of an indictment, based on the prosecutor's assessment that the case is suitable for mediation, or after the indictment has been filed, based on the judge's assessment or a recommendation by the case manager, and upon the proposal of the prosecutor or the proposal or consent of the injured party and the defendant to resolve their criminal matter through mediation.

The criminal offenses provided for in the Criminal Code of the Republic of Kosovo (CCRK) that may be considered most suitable for referral to mediation are:

Those provided for in Article 181, paragraphs 1 and 2 of the CCRK (Intimidation); Harassment (Article 182, paragraph 1); Assault (Article 184, paragraph 1); Slight bodily injury (Article 185, paragraph 1); Participation in a beating (Article 187); Coercion (Article 192, paragraph 1); Violation of the right to strike (Article 221); Misuse of the right to strike (Article 222); Theft of services (Article 314); Misuse of another's property (Article 318); Taking possession of movable property (Article 319); Forest theft (Article 349); and Destruction, damage, or removal of public installations (Article 357, paragraph...). 2. Failure to avert danger, Article 362; Endangering public traffic, Article 370, para. 1; Failure to participate in averting general danger, Article 405; Removal or damage of official seals or signs, Article 406; Taking or destruction of official seals or official documents, Article 407; Taking the law into one's own hands, Article 410, para. 1; as well as other criminal offenses deemed suitable for mediation.

Mediation in North Macedonia

Mediation, as an alternative method of dispute resolution in the Republic of North Macedonia, was established through the enactment of the Law on Mediation in 2006. This law was drafted in alignment with the Justice System Reform Strategy and the Republic of Macedonia's commitment to European integration—now known as the path to the European Union—viewing this as a key step in legal harmonization. The Law on Mediation entered into force on November 1, 2006. Amendments and supplements were subsequently made to the law between 2007 and 2009 to address legal gaps and clarify specific provisions.

The primary objective behind implementing mediation procedures was to relieve courts of heavy caseloads by resolving disputes through mediation prior to the initiation of formal litigation, as well as to enable courts to refer parties involved in ongoing litigation to mediation for dispute resolution. The Law on Mediation was adopted in 2013 ("Official Gazette of the Republic of Macedonia" Nos. 188/13, 148/15, 192/15, and 55/16), aiming to advance the functioning of mediation within the legal system and to provide the most suitable, rapid, cost-effective, and efficient means for resolving disputes between natural and legal persons in the Republic of North Macedonia.

This Law regulates mediation in disputes where the parties are free to dispose of their claims—unless exclusive jurisdiction has been assigned to a court or other body by another law—regardless of whether the mediation takes place before or after the commencement of court proceedings or other proceedings. Mediation procedures apply to disputes such as: property-related legal disputes arising from inheritance proceedings; family disputes; labor disputes; commercial disputes; consumer disputes; insurance disputes; disputes arising from notary payment order proceedings; disputes in the field of education; disputes regarding occupational health and safety; disputes concerning healthcare; disputes regarding environmental protection; discrimination-related disputes; disputes involving civil liability for insult and defamation; as well as other contentious relationships—involving domestic and/or foreign natural and legal persons—where mediation suits the nature of the dispute and can facilitate its resolution. These same legal provisions shall also apply to criminal matters, except where the law stipulates otherwise or where a special law prescribes a different course of action.

In the legal system of North Macedonia, the initiation of criminal cases within the mediation process is also regulated by provisions contained in the Law on Criminal Procedure. For criminal offenses prosecuted via private complaint, the competent judge may—during the reconciliation hearing—propose that the parties resolve the dispute through mediation, provided that, based on their assessment and the circumstances, the case is deemed suitable for such a procedure. Such a referral is made only with the parties' consent.

Statistical data provided by the Ministry of Justice indicate that the initial electronic recording of mediation cases was incomplete, as prior legislation did not mandate their systematic registration. With the entry into force of legislative amendments, this requirement was incorporated, enabling the gradual updating of the electronic registry and the retroactive completion of data records.

Conclusion

This research concludes that, for both the Republic of Kosovo and the Republic of North Macedonia, the mediation procedure represents a significant alternative mechanism for handling criminal cases and an instrument with distinct potential within the framework of restorative justice. The legal analysis conducted for these two states reveals that criminal mediation is already part of the alternative justice mechanisms in both Kosovo and North Macedonia—established by legal provisions and implemented in cases deemed suitable for this

process. The existence of a legal framework allows for the resolution of certain criminal cases outside traditional court proceedings; unlike the traditional approach, this framework offers parties the opportunity to reach a mutually agreed-upon resolution and focuses on addressing the consequences of the criminal act that infringed upon a legally protected interest. This study identifies that awareness and understanding of the criminal mediation procedure remain key challenges, requiring dedication and attention across several dimensions of the mechanism's implementation.

Regarding mediation in criminal matters in Kosovo and North Macedonia—and taking into account the challenges identified in the practical implementation of this mechanism—we argue in this paper that both countries need to take action in this regard. Competent institutions should undertake continuous activities to inform citizens about the purpose, functioning, benefits, and limitations of criminal mediation. Such outreach should aim to ensure citizens are aware of the rights and obligations arising from this mechanism.

Early exposure to mediation principles and procedures should be facilitated; this would enable future legal professionals to view mediation as a vital component of the criminal justice system and to refer cases to mediation, thereby achieving resolutions through a process that is faster for the parties involved.

We recommend ongoing training and engagement, particularly in areas related to communication, conflict management, victims' rights, the protection of minors, professional ethics, and the restorative justice principles underlying mediation. We believe that inter-institutional cooperation—among courts, prosecutors' offices, the police, mediators, and other relevant institutions—needs to be deepened.

Research indicates that, regarding criminal mediation, it is essential to ensure victim participation is voluntary and informed, and that victims are not exposed to pressure, intimidation, or re-victimization; this would enable a resolution of the matter free from undue influence.

We also consider it necessary to strengthen cooperation and the exchange of institutional and professional experience. Furthermore, sharing best practices would benefit the domestic system of the other state.

Reference

[1]. Jean-Paul Jean, Gaelle Deharo, La justice en perspectives. Justice „reparatrice", justice „restaurative", Ecole Nationale de la Magistrature, Mission de Recherche Droit et Justice, faqe 19

[2]. Dumitru-Virgil Diaconu, Medierea în cauzele penale / Mediation in criminal cases, C.H. Beck Publishing

[3]. House, Bucharest, 2012, faqe 6

[4]. James Dignan, Understanding Victims and Restorative Justice, Open University Press, 2005, faqe 94

[5]. Luminita Dragne, Anamaria Tranca, Medierea în materie penală / Mediation in Criminal Matters, Universul

[6]. Juridic Publishing House, Bucharest, 2012, faqe 56

[7]. Brett Norman, Mediation to Chart Unfamiliar Course, PENSACOLA NEËS J., Oct. 18, 2002.

[8]. Chiriac, L., & Blaj, S. B. (2016). Settlement vs. mediation in the criminal trial. Journal of Romanian Literary Studies, 8, faqe 599–603

[9]. Jeff Latimer, Steven Kleinknecht, Les effets des programmes des justice reparatrice: analyse documentaire sur larecherche empirique, 2000, faqe 6; http://canada.justice.gc.ca/fr/ps/rs/rep/2000/rr00-16a.pdf

[10]. Rössner, D. (1999). Mediation as a basic element of crime control: Theoretical and empirical comments. Netherlands Criminal Laë Revieë, 3(1), fq. 211–220