

Victim-Offender Mediation and Observance of Procedural Rights in the Macedonian Juvenile Justice System: Competitive or Balancing?

Stojanka Mirčeva, Vesna Stefanovska, Bogdančo Gogov

Purpose:

The paper examines the observance of procedural rights of the parties referred to Victim-Offender Mediation (VOM) in the Justice System for Children (JSC), and particularly pioneering practice associated with challenges pertaining to the multicultural character of the community.

Design/Methods/Approach:

Analysis is based on qualitative data collected by using in-depth interviews and document analysis. Sources of data were relevant stakeholders in the referral procedure, the Child and the Victim, as well as court/prosecutors files. In-depth interviews were carried out with 17 stakeholders to capture professional attitudes, attached meanings and experience of the respondents in relation to VOM. Document analysis as a data collection technique was applied to two prosecutor's files and one court file which, at present, are the only cases of VOM in JSC.

Findings:

The main findings pertain to the indispensable recognition that meanings attributed to VOM in JSC, as well as expectations, vary extensively among respondents. In turn, this situation shapes the procedural rights of the parties in 3 VOM cases. In addition, basic principles of VOM are implemented in line with the perceived significance of procedural rights in VOM cases.

Research Limitations/Implications:

The findings relate only to respondents' attitudes and views on VOM as well as data contained in court/prosecutor's files. In-depth knowledge on the implementation of procedural rights during VOM process is missing due to the impossibility for participatory observation of the joint meetings.

Originality/Value:

While across Europe much research on balancing VOM principles and fair trial standards has been conducted, no research at all has been carried out in Macedonia in relation to VOM in JSC. This small scale survey is particularly valuable in filling up the existing empirical gap, and findings might be used as a basis for developing system prerequisites for VOM.

UDC: 343.1

Keywords: victim-offender mediation, child offenders, victims, Macedonian Justice System for Children

Mediacija in zaznavanje procesnih pravic v makedonskem sistemu sodstva za mladoletnike: tekmovanje ali uravnoteženje?

Namen prispevka:

Članek obravnava zaznavanje procesnih pravic strank v mediaciji med žrtvami in storilci kaznivih dejanj (Victim-Offender Mediation – VOM) v makedonskem sistemu sodstva za mladoletnike (Justice System for Children – JSC) ter novih praks in izzivov, ki se na tem področju porajajo v multikulturni skupnosti.

Metode:

Raziskava temelji na kvantitativnih podatkih, ki so bili pridobljeni z intervjuji in analizo dokumentov. Vir podatkov so glavni deležniki v zadevnih postopkih ter izbrano gradivo iz sodnih in tožilskih spisov. Izvedenih je bilo 17 intervjujev s ciljem pridobiti podatke oz. informacije o pogledih in izkušnjah respondentov v zvezi s postopki mediacije. Analiza dokumentov kot oblika tehnike zbiranja podatkov je bila uporabljena pri analizi dveh tožilskih in enega sodnega spisa, ki trenutno predstavljajo edine znane primere mediacije v makedonskem sistemu sodstva za mladoletnike.

Ugotovitve:

Glavne ugotovitve raziskave vključujejo spoznanje, da se pomeni, ki jih pripisujejo procesnim pravicam v mediaciji med žrtvami in storilci v sistemu sodstva za mladoletnike ter pričakovanja v zvezi s temi postopki, pri respondentih pomembno razlikujejo. Ta okoliščina, po drugi strani, pomembno vpliva na zaznavanje procesnih pravic strank v mediaciji, pri čemer pomen, ki se pripisuje procesnim pravicam, pomembno vpliva tudi na zaznavanje temeljnih načel mediacije.

Omejitve/uporabnost raziskave:

Ugotovitve raziskave se nanašajo izključno na zaznave in stališča respondentov o mediaciji med žrtvami in storilci kaznivih dejanj ter na podatke, ki so vsebovani v sodnih in tožilskih spisih. Zaradi omejenih možnosti opazovanja z udeležbo v postopkih pričujoča raziskava ne prinaša izvirnega vpogleda v uresničevanje procesnih pravic v postopkih mediacije.

Izvirnost/pomembnost prispevka:

V Evropi so bile izvedene številne raziskave o temeljnih načelih in standardih poštenega postopka mediacije med storilci in žrtvami v sistemu sodstva za mladoletnike. Prav nasprotno velja za Makedonijo, kjer tovrstnih empiričnih raziskav ne zasledimo. Pomen pričujoče raziskave je zapolniti te praznine, pri čemer bi njene ključne ugotovitve lahko služile kot podlaga za razvoj sistemskih izhodišč postopkov mediacije.

UDK: 343.1

Ključne besede: mediacija med žrtvami in storilci kaznivih dejanj, otroški storilci, žrtve, makedonski sistem sodstva za mladoletne

1 INTRODUCTION

Restorative Justice is both a new and an old concept of justice and can be extensively applicable in countries with diverse cultures and legal systems. It is substantially a unique paradigm of crime and responses to it, based on mediation, reconciliation, restitution and compensation. Nevertheless, the introduction of Restorative Justice (RJ) as a more effective and humane response to crime (Van Ness, 1998) raises up some issues and dilemmas in practice, not only among its opponents but also among the advocates of RJ.

Like elsewhere across the globe, the entrance of RJ programs into the Macedonian criminal justice responses is through the justice system for children. The Macedonian criminal justice system (CJS) in treating young offenders implements welfare principles of education and rehabilitation influenced by demands of justice model. The strategy underlines the concept of "care" for the juvenile to return back on the track of positive behavior and integration into the social system as a positive person. The Law on Juvenile Justice as of 2007 (Zakon za maloletnička pravda, 2007) introduces restorative justice principles as a primary response.

The main feature of the legal provisions is that all activities undertaken are in line with the basic principle of acting in the best interest of the child, protection from stigmatization, early intervention and diversion from the negative influences of the formal justice system. Namely, the principle of diversion from formal court procedure is accomplished through the application of certain RJ measures, *inter alia*, through the most widespread form of RJ: the victim-offender mediation. VOM is defined as a process in which, with voluntary consent, victim and perpetrator actively participate in resolving matters arising from the crime with the help of an independent third party, the mediator. There are several modes of mediation, but our legislator has chosen the integration model as part of the justice system for children, which means that mediation, though applied independently, i.e., the procedure of mediation and reconciliation between victim and offender as such is conducted outside the system, the agreement reached between parties does not mean automatic termination of judicial procedure, but it has an influence on the decision of the public prosecutor or the court to terminate the procedure or proceed with it from where it has stopped before referral (for example, indictment will be either rejected or affect the sentence), depending on whether they confirm or reject the reached agreement. Victim-offender mediation procedure in our justice system for children has the meaning of diversion from formal judicial procedure, or one of its goals is to discourage the child from that procedure and thus protect it from the negative effects produced by the formal system itself (stigmatization, recording in criminal records, strict formal procedures, procedural actions towards evidence presentation, etc.). At the same time, the necessity for more productive safeguarding of the interests of damaged (victims) is identified, and by this they are placed into a new, more favorable position in the criminal procedure.

If we strive for VOM to become an integral part of the mainstream CJS, due attention need to be placed on the essence of the VOM program and procedural aspects that are well situated in the mainstream CJS, the focus being, in particular,

on the interplay between the VOM principles on one hand, and the CJS procedural safeguards, on the other.

One of these aspects is a question of fundamental procedural rights of the parties that protect them from possible abuses during the proceedings, by the formal judicial system and by the extra-judicial institutions responsible to implement RJ processes.

Clear standards and guarantees need to be set up and uphold, because informality means uncertainty and openness to different interpretations and abuses by the stakeholders. Therefore, formalism and clear written rules for the implementation of the procedures, and the rights and obligations of all parties are, in essence, their protection, because as noted by Eliaerts and Dumortier (2002: 205), “although procedures and formalism can discourage participation of offenders, victims and the community in dealing with crime, it also, at the same time, protects citizens against unwanted interventions in their lives”.

The paper is concerned with the procedural rights of the parties in the VOM cases in Macedonian JSC. Worth noting is that although the share of juvenile crime in the total crime in the country in the twenty years period (1985–2005) is small, ranging from 5–14%, the recidivism rate among juveniles is between 7.1 to 19.9%, with special recidivism being very high, 80–94% (Caceva, 2008: 114). Potentially negative influences of the formal justice system on the juveniles’ developments recognized, and number of diversionary measures, *inter alia*, have been introduced with the new Law on Juvenile Justice (Zakon za maloletnička pravda, 2007). The survey aims to provide general overview of the progress in implementation of VOM in the justice system for children. Research questions were concerned, whether or not in the implementation of VOM, the CJS professionals adhere to the procedural rights of the parties, what is the meaning attributed to VOM, and how it affects accommodation of CJS procedural safeguard.

Apart from the introduction, the paper is structured in five parts. In assessing procedural guarantees of the child and the victim in the VOM processes, the second section aims to make clear distinctions about the meaning and application of the procedural guarantees of the child alleged as or accused of having infringed the penal law, as well as the procedural safeguards of the parties in the restorative processes. Nevertheless, due to the limited length, only three procedural guarantees will be elaborated. The third part provides insight into the used methodology together with addressing ethical issues and limitations to the study. In recognition of the thesis that efficient implementation of any legal reform requires accomplishment of three key elements (appropriate legal framework, institutional capacity at all levels, and existence of culture, awareness and mentality to accept the specific legal reform), these elements have been particularly highlighted and addressed in the paper. Discussion of the research findings¹ is situated in the fourth part and focuses

¹ *The small scale survey was carried out in the period April-May 2014 as part of the evaluation of the Project MAK-11/0011 “Assistance to implementation of Restorative Justice Concept”, as part of Bilateral Co-operation Program between the Kingdom of Norway and the Republic of Macedonia. The paper focuses strictly on the penal cases referred formally from prosecutors and court. Apart from 3 VOM cases, there were also 14 civil cases referred directly from the parties to the mediation office established for the project. Thus, the paper does not give the full picture of the activities in the project.*

on analyzing the aforementioned rights referring to the views of all professionals included in the VOM processes. In the concluding remarks the paper opens further debate on the necessity not only to have set up clear written rules for the implementation of the VOM processes, but rather their observance.

2 PROCEDURAL RIGHTS OF THE CHILD AND VICTIM IN THE JUSTICE SYSTEM FOR CHILDREN

The last century is marked with a growing body of international documents concerned with children's rights. Article 40 of the Convention on the Rights of the Child (1989) set minimum procedural rights of the child (general and specific).

Development of victim's rights instruments and legislation showed rather pale progress on both, international and national level. Most of the efforts lead to a weak or non-binding nature of the established instrument (Lauwaert, 2013), which in turn impacted implementation of victim's rights. Worth noting are the CoE Recommendation R (99)19 concerning mediation in penal matters (Council of Europe, 1999), European Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings (2001) as replaced with the European Parliament and European Council Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime (2012) (here and after Victims Directive). Though its impact on the victims' rights remains to be seen across EU Member States, the Victims Directive (2012) clearly sets safeguards for victims of crime and obligation to recognize and treat them with respect emphasizing individual approach.

Given that the aforementioned due process rights belong to the group of universal human rights, they must be protected in all procedures, even those which mean an alternative to court trial (Khatiwada, 2005: 57).

Thus, the critique that RJ fails to ensure the basic due process rights, particularly the right to the presumption of innocence, the right to silence, prohibition for self-incrimination, and the right to legal assistance is challenged with other established procedural legal safeguards for the parties in the RJ processes. They have a rather dual function. Primarily, they ensure that due process rights have a superior place in the proceedings, and that participation in a restorative process does not mean completely giving up of those rights, nor does it mean ignoring or violating them, or setting them aside. Secondly, they also protect the parties from possible abuses during RJ procedures by the formal judicial system, and/or by the main stakeholders within the RJ meetings. As McEvoy and Eriksson (2006: 331) noted, "what would normally be framed as due process rights concerning fair trial in the formal justice system have been substantially 'filled in' with RJ values concerning fairness, impartiality, quality, non-violence and so forth".

The issue that inevitably rises at this point is concerned with what counts for procedural safeguards during RJ processes? According to the Basic principles on the use of restorative justice programmes in criminal matters (United Nations, The Economic and Social Council, 2000), "the fundamental procedural safeguards should be applied in RJ programs, particularly in RJ process". The parties have the

right to consult with a legal counsel during RJ process, the right to information about their rights, the nature of the process, the possible consequences of their decision and the right to voluntary participation.

2.1 The Right to Information

The right to information about the possibility to resolve the case through mediation is an essential right of the parties, which includes information about the meaning of VOM, its benefits, the procedure, information about the agreement and its legal effect, the consequences in a case when the agreement reached is not fulfilled, and the right of the parties to withdraw at any time of the procedure. When one party is a child, in order to fully understand the information, the presence of a parent or guardian is compulsory, as well as presence and help by an interpreter if he/she cannot understand the language of the proceedings, and that of/by the legal adviser. Hence, the presence of these persons is *sine qua non* that allows the parties to fully enjoy the right to information and to fully understand and get familiar with the information provided (Khawiwada, 2005: 36). With regards to victims, observance of the right to information is of utmost importance and encompasses the right to understand and to be understood, as a precondition for informed consent to participate in VOM processes. Depending on the phase of the reference, the judicial authorities are obliged to provide an informed consent prior to referring parties to VOM. In addition, advocates and mediators have a legal and moral obligation laid down in international documents and the national legislation to inform the parties of all relevant issues related to VOM.

The right to information is one of the basic rights prescribed in article 4 of the Macedonian Law on Justice for Children (Zakon za pravda za decata, 2013), which provides that “the child has the right to be informed by all institutions that come into contact with him, for his rights that involve duties and responsibilities prescribed by the Convention on the Rights of the Child (1989), by other international instruments and by this law”. It further stipulates that “the child has a right to be heard, examined and educated for the procedural rights and about the procedure itself”. The right to information of a victim of crime is stipulated in Article 57 of the Law on Criminal Procedure (Zakon za krivična postapka, 2010). In particular, the right of the damaged party in relation to VOM is further elaborated in Article 57. Also, the availability of information on mediation is regulated as a basic principle in the Law on Mediation (Zakon za medijacija, 2007). Hence, the police, the prosecutor, the judge for children, social services, children’s defendants, and mediators need to have sound knowledge of the legal conditions for and meaning and possible outcomes of VOM. Well-timed and correct information given to the parties contribute to more frequent use of mediation and to its promotion and development of the Macedonian practice.

2.2 The Principle of Voluntary Participation

The correct and complete information allows an informed choice of parties to participate in the VOM, and thus to give informed consent. Informed consent

means free consent that is basic procedural safeguards that participation in VOM can only be on a voluntary basis (Groenhuijsen, 2000). The free will of participants means the right to choose to participate or not to participate, the right to cancel at any time without consequences in further proceedings and voluntary fulfillment of the obligation of the agreement reached by the child.

However, this principle imposes certain dilemmas: whether participation in VOM is truly voluntary and whether the conviction of the parties or the implicit warning of serious consequences violates the principle of free will? Although international documents and legislation in almost all states incorporate the principle of voluntary participation of the parties to participate and the right to withdraw at any time of the procedure, in the wider scientific literature we can meet practical examples of deviations from that principle (Durmortier, 2003; Hedeem, 2005; Ikpa, 2007; Staines, 2013). One of those threats, as a “sword of Damocles” that constantly hangs over the offender’s head, is the open and clear indication that the offender will be criminally charged if he/she did not agree to participate in VOM.

The principle of voluntary participation of the parties is regulated in almost all jurisdictions and international documents. The Guidelines for better implementation of the Recommendation R (99) 19 (Council of Europe, 1999, 2007) endorse the states to establish appropriate safeguards for children’s participation in mediation who should pay particular attention to the child’s age and his/her mental maturity, and the consequences of involvement in the arbitration process. No less importance should be given to the role of parents, especially when they disagree with participation in mediation, the role of social workers, psychologists and attorneys when children are involved.

The free will of the participants is the first and foremost principle in the Law on Mediation (Zakon za medijacija, 2007), while the voluntary participation of the child and the victim is legally regulated in Articles 79 and 84 of the Law on Justice for Children (Zakon za pravda za decata, 2013). Namely, the provisions regulate submission of a written consent for participation by the parties to the Public Prosecutor or to the Judge for children. Voluntariness applies throughout the procedure, because the parties may withdraw from the mediation at any time by submitting a written statement regardless of the reasons related to their decision.

2.3 The Right to Legal Assistance

The right to legal assistance should not be identified with the right to a defense lawyer, much less with the right to presence of defense lawyer during the VOM.

The right of the parties to seek and obtain legal assistance for any issue related to VOM is undisputed and guaranteed. Whether they consult with a lawyer, attorney or other legal service which provides legal advice to citizens regardless of their status in the specified procedures is irrelevant. Among some proponents and opponents, the only disagreement that appears is related to the right to defense lawyer to be present during RJ process, which is regulated differently in separate legislations.

Different interpretation of this right arises from the possible conflict of defenders with their commitment and dedication in providing due process

rights, particularly their frequent advice to their clients to defend themselves with silence or deny guilt in the court proceedings. According to Groenhuijsen (2000), the chances to manage to reach mutual agreement are generally reduced by the presence and participation of defenders during the VOM process. The problem is that lawyers often have resentment towards mediation, and the background for such reluctance is twofold: they want to maintain their monopoly in court proceedings and have a financial interest in the use of conventional legal procedures. Legal aid in traditional and conventional sense can seriously harm the achievement of the goals of VOM. Therefore, one position is to minimize the involvement of lawyers in the mediation process in order to avoid the “masked” trial.

However, the stated dilemma should be removed in the cases of child offenders participating in RJ processes because of the protection and assistance they enjoy within the proceedings. If the right to legal assistance is mandatory during the trial (in all proceedings), even more the presence of defense lawyer should not be challenged during the VOM for several reasons. It not only guarantees due process rights, but it is basic procedural safeguards for children from possible abuses during the VOM. In addition, the defense lawyer has an important role in providing protection against possible forced participation of the parties in the process, and according to Eliaerts and Dumortier (2002), the presence of a defense lawyer while reaching the mutual agreement between the parties should be mandatory.

In the international documents the right to legal assistance before and after VOM is guaranteed and does not exclude the right to legal assistance during the VOM process, which is perhaps more necessary in the process of negotiation between the parties. So when mediation may affect the rights and obligations of the participants, the mediator will advise them to seek independent legal advice before settling the case and signing the mutually reached agreement (Victim-Offender Mediation Association, 1998).

Law on Justice for Children (Zakon za pravda za decata, 2013) regulates only the mandatory presence of a lawyer during the information and the submission of a written consent to participate in VOM, but, referring to the Law on Mediation (Zakon za medijacija, 2007), in further stages of the procedure and during the signing of the agreement, the parties may have defense lawyer to consult him. So, the right to legal assistance and defense lawyer is guaranteed before, during and after the mediation in order to provide greater legal protection and security for the child.

The fulfilment of the basic procedural safeguards within VOM in juvenile cases, i.e., the participants’ perceptions of the principle of voluntarily participation and the rights to information and legal assistance, is narrowly surveyed in the RJ literature and practice, mainly from a legal and organizational point of view. Recently, in 2012, in Belgium a study was carried out to examine the practical application of the core principles of RJ (voluntarily participation, impartiality and confidentiality). In terms of the voluntarily participation, the findings show that participants fell free to “enter” the restorative program and to have a say in the restorative process (De Mesmaecker, 2013: 357). Contrary, another study indicates

that coercion as a way to encourage or to persuade offenders to participate is recognized towards young offenders in some conference cases in Australia (National Alternative Dispute Resolution Advisory Council) (Field, 2004).

Though the Republic of Macedonia has a poor practice of application of mediation between victim and offender in the juvenile justice system, we cannot make a proper evaluation of its implementation nor analyze the situation of child-offenders and victims in the restorative processes. There are only few isolated projects that slightly contribute to the development of restorative practices, but without strong political will, support and understanding of the program implementation it is doomed to failure.

3 NOTES ON METHODS

The survey was conducted as part of the evaluation of the progress in the establishment of sustainable and functional mechanisms for criminal cases handling through restorative practices of VOM in the justice system for children, following the completion of the first year of implementation of the Project in one municipality in the country. Worth noting is the context within which the survey took place. Namely, the context refers to following: 1. Clearly expressed political will on national and local levels for integration of restorative practices within the justice system for children in line with EU standards and criteria; 2. Acceptance and incorporation of international standards for the rights of children at risk/in conflict with law, rights and interests of victims of criminal offenses and victim-offender mediation into the national criminal justice system; and 3. Still present isolated cases of ethnic tension and parallel living and functioning of different ethnic communities.

3.1 Scope and Data Sources

The scope of survey covered area of one municipality in Macedonia. Namely, it encompassed the activities of the key stakeholders pertaining to the mechanisms for referral to mediation, mutual cooperation and implementation of VOM procedures within the JSC. Worth noting is that the municipality where the survey took place is multi-ethnic, multi-confessional and multi-lingual environment. The survey concerns the period September 2013 to May 2014. Evaluation was conducted in the period March–May 2014.

Through analysis of the attitudes of all professionals involved in the system of mediation, the survey was intended to identify and articulate the factors of key influence. Attention was also devoted to experiences and prospects of the parties in mediation procedure and their reflection. In this way, a possibility is offered to “let dampened voices reach the surface”, which opens the possibility to start from the zero point given the fact that the three cases referred to VOM are the first VOM cases in the country. Worth noting is that out of three referred cases, 2 were referred by the Public Prosecutor and one by the Judge for Children. The cases referred by the Public Prosecutor were related to property crimes and are

punishable with fine or imprisonment of up to three years, while the court referred case was for crime against public order which is punishable with imprisonment from six months to five years. Two of the referred cases were completed with reaching an agreement during the VOM procedure and subsequently confirmed by the Public Prosecutor or the Judge, respectively.

The survey applied multi-method approach. The following data sources were identified: documents (court and prosecution cases referred to VOM, files of mediators on the cases referred to mediation, decisions on referrals to mediation, agreements and decisions verifying agreements), statements from interviews (with professionals in the system and with parties referred to mediation), and data from observed victim-offender mediation procedures. Data collection included review of documents, interviews with identified respondents and observation of referral and mediation procedures.

Review of documents consisted of analysis of documents contained in cases referred to victim-offender mediation within the JSC.

Respondents with whom interviews were made were selected in two ways: the first group of respondents from institutions of the system at local level was dominantly selected by the heads of the relevant institutions of JSC in the selected municipality, while the second group of respondents (mediators, lawyers) was selected from the lists of professionals developed by professional associations that are trained in handling cases within the JSC. Also, persons responsible for the Project implementation on national level were selected. Data collection was conducted by way of face-to-face interviewing with application of semi-structured protocol for interview with different system stakeholders. Total of 17 respondents were interviewed.

For the purposes of data collection, semi-structured protocol for interview with victims referred to mediation, as well as children suspected to have committed act which is by law defined as criminal offense, were developed, but no interviews were conducted. Furthermore, protocol for observation of mediation procedure was developed, too. However, no data from participant observation of VOM procedure were collected.

The analysis of data from documents and from interviews relied on the use of thematic analysis. By means of data triangulation, key findings were identified. Besides triangulation, validation of the interpretations of narratives obtained from interviews was reinforced by requesting feedback from part of the respondents about authenticity of findings.

3.2 Access to Data and Ethical Issues

For the purpose of access negotiation, meetings were held with the Heads of relevant institutions, President of the Court, Public Prosecutor, Chief of Sector for Internal Affairs, and Director of the Centre for Social Work, while the list of lawyers authorized to handle cases in the justice system for children and the list of mediators authorized to manage VOM procedures in the JSC were requested and obtained from the Chamber of Lawyers and Chamber of Mediators, respectively. It is important to note that, within the negotiation of the access to data in

institutions, including access to professionals, identification of respondents was determined on the basis of their competence within the JSC and proposals of the heads of the relevant institutions.

Access to data was also supported by written communication by the partners in the Project. At the level of institutions, uninterrupted access to professionals and cases was provided subject to confidentiality rules. All professionals, except one, expressed readiness to be interviewed.

Due diligence was devoted to ethical issues arising from two aspects: vulnerability and specific protection of victims and children as parties in mediation procedure, and limited number of interviewed professionals preventing guarantees that no assumptions would be made of the possible identity of interviewed professionals. In this regard, all steps were guided by the general orientation towards protection of integrity and safety of vulnerable respondents (victims and children in VOM procedures) and making the least possible potential damage, as well as guaranteeing the anonymity of professionals to the maximum possible extent. This approach was applied starting with techniques for data collection, through the manner of data collection and presentation, up to findings validity checkup.

Besides the provided access to data on institutional level, and considering that research design included techniques of data collection from individuals – interviews with professionals, interviews with victims and children referred to VOM and observation of VOM procedures, researchers used bi-tariff model guaranteeing informed consent. Although interviewed professionals were not vulnerable category, yet bearing in mind that the access to them was provided by the heads of the relevant institutions, detailed information was given prior to the interview, concerning the goal and the content of the interview, while adhering strictly to the rules on voluntariness and informed consent.

Information to children and victims referred to VOM about the survey, goals and content was provided through mediators, without any contact being made with researchers. In this way, the relationship of confidentiality between mediator and parties in the procedure was guaranteed. With regard to observation of mediation procedures, the same approach of consent granting by the parties in VOM procedure was applied. All records from conducted interviews are subject of specific manner of keeping and only evaluators have access to them. With reference to personal data coming in contact with the team of evaluators in the course of data collection through interviewing or analysis of documents in files, such data is not used for identification of persons.

3.3 Limitations

There were four main limitations identified in the course of the survey: term of the evaluation, impossibility to observe procedures for referral and mediation, prevented access to the files of mediators of cases referred to mediation, and denied consent for participation in the evaluation by VOM parties in all three cases.

The period in which the survey was conducted occurred as a factor of limitation. Namely, the three cases referred to VOM and mediation procedures

finishing before the commencement of the survey prevented observation of the referral and mediation procedure, as well as interview taking with parties prior to referral and VOM procedure implementation. Another limitation is due to the period of evaluation starting after referral/implementation of VOM procedures, and their observation was practically impossible. Hence, evaluation does not provide an insight into applied procedures of referral and mediation.

All efforts employed to gain access to the files of mediators of referred cases, failed to produce any result.

As far as parties in VOM are concerned, denial of interviews both by children and their parents, and also by victims, is noteworthy. The causes could be the season of intensive agricultural activities, and shortage of time resulting thereof, and potential lack of understanding of their own role in VOM and possible skepticism. Therefore, the paper lacks data on the experience and prospects of the VOM parties.

4 FINDINGS

The presented discussion of the findings is along three procedural guarantees of the VOM parties. Correspondingly, the provision of process guarantees in the course of VOM procedure is closely related to the treatment of VOM within the justice system for children. Asked the question who should provide the process guarantees of the parties to the dispute during mediation procedure, professionals often answer that it is the mediator who should provide them, using his/her skills, ability to listen and secure equality of parties:

“So, here, it depends primarily on the skills of the mediator with regard to presenting or giving direction to the procedure itself. However, if the question concerns a check by some person or by any institution, each of the parties has the right to its proxy or defense attorney in the procedure as a person to take part in the mediation procedure, as neutral persons in a sense of safeguarding the interest of the side they represent.”

The responses need to be seen in the broader social context and capacities of the main stakeholders. Most of the stakeholders in the JSC cope with limited spatial and human resources. The principle of separate access, separate units within institutions (court unit for children, public prosecutor for children, special office for interviews with children within police station) to relieve negative effects of the formal conduct of the court proceeding itself, faces severe constraints. In the labyrinths of court system, children confront overloaded court buildings, crowded offices, unpleasant and formal ambiance.

The professional's viewpoints of the meaning of VOM in the justice system for children matters, as well as their perception of the goal of the JSC. In general, the viewpoint for VOM as a possibility for alternative settlement of disputes and that mediation is a good possibility for extra-judicial settlement of disputes prevails among professionals, because, as they say, *“instead of maltreatment before courts”*, long lasting procedures, citizens want to have their case settled faster outside the court. According to professionals, this derives from the lack of confidence in the judicial system, or its inefficiency in preventing a child to repeat the conviction of

an offence that is crime, which means in the segment of the exercise of the special prevention in the punishment. Furthermore, acceptance is conditioned by the lack of confidence in judicial system to secure the damaged party to be adequately compensated.

All stakeholders in the system have **well-articulated will for application** of victim-offender mediation. They recognize VOM as a positive possibility and support its more frequent application. They maintain that it could operate efficiently if the main preconditions for its application are secured. They identify such preconditions as development of institutional capacity and adequate election of mediators. In particular, the will for application of the mediation exists both in public prosecutor's office and court, because the so called "ice breaking" and recognition of positive outcomes of referred cases will bring positive climate and mood for further reference, provided that both parties agree to it.

However, part of professionals has insufficient and inadequate information and knowledge of the justice system for children and VOM procedure. Namely, part of the professionals in the JSC are not familiar with the provisions of the old Law on Juvenile Justice (Zakon za maloletnička pravda, 2007), as well as the new Law on Justice for Children (Zakon za pravda za decata, 2013), although the position they occupy assumes necessary knowledge of current legal solutions within the scope of their work. For example, part of respondents stated:

"I am not familiar with mediation and I was not invited and attended seminars and meetings on mediation. I have very little understanding of the term mediation."

"Now, I don't know how many mediators there are in ... I think we still don't have list, as we have for example list of notaries, list of lawyers, list of enforcement agents ... and, you see, I don't know if it is established as chamber or as association."

4.1 Perspectives of Professionals on the Right to Information

Despite of the manifested will for VOM, understanding of the benefits of mediation by professionals is of particular importance for its proper implementation, dominantly expressed through informing the parties.

Content of the information given to the parties analyzed through the content of 'what can parties expect and why to accept VOM' revealed the understanding and meaning attributed to VOM by professionals. Among professionals, there is a lack of confidence in the efficiency of formal system in dealing with children. According to them, judicial procedure is stigmatizing, it labels the child, and it is prone to secondary victimization of victims and has small effect on the prevention of juvenile delinquency. Therefore, they support mediation as extra-judicial resolution of disputes and child dissuading from formal procedure. According to the interviewed professionals, benefits of mediation are grouped around three topics among professionals: benefits on the side of referrers, benefits for child and benefits for victim.

Benefits on the side of referrers includes **relieve of the court and the prosecutor's office from case load and speeding the procedure**. In general, the viewpoint that mediation will relieve the court from judicial cases, accelerate the procedure and upon successfully completed mediation judicial cases will be closed successfully,

i.e. court proceedings will be terminated, prevails among professionals. This contributes to the assessment of the work of judges, because they will have the number of solved cases increased. By referring cases to mediation, part of professionals stated that the workload of the public prosecutor's office, which is overloaded with huge amount of work in conditions of staff shortage, will be relieved.

Benefits for child are dominantly seen by the respondents in **reduction of legal costs**. This benefit has been identified by almost all professionals. They maintain that mediation procedure is less expensive for the parties, as they will not bear legal costs or costs for the mediator, given the fact that the costs for the mediator are borne by the Budget of the Republic of Macedonia. In addition, the professionals have frequently expressed the viewpoint that the child will **not have criminal records** which means that harmful consequences involving stigmatization will be smaller. Child is not stigmatized and is not treated as recidivist.

Some of the professionals recognize the advantage of informal treatment of children and identify negative aspects of judicial procedures. This concerns a **child's fear of the court building in general**, fear from the rigid formalism during statement making, as well as fear of punishment.

"He comes and trembles before the court, when he sees the building, sees the court registrar, translator ..."

"So, juveniles will not go to court doors. First, the juvenile will be saved from unpleasant situations. A juvenile is certainly not happy to go to prosecutor for five times, and then to investigating judge, and after that to juveniles' judge."

Professionals share the viewpoint that mediation is a better procedure for child, because by facing the victim and compensating harmful consequences caused by the committed crime they may **accept greater responsibility for their action**.

"He [the child] will be more responsible to solve his problem. Possibly ... to make an apology and convince the victim that the deed will not be repeated and then the victim will be secure at least that the same offender will not do so another time."

Reaching the common grounds is frequently underlined benefit by professionals concerning the possibility for the parties, child and victim, to achieve jointly acceptable solution in the interest of both sides, where both sides will **reconcile and establish the impaired relationship**.

Major part of professionals regards the outcome from the mediation procedure **as more lenient treatment** compared to the outcome from formal proceedings. Some of the professionals declare that child "will not be punished" compared to the punishment he could face in a formal judicial proceeding.

Professionals recognize the advantages of mediation relative to judicial procedure and benefits for the child. Yet, part of them does not make sufficient distinction of what is the best interest of child. Statements that the outcome of the mediation procedure is a more lenient treatment of child compared to the outcome of the formal procedure minimize the essential meaning of VOM. Such approach could cause even more negative consequences for the child, who striving for more lenient treatment may fail to understand the substance of the procedure and its goals.

With regard to the *benefits for victim* major part of professionals regards **reparation** as the best benefit of mediation in the interest of the victim, who instead of exercising the right through judicial proceeding, has a possibility to agree on the compensation of damage with the child and his/her legal representative in a faster and easier way.

Part of professionals regards **the interest of the victim to get answers** to certain questions related to the crime as benefit of the mediation process.

“... well, I think that victims will try to understand why exactly they have become victims. Why exactly that person. Why I was selected to be a victim. And simply to overcome ... I don't know, some fear, to simply talk about the problem, why, how, to hear what was the motive of the offender.”

“... I think that when a case is solved through mediation, it will be much less painful for the victim as well to finish as soon as possible, to end well. Because, the shorter the process lasts, the better it is for the victim. In VOM the victim is not reminded constantly of what has happened, the same questions are not repeated in different offices, in different institutions.”

Victims in judicial proceedings are still marginalized, have a role in the legal process and their rights and needs during the formal procedure are not addressed. Professionals still perceive the right of victim reparation as a right that can be exercised through civil judicial procedure and do not discuss compensation for damage in a so called adhesion procedure. Therefore, they see the mediation procedure as an important possibility for the damaged party to receive compensation for damage, because otherwise, if she/he gives no consent to agree with the offender on the type and level of the compensation, she/he could encounter difficulties during judicial proceeding towards exercise of that right. By this end, professionals attribute great importance to victim in mediation procedure.

Information of parties and content of information is left to the personal choice of the given professional. Proper and appropriate information is condition for prior informed consent. However, absence of victim information and referral of the case to mediation has been noted.

4.2 Perspectives of Professionals on the Voluntary Participation

With regard to the importance of genuine information of the parties about VOM to result in prior **informed consent**, professionals have consensus that parties should be informed and are informed about VOM. However, the content of information to be given to parties is a particular challenge. In the absence of uniform content of the information on what mediation is, how to select mediator, what can parties expect, how does procedure run, what are the rights of parties in VOM procedure and how can VOM procedure end up, information depends on the knowledge of professionals about VOM and their personal assessment of the content of the information. Parties' understanding of the procedure and what they can expect from VOM is strongly relevant for mediation acceptance.

In the frames of the three cases referred to mediation, the absence of certain process guarantees was noted on both sides. Namely, with reference to cases

referral to mediation, there was no record of appropriate prior information of the basic principles, the meaning of and the expectations from the mediation. Furthermore, no written consent of the parties or their legal representative was recorded. Cases lack written consent for case referral to mediation by the child, her/his legal representative, defense attorney and damaged party.

On the other side, it is a legal requirement that parties submit written consent to the public prosecutor or the court. It is left at the disposal of the parties to decide on the form of the written consent. The analysis of cases referred to VOM by the court and the prosecutor indicated that the consent is recorded in the minutes on the interrogation of the child defendant, and in the minutes on the hearing of the witness-damaged party. However, no entry has been found in the cases of parties' information. On the other side, Public Prosecutor's Office faces difficulties to secure the presence of the victims in the procedure in order to inform them on the goals and the meaning of mediation. Due to short deadlines of the procedure, it is necessary to establish efficient system of delivery and communication with children and victims, especially taking notes of their contact telephones in the criminal reports submitted by the police to the public prosecutor's office.

In addition, the document review in the referred files indicated a lack of record of prior establishment of the facts of the crime, i.e. acceptance of the responsibility by the child perpetrator. This aggravates further attempts towards reconciliation by the mediator and is at the same time contrary to the basic principles of mediation.

4.3 Perspectives of Professionals on the Right to Legal Aid

The right to legal aid was also part of the survey and the professionals were asked on their opinion of the role of the defense lawyer in the proceedings for VOM and what they expect from them. The survey identified cases where conversations with child offenders and child victims in the course of the procedures were held without legal representative. Professionals identified part of the reasons in the lack of motivation by lawyers themselves to be legal representatives in procedures involving children due to the difficulties in the payment of compensation of costs and award for their work. Though appointed by official duty, they give up during procedure and do not attend further process actions.

The role of defense lawyer in procedures against children has been minimized, not only by defense lawyers themselves, but also by other professionals. Due to inconsistent application of legal solutions and absence of defense lawyers in the procedure, process guarantees of child and victim are frequently violated, especially when parties involved are uneducated and poor. The role of defense lawyer in the procedure is important for proper information of its goals and principles and for safeguarding and providing the basic process guarantees, especially in cases of disparity in the power between the parties.

The right to a mutually agreed selection of mediator was not observed. Selection of mediator by agreement is not applied for the reason that the damaged party has not been even informed or consented to refer the case to mediation. Even in case of both parties being properly informed and written consent given,

the court or the public prosecutor cannot enable the parties to select mediator by agreement from the list of mediators, as there is no such list.

With regard to the implementation of VOM, professionals attribute great importance to informing citizens of the benefits of mediation and constant rising of public awareness. According to respondents, there is a tradition of alternative and extra-judicial resolution of disputes by a distinguished member recognized in the community. Professionals maintain that this is a strong argument in favor of regaining acceptance for alternative disputes resolution; however, a lack of familiarity with the term mediation is an obstacle which could cause lack of understanding of the procedure itself. Professionals also share the opinion that citizens are not informed sufficiently of the benefits of mediation and therefore they manifest non-confidence towards mediation and mediators in general. It has been stated that if citizens were more aware of the benefits of the procedure itself and felt the gain, then they would have wished to resolve their disputes by mediation much more frequently.

5 CONCLUSION

"The ice is broken." Even though the paper based on the 3 penal cases with limited access to the mediators case files and no interviews with the parties, but with 17 interviews with local professionals from the justice sector, cannot bring compelling general conclusions or provide a deeper insight into practice, it does give an insight in the viewpoints of professionals in the justice sector that certainly may serve as an important indicator of topics to be taken into consideration in the further developments. By referring the first three cases and a successful completion of two of them, positive practice and rising confidence in the benefits of its application for all participants in the dispute and procedure in general have emerged. Hence, the research findings are to be used as a basis of which we can learn, build good practices and identify certain weaknesses in the system. Given that VOM as a new criminal legal institute in JSC was established back in 2007 and the first three cases were referred to mediation in February 2014, they can serve as object lessons of how it should or should not be managed or what should be improved to build the practice. This small scale survey is particularly valuable in filling up the existing empirical gap, and the findings might be used as a basis for developing system prerequisites for VOM.

However, the findings from the first three referred cases do not provide sufficient grounds to draw a conclusion whether procedural rights of the parties during the VOM procedure were observed since no observation of the mediation processes happened accompanied with prevented access to mediator's files. On the other hand, the findings clearly point out to the lack of adherence to the basic VOM principles, especially the right to information and informed consent of the parties, which in turn shape the observance of procedural rights.

Proper and adequate information of the parties about VOM procedure, as well as their written consent and facilitation of mediator selection by mutual agreement, are still a serious challenge in mediation application.

REFERENCES

- Caceva, V. (2008). Fenomenoloski karakteristiki na maloletnickiot kriminalitet vo Republika Makedonija [Phenomenological features of juvenile crime in the Republic of Macedonia]. In O. Bacanovic (Ed.), *Maloletnička pravda: od ideja do praktika* (pp. 98–116). Skopje: Policiska Akademija.
- Convention on the Rights of the Child*. (1989). United Nations. Retrieved from <http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf>
- Council of Europe. (1999). *Recommendation No. R (99) 19 concerning mediation in penal matters*. Committee of Ministers.
- Council of Europe. (2007). *Guidelines for a better implementation of the existing recommendation concerning mediation in penal matters*. Retrieved from <https://wcd.coe.int/ViewDoc.jsp?id=1223865&Site=DG1-CEPEJ>
- De Mesmaecker, V. (2013). Victim-offender mediation participants' opinion on the restorative justice values of confidentiality, impartiality and voluntariness. *Restorative Justice*, 1(3), 334–361.
- Durmortier, E. (2003). *Neglecting due process for minors: A possible dark side of the restorative justice implementation?* Retrieved from www.restorativejustice.org/10fulltext/durmortier-els.-neglecting-due-process-for-minors-a-possible-dark-side-of-the-restorative-justice-implementation
- Eliaerts, C., & Dumortier, E. (2002). Restorative justice for children: In need of procedural safeguards and standards. In E. G. Weitekamp, & H. J. Kerner (Eds.), *Restorative justice: Theoretical foundations* (pp. 204–223). Devon: Willan.
- European Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings. (2001). *Official EU Journal*, (L 82), 01–04.
- European Parliament and European Council Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA. (2012). *Official EU Journal*, (L 315), 57–73.
- Field, R. (2004). Victim-offender conferencing: Issues of power imbalance for women juvenile participants. *Murdoch University Electronic Journal of Law*, 11(1). Retrieved from <http://www.austlii.edu.au/au/journals/MurUEJL/2004/12.htm>
- Groenhuijsen, M. S. (2000). Victim-offender mediation: Legal and procedural safeguard: Experiments and legislation. In M. S. Groenhuijsen (Ed.), *Victim-offender mediation in Europe: Making restorative justice work* (pp. 69–82). Leuven: Leuven University Press.
- Hedeen, T. (2005). Coercion and self-determination in court connected mediation: All mediations are voluntary, but some are more voluntary than others. *The Justice System Journal*, 26(3). Retrieved from <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/adr&CISOPTR=29>
- Ikpa, T. S. (2007). Balancing restorative justice principles and due process rights in the justice system. *Washington University Journal of Law & Policy*, 24. Retrieved from http://openscholarship.wustl.edu/law_journal_law_policy/vol24/iss1/11
- Khatiwada, I. (2005). *A research report on ensuring fair trial in cases children in conflict with the laws 2004–2005 (Nepalese perspectives)*. The Danish Institute for Human

Rights. Retrieved from <http://www.humanrights.dk/files/Importerede%20filer/hr/pdf/ishwor.pdf>

- Lauwaert, K. (2013). Restorative justice in the 2012 EU victims directive: A right to quality service, but no right to equal access for victims of crime. *Restorative Justice*, 1(3), 414–425.
- McEvoy, K., & Eriksson, A. (2006). Restorative justice in transition: Ownership, leadership and 'bottom-up' human rights. In D. Sullivan, & L. Tifft (Eds.), *Handbook of restorative justice a global perspective* (pp. 321–335). London: Routledge.
- Staines, J. (2013). The implementation of restorative approaches in a secure child care centre. *Restorative Justice*, 1(3), 362–388.
- Van Ness, W. D. (1998). *Restorative justice: International trends*. Paper presented at Victoria University Wellington, October, 7, 1998, New Zealand.
- Victim-Offender Mediation Association. (1998). *Victim-Offender Mediation Association recommended ethical guidelines*. Retrieved from <http://www.voma.org/docs/ethics.pdf>
- United Nations, The Economic and Social Council. (2000). *Basic principles on the use of restorative justice programmes in criminal matters* (ESCO Res. 2000/14 U.N.Doc.E/2000). United Nations.
- Zakon za krivična postopka [Law on Criminal Procedure]. (2010). *Služben vesnik RM*, (105/10).
- Zakon za maloletniška pravda [Law on Juvenile Justice]. (2007). *Služben vesnik RM*, (87/07).
- Zakon za medijacija [Law on Mediation]. (2007). *Služben vesnik RM*, (60/07).
- Zakon za pravda za decata [Law on Justice for Children]. (2013). *Služben vesnik RM*, (148/13).

About the Authors:

Stojanka Mirčeva, Ph.D., Assistant Professor, Police and Human Rights, Faculty of Security – Skopje, University St. Kliment Ohridski – Bitola. Main areas of research: victims in the criminal justice system, justice system for children, restorative paradigm, policing and non-discrimination, police responses to domestic violence against women. E-mail: smirceva@gmail.com

Vesna Stefanovska, Ph.D., Assistant Professor in Criminology, Faculty of Security – Skopje, University St. Kliment Ohridski – Bitola. Main areas of research: criminology, restorative justice, crime prevention, justice for children, prison society. E-mail: vesne_stojkovska@yahoo.com

Bogdančo Gogov, Ph.D., Assistant Professor, Police and Human Rights, Faculty of Security – Skopje, University St. Kliment Ohridski – Bitola. Main areas of research: policing and fair trial standards, restorative justice, community policing, gender based violence against women. E-mail: bgogov@t-home.mk