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Possibilities of Mediation in Republic of Serbia in Cases of Domestic Violence

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Purpose:

This paper analyses the theoretical, legislative and practical advantages and limitations of mediation as an alternative way of resolving the conflict between perpetrator and victim of domestic violence in Serbia. Starting from the premise that mediation in lighter cases of domestic violence is more preferred form of social reaction from the initiation of criminal proceedings; the authors analyse the legislation of the Republic of Serbia and point out that the mutual incompatibility of laws disables use of mediation in practice.

Design/Methods/Approach:

Based on acceptability of the concept of restorative justice, this scientific work analyses the advantages and limitations of mediation as an alternative way of resolving the conflict of the offender and the victim in cases of domestic violence. Authors use the comparative method, legal dogmatic method, case study method (examples for court practice in Serbia) and statistical data to examine the hypothesis that mediation may constitute a constructive way of resolving less violent conflicts within the family members and why is not enough applied in practice.

Findings:

Modern criminal political orientation of the "zero" tolerance of domestic violence, which was adopted in law in practice in Serbia is "blocking" use of mediation, which, in public opinion, is seen as an inadequate response to this crime. Results of the analysis show that the Serbian legislature opted for a punitive response and measures of restraining as most important mechanisms for the prevention of domestic violence.

Research Limitations/Implications:

These data provide insight into the marginal segment of the formal response to domestic violence in Serbia.

Originality/Value:

Few studies in Serbia comparing foreign experience and domestic social possibilities for the success of mediation in cases of domestic violence.

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Keywords: alternative criminal sanction, mediation, domestic violence, Serbia

Možnosti mediacije v Republiki Srbiji v primerih nasilja v družini

Namen prispevka:

Članek analizira teoretične, zakonodajne in praktične prednosti in omejitve mediacije kot alternativnega načina reševanja konflikta med storilcem in žrtvijo nasilja v družini v Srbiji. Izhajajoč iz predpostavke, da je mediacija v lažjih primerih nasilja v družini primernejša oblika socialne reakcije kot uvedba kazenskega postopka, avtorji analizirajo zakonodajo Republike Srbije in poudarjajo, da nezdružljivost zakonodaje onemogoča uporabo mediacije v praksi.

Metode:

Na podlagi sprejemljivosti koncepta restorativne pravičnosti to znanstveno delo analizira prednosti in omejitve mediacije kot alternativni način reševanja konflikta med storilcem in žrtvijo v primerih nasilja v družini. Avtorji uporabljajo primerjalno metodo, pravno dogmatično metodo, študijo primera (primeri sodne prakse v Srbiji) in statistične podatke za preverjanje hipoteze, ali lahko mediacija predstavlja konstruktivni način reševanja manj nasilnih konfliktov med družinskimi člani in zakaj ni dovolj uporabljena v praksi.

Ugotovitve:

Sodobna kazenska politična usmeritev "ničelne" tolerance nasilja v družini, ki je bila sprejeta v pravni praksi v Srbiji, "onemogoča" uporabo mediacije, ki je po mnenju javnosti videti kot nezadosten odziv na to kaznivo dejanje. Rezultati analize kažejo, da se je srbski zakonodajalec odločil za kaznovalni odziv in prepoved približevanja kot najpomembnejša mehanizma za preprečevanje nasilja v družini.

Omejitve/uporabnost raziskave:

Ti podatki omogočajo vpogled v obrobni segment formalnega odziva na nasilje v družini v Srbiji.

Izvirnost/pomembnost prispevka:

Nekatere študije v Srbiji primerjajo tuje izkušnje in domače socialne možnosti za uspeh mediacije v primerih nasilja v družini.

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Ključne besede: alternativna kazenska sankcija, mediacija, nasilje v družini, Srbija

1 INTRODUCTION

The concept of reconciliation of the victim and the offender by court settlement (as one of restorative justice programs) is very popular in Anglo-American countries, the Scandinavian countries and Europe. Such programs of restorative justice are well-established in North America, Australia and Western Europe (Gavrielides, 2007; Liebmann, 2007). In Central and Eastern Europe the concept of restorative justice is relatively new phenomenon that is introduced in legislation during the

transition period (end of the 20th century) under foreign influences, as follows from Willemsens and Miers (2004) and Fellegi (2005).

Among European countries, "pioneers" in the application of informal methods of conciliation and settlement as an alternative method of removing the criminal proceedings are: Austria, Norway, Belgium and Finland (Haller, Pelikan, & Smutny, 2004; Lappi-Seppäla, 2003). Popularity of this concept comes from extended capabilities for effective practical application of this method as an alternative for "classical" criminal prosecutions and indictments. It can be assumed that not only theoretical but also utilitarian reasons stand in favour of the practice of conciliation proceedings and settlement. Therefore, it is necessary to clearly examine the advantages and disadvantages in the application of this alternative procedure criminal charges.

There are limited possibilities of conciliation and settlement in practice. Before the concept of restorative justice gained wide popularity, it was advocated that the reconciliation of the offender and the victim as an alternative way to avoid unnecessary criminal proceedings and convictions could be applied only in cases of minor criminal offenses (the so-called lighter crime) performed among those previously familiar with, such as neighbours, relatives, colleagues at work, spouses (Burgstaller, 1990; Cusson, 1987; Joutsen, 1987). According to this, the reconciliation and settlement could apply only in certain cases, for example when the crimes are carried out by minors or when the offender performed criminal offense for the first time and without the element of violence, when committed minor criminal offenses such as insults, slander, theft (especially theft by supermarkets, the vehicle or vehicle theft), vandalism or minor bodily injury.

Such a stand is even today not in question. In the meantime, there are designed other ways to mediation and settlement procedures that are used in combination with the criminal sanctions or even during the execution of a sentence of imprisonment (according to Gavrielides' typology (2007: 31–32) named "relatively dependent" system).

Mediation and reconciliation of the offender and the victim cannot be practiced as the only alternative way of resolving social conflicts that arise regarding the enforcement of serious crimes that violate the personal good of man, such as attempted murders, rapes, robberies and etc. Yet, they do not exclude any possibility of application of settlement and reconciliation in these cases, if the perpetrator and the victim previously know each other (if they were friends or spouses), which was checked in some Canadian experiments in which participated some victims of crimes involving violence (Fattah, 1998; Roach, 2000). In cases of domestic violence (precisely violence in an intimate relationship) and other crimes committed between victim and offender who previously know each other, reconciliation and settlement have a particular justification, because it is in the interests of both parties and gives them the opportunity to resolve their conflicting relationship without the threat of formal criminal proceedings and the imposition of criminal conviction. And even in serious crimes, which inevitably must be sentenced to imprisonment, such as for example murder or manslaughter, reconciliation and settlement can be beneficial to the offender and the victim's closest relatives (Wright, 2009). Victim-offender mediation in

domestic violence is theoretically controversial, noted Strang and Braithwaite (2002: 4), but domestic violence "is not a unitary phenomenon: it involves varying levels of violence, varying frequency and persistence and varied interpersonal and structural dynamics". Different situations and changes in dynamics of domestic violence require good connection between formal legal regulation and nets of community control – mediation may be one of the links. So, "domestic violence under the lens of restorative justice" deserves attention, at least as a solution for needs of victims for a better protection (in accordance to Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards for the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA).

Programs called facilitative mediation that could be applied in relation between those who are convicted of serious crimes and their victims do not exist in Serbia, and due to repressive public opinion every effort to introduce them would be doomed to failure. Because of this, mediation is applicable only in criminal proceedings conducted upon a private charge, which existed since the eighties in cases of domestic violence. It seems to be counterproductive to suggest greater use of mediation, because Serbia since 2000, in accordance to the general trend of strengthening the protection of women as victims of domestic violence, insists on timely recognition, prevention, and more intense repressive response to domestic violence, which excludes the application of mediation, even if it is facilitative in nature. Similar situation exists in many countries where under the influence of women's organizations, governments believe that repression is the only answer to violence against women. Nonetheless, there are examples of good practice in Finland, Austria and United Kingdom as have found Liebmann and Wotton (2008/ 2010), Flinck, Säkkinen, and Kuoppala (2011) and Pelikan (2000, 2010) in research from 2000 and 2009.

In contrast, in Serbia the practice of social protection mediation is still used in marriage and family disputes since fifties. Based on Džamonja Ignjatović and Žegarac (2007) in Serbia and based on Sladović Franz (2006) in Croatia, there are some attempts to comply with international programs to develop transformative model of mediation, which would achieve a change in the relations between the participants of the mediation process.

Without prejudice to the need in Serbia to reinforce changes in public awareness of the unacceptability of domestic violence and to strengthen the protection of victims, in this article, by comparing foreign experience and based on the examples from the case law (case-study method) we point out the perceived deficiencies in the system of protection against domestic violence, which would, in our opinion, contribute to greater application of the conciliation procedure and achieving better results than it is currently the case.

2 LEGAL FRAMEWORK FOR THE PROTECTION OF VICTIMS OF DOMESTIC VIOLENCE AND MEDIATION

Thanks to the activities of the Victimology Society of Serbia and the non-governmental organization for the protection of women against violence since 2001 there has been intensive investigation of domestic violence in Serbia and monitoring state's reaction (Jovanović, 2010; Lukić & Jovanović, 2001; Nikolić Ristanović, 2002; Konstantinović Vilić & Petrušić, 2004). Based on these results, a model for the prevention of domestic violence was designed, which, with the support of non-governmental organizations for the protection of the women rights, influenced the fact that in 2002, the Criminal Law of the Socialist Republic of Serbia [CL SRS], (1977, 1977, 1979, 1984, 1986, 1987, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1998, 2001, 2003) has been introduced with the article 118a, which was a new criminal offense called domestic violence, prescribed now in article 194 in the Criminal Code of Republic of Serbia [CC RS], 2005, 2009, 2012, 2013, 2014). Then, in 2005, the Family Law of Republic of Serbia (FL RS, 2005, 2011, 2015; which was amended in 2011 by another law) set regulations aimed at preventing and protecting early family members from domestic violence. The same law traditionally accepts mediation, as a part of the divorce proceedings. In addition, family mediation within their powers also practice guardianship authorities.

At a similar time, in 2001, first pilot project of mediation in civil proceedings was introduced, and since 2005, training for mediators is conducted at the Center for Mediation in Belgrade. The process of mediation was regulated by the Law of Mediation of the Republic of Serbia [LM RS], 2005 poorly (the law has only 32 members) and uniformly in various areas of dispute between individuals or between individuals and legal entities (property law, commercial, family, administrative and criminal law). Similar provisions are in the Law on Settlement and Mediation in Resolving Disputes (LSM RS, 2014), in force from 1. January 2015. In the practical application the legal provisions are combined with civil and criminal law, and the additional laws ordered the way of arranging the list of mediators and training program for mediators. It insists on the voluntary initiation of the mediation procedure, which is then converted into a separate formal proceeding. This procedure should be performed before the court proceeding starts or upon its completion, and cases are kept under a special mark "M". LSM RS (2014), as well as LM RS, 2005, regulates the obligations of the court in relation to the referral of the parties to mediation, determining the mediator, and the rights and obligations of the parties and the mediator. Centres which conduct mediation in the event of divorce or other family law cases are in courts, so that judicial mediation is linked to the potential (unsuccessful) process of conciliation and compromise, and is conducted by the custodian in the event of perceived dysfunctional family relationships.

Legislator can be objected that he did not properly understand the nature of mediation, that should not be a "pendant" of formal court proceedings, but a constructive way to resolve a conflict among people to achieve balance in their relationships and restore peace in the community in accordance with the concept of restorative justice. These are all circumstances that mediation associated with the sanctions applicable in the community (community based sanctions) and this concept is realized with great difficulty in Serbia (Mrvić Petrović, 2006, 2010).

The law does not provide a basis to take advantage of all the benefits of the mediation process, which should be undertaken primarily in the interest of improving the relations between the parties, not just for the rapid resolution of the disputed judicial matters.

2.1 The Inability of the Application of Mediation in Criminal Matters

When it comes to criminal cases, mediation is limited to criminal proceedings which are initiated by private complaint. According to the current criminal law, the court refers the parties to mediation, where unexcused absence of duly summoned private prosecutor (the injured, criminal offense) to appear in court in order to be informed of the benefits of mediation leads to the rejection of his private complaint, while "sanctions" for the defendant are that the judge will immediately determine the trial date (according to Section 505 of the Criminal Procedure Code of Republic of Serbia [CPC], 2011, 2012, 2013, 2014).

Criminal legislation which contains criminal act of domestic violence does not allow proceeding for criminal act of domestic violence to be initiated upon a private charge which means that there is no possibility to apply mediation - the only way to exclude possibly lighter case from criminal proceeding is to apply conditional rejection of criminal charges under Art. 283 of the Criminal Procedure Code (CPC, 2011, 2012, 2013, 2014) as the public prosecutor determines performance of an obligation (indemnity, payment of a sum of money to charity, the requirement of a psychosocial treatment for the elimination of the causes of bullying or similar) to the registered person. Secondly, the defendant may be awarded a lighter penalty based on the agreement of the prosecutor and the defendant on the admission of the offense. Otherwise, the agreement can be initiated when the defendant is on trial for the most serious offenses for which a punishment of imprisonment is for a term of 30 to 40 years.

All the more surprising is that the it appropriateness of the solution for the offender and victim using mediation to resolve their relationship in the case involving minor offenses (for which, for example, imprisonment is up to three or five years) was not noticed. It would be quite in line with the general tendency to avoid keeping inadequate criminal proceedings and with measures for its acceleration that dominate the modern criminal procedural law. At the same time, it would correspond to the other provisions of the criminal law, as it is laid out in the Article 18 of the Criminal Code (CC RS, 2005, 2009, 2012, 2013, 2014) which provides that the institution of acts of minor significance, under legal conditions, may apply to the offenses for which the imprisonment is up to five years. Also, Article 59, entitled "Alignment of the offender and the victim", prescribes that the court may remit the punishment of the perpetrator of the offense for which a punishment of imprisonment is up to three years or a fine if it is on the basis of the agreement reached with the victim complied with all obligations under the agreement.

As it turns out, even the Criminal Code (CC RS, 2005, 2009, 2012, 2013, 2014) does not preclude the possibility of using mediation for the crime of domestic violence, which is the most common in practice and for which a punishment of

imprisonment is from three months to three years. Obviously, the reasons for which the provisions of Article 59 of the Criminal Code (CC RS, 2005, 2009, 2012, 2013, 2014) remain a "dead letter on the paper" and that the mediation is not widely permitted in criminal proceedings are only criminally-political. It's criminal and political orientation that is related to the need to strongly respond to the structural violence in society (especially manifested in the family). In a way, that approach comes into play when it comes to the application of legal protection from domestic violence. There's nothing to object such a decision, which is generally accepted among the members of the Council of Europe (regarding 2011/210 Council of Europe (2011) Convention preventing and combating violence against women and domestic violence [CETS], which in art. 48 prohibits "mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence" covered by the Convention). There is a real need to change social attitudes towards domestic violence in Serbia and to ensure the effective protection of victims.

2.2 Protection of Victims of Domestic Violence Based on Civil Remedies

There is a need to criticize the mismatch of civil (FL RS, 2005, 2011, 2015) and criminal legislation in Serbia aimed at preventing violence. Such a mismatch can, on the one hand, undermine legal security of citizens, and on the other hand, can affect the efficiency of legal protection of victims of violence. Thus, the Family Law (FL RS, 2005, 2011, 2015) under domestic violence means any conduct by which a family member threatens the physical integrity, mental health or peace of another family member, followed by the list of the typical types of violence, which include not only threats, outrageously and reckless behaviour, but also attacks on physical integrity and sexual freedom of any family member (article 197). The definition of domestic violence not only includes the elements of the crime of domestic violence under Art. 194 of the Criminal Code (CC RS, 2005, 2009, 2012, 2013, 2014), but also a series of acts of commission of other criminal offenses such as libel, violation of safety, light and serious bodily injury, rape, sexual intercourse with a minor, etc.

Very broad statutory definition of domestic violence in the Family Law (FL, 2005, 2011, 2015) provides that under the domestic violence means any outrageous, wanton or malicious act that threatens even the tranquillity of another family member (Počuča, 2010). Certainly, such a definition has a purpose of achieving the widest possible protection against violence, but there is a problem with arbitrary filling the contents of legal standard by judges, in order to show "zero" tolerance on domestic violence. The manual for judges suggest that any behaviour that deviates from the normal standards of behaviour and communication with family members qualifies as domestic violence (Petrušić & Konstantinović Vilić, 2006). But such an intolerant attitude does not always show up in the constructive response to violence, because, thanks to the legal definition according of which any disorder in marital and family relations can be subsumed under an act of violence for which is permitted judicial protection, which leads to possible abuses in practice.

The social welfare authorities which first observe disorders in families, provide support and "filter out" the cases in which it is necessary to initiate other forms of legal protection from domestic violence. However, in the current conditions in which they work, in spite of great efforts, the employees of these bodies are not always able to make a realistic assessment of the selection of cases that should receive court protection. According to reports of the social welfare centres in Serbia in 2011 and 2012, each year has an increasing number of reported victims of domestic violence, which is associated with a change in public awareness of the unacceptability of such violence. What is the most common type of activity carried out by the centres when cases of domestic violence are recorded? In 2012 in 342 cases Family law protection against domestic violence was initiated, and 253 cases were charged, but most commonly (in 778 cases) it were taken "some other action". In the report it is stated that the data from which we can not conclude what has been undertaken indicate that there are gaps in determining the practices, but can indirectly be considered that these were incidental to violence when in the centres had been probably undertaken various advisory activities and direct, control and monitoring, including possible mediation (Republički zavod za socijalnu zaštitu [RZSZ], 2013). According to this, in most recorded cases of domestic violence centres have taken some action, but we do not know clearly what and with what success. Insufficiency and deficient training of personnel, their bad financial situation and underestimated role in the structure of state organs, poor accommodation and working conditions are the reasons why the social welfare is facing great difficulties in its function, and therefore expected a heavy burden of preventing domestic violence should be transferred to the court. Thus, the report for 2011 states that the court has imposed protective measures only 44.2% of the total number of cases filed such claims of social welfare centres, while the report from 2012 highlights worried that the number of court protective measures drastically reduced, and the court has not imposed even a court order for the eviction of the perpetrator from the home (RZSZ, 2012, 2013). These data, however, indicate a different point of view of social welfare centres and the courts when it comes to the assessment of the legal criteria for protection against domestic violence (which is favoured too broad statutory definition of domestic violence).

On the other hand, it is evident that in this respect there is a lack of uniformity of judicial practice. Some court decisions insist that the existence of vulnerability of the family activities of another member must be proven, although the level of the threat is not important (Supreme Court of Serbia [VSS] solution Rev 96/07 of 14. 3. 2007), but the verdict by Supreme Court of Cassation [VKS] Rev 2857/10 of 9. 6. 2010, allows a measure of protection from violence, although the existence of vulnerability is not proven, but just not clearly excluded. In that case, the defendant is prohibited from approaching the juvenile son, except in the Centre for Social Work, based on the expert opinion of the team of the Clinical Centre, that sexual abuse of a child at the age of three years "cannot be excluded with certainty, but is likely to be more likely to it never happened" (the judgment mentioned by Milikić, 2011). The verdict is even more important as it was adopted in the meeting of the Civil Division of the Supreme Court of Cassation Serbia on 13th September 2010 (Supreme Court of Cassation [VKS], Conclusion (2010). A rare example is, as in

the judgment of the Appellate Court in Novi Sad Gž2. 51/10 from 3rd February 2010 trying to explain the difference between domestic violence and permanently disturbed family relationships. In that judgment the Court stated that "domestic violence is a pattern of behaviour that a family member is taking, or exerts to other member, in order to establish power and control or to satisfy some of their needs at the expense of another family member, but not an isolated incident. In the opinion of this court, it were a serious and permanently disturbed marital relations between plaintiff and the defendant for which it constantly comes to mutual quarrels, insults and abuse, but there were no elements that the behaviour of the respondent was to be considered brash, reckless and malicious behaviour in terms of the legal definition of domestic violence" (judgment of the Appellate Court in Novi Sad, 2010: 98–99).

Courts of different instances of the same case differently can differently assess the need for the protection in the cases of family violence. For example, the lower instance courts have judged that such a need is missing, and that is why they rejected the claim in which the plaintiff alleged that she constantly suffers physical and psychological violence, because the defendant (her former spouse with whom she shares an apartment after divorce), insults, throws her belongings out of the apartment, locks rooms etc., because of what she contacted the police twice. Allegations of violence that she suffered were proved with a medical certificate. Based on the findings of the Institute of Mental Health, the trial court found that the plaintiff was anxious, "with significant depression and a sense of threat from the world around them, and therefore also from the former husband", all of which can be considered as a response to the dissolution of marriage. All of this contributes to fact that the plaintiff, according to the opinion of the experts, events and the actions of others estimates as too threatening. On the other hand, the defendant was recorded to be impulsive and with the potential weakness of control, which together with the quality of depressed mood may result in inappropriate actions. The findings of the experts stated that in this case the increased interpretive tendency of the plaintiff undoubtedly caused a deterioration in relations between the defendants. Despite of these findings and the fact that due to the conclusion of a new marriage the defendant no longer lived in the same apartment, but was only occasionally visiting, the Supreme Cassation Court took the opposite view and judgment of Rev. 2844/10 of 26th May 2010 reversed the judgment of the first instance courts and imposed protective measures against domestic violence for plaintiff and forbade the defendant from entering the apartment where the plaintiff lives for a period of six months (with possibility of extension).

In the explanation of that decision of the Supreme Court of Cassation (Rev 2844/10), inter alia, is noted that "legal measures for protection are not only the punishment for the perpetrator of domestic violence. They also have a preventive effect because they admonish and warn the offender what legal consequences he can expect in case he continues to repeat his offense, and aim to prevent the recurrence of violent behavior". It appears that the Supreme Court of Cassation provided protection for plaintiff guided by the need for prevention of violence, although the trial court did not establish that violence. It is also unusual is that

the Civil Division of the Supreme Court of Cassation in its decision to "speaks the language" of criminal law.

This example of court decisions symbolically shows that Family law protection is understood as the dominant way to prevent domestic violence. That this is so also documents the fact that in the period from 2005 to 2011 on the basis of the surveyed 60 verdicts of the highest court of the Republic, the demand for protection against domestic violence in 57 (95%) cases had been filed as a basic claim (independently of the other claims). Only in three cases the request was submitted together with lawsuits in proceedings for divorce, the exercise of parental rights and the maintenance of children (Milikić, 2011). The question is what is achieved by such an isolated primary protection of family violence if there is no further legal response in the form of starting divorce proceedings or criminal proceedings against the perpetrator of violence. The legal response to domestic violence should be applied as ultima ratio – when it is not possible through activities of social welfare centres to affect the resolution of family conflict or when due to nature of disturbed family relationships the progression of violence can be expected. Is it sufficient in such cases that only legal protective measures against violence are imposed?

According to the indicators of social welfare centres, the number of recorded cases of domestic violence in Serbia is growing every year, with the most common victims are children under the age of 18 years and women, and violent members of the family are especially fathers (RZSZ, 2012). Such violence usually lasts a long time and cannot be effectively prevented by judicial protection measures which may last only up to one year, if the victim is forced to continue living with the abuser. Measures of protection against violence are not being executed, because no one is responsible for their execution. Possible indirect control of the social welfare is also absent, which could oversee relations in the family in the context of their authority even though they do not perform judicial measures, because they only have data on the measures for those cases for which they are the initiators of the procedure or the proponents of measures to protect against domestic violence (RZSZ, 2012). Therefore it is no surprise that the jurisprudence usually pronounces the prohibition of further harassment of plaintiff, and significantly less often other measures that involve control over approaching the victim and limitations of the right to the enjoyment of private property such as measure of eviction of the perpetrator from the victim's apartment or moving victim into an apartment (Petrušić & Konstantinović Vilić, 2010; RZSZ, 2012).

3 APPLICATION POSSIBILITIES OF MEDIATION

At first sight it would seem that the mediation and domestic violence are excluding each other. In a situation when confronted with delayed state reaction and the difficulties of proof of violence that occurs behind the eyes of the public and without witnesses (evidence "word to word"), a legitimate interest in ensuring effective protection against domestic violence is not exhausted with only launching a legal mechanism protection and punishment of the alleged perpetrator. Numerous cases of dysfunctional family relationships in which some

members had experienced violence, but still show a willingness to change their behaviour may be suitable for mediation, but the mediators should need to make a special effort and be very experienced in order to successfully perform their jobs. Even then, the mediators may be the first that can find out information about the history of abuse and to establish the existence of power and control, which suggests that it is not an isolated case of violence, but a continuous, when it would be advisable to look for other means of judicial protection from violence.

According to the criteria offered in social work practice (Girdner, 1990), mediation is not admissible in cases where people are unable to negotiate or cannot be excluded readiness of the abuser to seriously hurt their partner (for example, when earlier in the act of violence weapons has been used). Girdner (1990) also states that the mediation cannot be applied even in cases where the perpetrator has a need to control the abused or is frustrated by the idea that he cannot get whatever he wants, and when the victim confirms that they were abused, but is not ready to reveal the abuser or had accepted patterns of psychological abuse and is identified with the needs of the perpetrator that are seen as a primary and necessary.

With Girdner's (1990) criteria the Canadian experience also agrees, which does not give the right to expect that a close previous relationship of the perpetrator and the victim in any case justifies the use of settlement and reconciliation. This particularly will not be easy to implement in cases of repeated domestic violence or if there existed unequal relations between the offender and victim based on domination, tyranny and manipulation. In such cases, the victim, who is trying to forget his previous position and to terminate such a relationship does not want to be reminded of the circumstances under which each time had been repeatedly victimized while living with the perpetrator. For this reason, it is questionable whether in such cases they should insist on meeting victims and abusers and refer them to maintain mutual personal contacts (Gaudreault, 2005).

However, mediation should not be systematically excluded in all cases of recorded domestic violence, because it might be applied in those situations when it comes to facilitating violence incident nature, when there is a willingness among partners to overcome the problems and to mutually decide the fate of common life, the care of children, division of property etc. Mediation in such cases of dysfunctional family relationships may prevent future violence. This is useful when the partners decide to consensually terminate their relationship because it contributes to the peaceful atmosphere for making important decisions. Mediation could also be practiced in cases involving misdemeanours against public order or minor criminal offenses (carrying a penalty of up to three years, and which are prosecuted by private action or on the motion of the injured party). For example, for such misdemeanours, as it done in Greece with Act on confronting domestic violence from 2006, mediation could eliminate criminal proceedings (as stated Artinopoulou, 2010: 181–186). Similarity of legal systems of Greece and Serbia (both are built on the traditions of German variant of the continental legal systems) and similar social conditions make it acceptable to transplant this legal solution from Greek law to Serbian law. In such cases it should be carefully examined whether it is expedient to apply mediation. If the public prosecutor or

the court could do this assess, they need professional help of the guardianship, which is now employed ad hoc. Undertaking mediation must match the victim, her interests and willingness to engage in such practices should be crucial in a situation where she files a criminal complaint or otherwise initiates a criminal proceeding.

For now, the mediation was excluded for crimes of domestic violence. In all these cases in the period from 2007–2009, and in Serbia now, punitive repression was applied, which usually lead to the imposition of a suspended sentence or a brief prison sentence for the main form of crime of domestic violence under Article 194 of the Criminal code (CC RS, 2005, 2009, 2012, 2013, 2014) (Nikolić Ristanović, 2013; Statistical Office of the Republic of Serbia, 2014). It is a legally and technically deficient provision, which, like the legal definition of domestic violence under the Family Law (FL RS, 2005, 2011, 2015), under the consequence encompasses all forms of threats to physical and mental integrity, and even personal tranquillity of a family member. The application of these provisions in practice creates significant problems because of the difficulty in separation from other crimes, which affect the courts to act completely differently in similar cases (Jovanović, 2010). So, some may "go" unpunished, others with similar behaviour are to be punished for a misdemeanours against public order, and third for criminal offence of domestic violence.

Due to the broad criminal procedure, there are a "funnel" of crime so that the official statistics for 2013 show the criminal conviction for 40.5% of the accused for the crime of domestic violence is non-existent (RZS, 2013). Although we cannot exclude that this is largely because the victims changed their mind and withheld evidence in criminal proceedings, however, the question of what it is achieved when a conviction of the perpetrator is obtained? A suspended sentence in 2013 was imposed in 977 cases, accounting for 63, 8% of the total number of prisoners (1532), but it does not include the supervision of the conduct of a prisoner at liberty, or the measures of assistance and support, or eventually his mandatory referral to treatment rehab of violence (although it is possible to combine it with its security measures withdrawal from alcohol or narcotic drugs). Imprisonment was imposed in 533 cases (34.8%). For more frequent and imposing penalties partly contribute the fact that legally for the basic form of a crime of domestic violence it may be imposed a prison sentence that cannot be mitigated below a month. As in Serbia the post penal programs of care about prisoners are missing, the behaviour of the convicted person released from prison can be traced only through the possible activities of social work centres on the occasion of subsequent reports of disorder family relationships. In such circumstances it would be meaningful to review the legal description of the crime, to precise action for execution and to provide a consistent delineation of this crime and other offenses, with the removal of legal barriers in order to apply mediation as diversional measure, if it is justified by the circumstances under which the offenses were committed, the history of family relationships and personal characteristics of the offender and the victim. Of course, such programs should primarily serve to improve the position of victims.

For this to be achieved it is necessary to create organizational conditions that control the viability of the agreement reached with the provision of

efficient cooperation with the police, prosecution, courts and other state authorities. Also for practical view are instructive the Austrian model mediation *(Außgerichtlichtatausgleich)* and successful practice of NEUSTART (Pelikan, 2002, 2010). It would be necessary to popularize the wider public benefits and family court mediation.

4 CONCLUSION

Analysed data and examples from Serbia show that the legal framework for the use of mediation exists, but that fades interest for its application. Family mediation is usually used as part of civil proceedings, but it seems to be stopped halfway, after the initial euphoria, between 2001 and 2006 (which led to the amendment of domestic legislation, the establishment of the Centre for Mediation and Training of mediators). In criminal matters, mediation practically doesn't exist. It is noted in the Evaluation report of the European Commission for the Efficiency of Justice (CEPEJ) on 2014 year (data from 2012): efficiency and quality of justice, in which in table 6.3. (European Commission for the Efficiency of Justice, 2014: 151–152) data given for Serbia relating to 2006 (until the later years of data did not).

It is equally likely that a clear concept of development and organization is a major obstacle to the effective implementation of judicial mediation. The reason that mediation is "on the fringe" is that there is only one direction to combat domestic violence by applying criminal sanctions, and the protection of victims is achieved through judicial measures imposed in civil proceedings. From our perspective, this is neither sufficient, nor effective, because it is missing legal criteria to assess when a domestic violence should lead to litigation and when to criminal proceedings. Adopting mediation on a national level in the criminal justice system is prevented by the predominantly repressive orientation in the field of gender-bases violence. Mediation, as alternative procedure on the borders of criminal justice system, should offer victims an adequate choice according to her/his needs. It also prevents (informal) discretionary selection of criminal cases in police practice. Programs for conciliation and settlement of the offender and the victim in domestic violence cases can be applied only to a limited extent, but may be helpful in some cases to empower women victims and support some men to change (Pelikan, 2002, 2010). Examples of Austrian good practice could be a model for development activities Probation Service in Serbia.

REFERENCES

Appellate Court in Novi Sad. (2010). The Jugdment Gž2. 51/10 from 3rd February 2010. *Bulletin jurisprudence of Appelate Court in Novi Sad,* (1/2010), 95–99.

Artinopoulou, V. (2010). Victim offender mediation in cases of domestic violence: The Greek experience. In Afford Ltd., M. Gyökös, & K. Lányi (Eds.), *European best practices of restorative justice in the criminal procedure 2010* (pp. 177–186). Budapest: Ministry of Justice and Law Enforcement of the Republic of Hungary. Retrieved from http://www.iars.org.uk/sites/default/files/Restorative%20justice%20report%20_%20Hungary.pdf

Burgstaller, M. (1990). Kriminalpolitik nach 30 Jahren IKV/AIDP [Criminal policy after 30 years IKV / AIDP]. *Zeitschrift für die gesamte Strafrechtswissenschaft, 102*(3), 637–654.

Council of Europe. (2011). *Convention on preventing and combating violence against women and domestic violence* (CETS, No.: 210). Retrieved from http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&NT=210

Criminal Code of the Republic of Serbia [CC RS]. (2005, 2009, 2012, 2013, 2014). *Službeni glasnik Republike Srbije,* (85/05, 88/05, 107/05, 72/09, 111/09, 121/12, 104/13, 108/14).

Criminal Law of the Socialist Republic of Serbia [CL RS]. (1977, 1979, 1984, 1986, 1987, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1998, 2001, 2003). *Službeni glasnik Socijalističke Republike Srbije,* (26,77, 28/77, 43/77, 20/79, 24/84, 39/86, 51/87, 6/89, 21/90) and *Službeni glasnik Republike Srbije,* (16/90, 26/91, 75/91, 58/91, 9/92, 42/92, 51/92, 23/93, 67/93, 47/94, 17/95, 44/98, 10/02, 11/02, 80/02, 39/03, 67/03).

Criminal Procedure Code of Republic of Serbia [CPC RS]. (2011, 2012, 2013, 2014). *Službeni glasnik Republike Srbije,* (72/11, 101/11, 121/12, 32/13, 45/13, 55/14).

Cusson, M. (1987). *Pourquoi punir* [*Why punish*]. Pariz: Institut de criminologie.

Džamonja Ignjatović, T., & Žegarac, N. (2007). Medijacija u sistemu socijalne zaštite, karakteristike, primena i edukacija [Mediation in the social security system, characteristics, application and education]. *Godišnjak Fakulteta političkih nauka u Beogradu, 1*(1),401– 411.

Directive 2012/29/EU of the European Parliament and of the Council 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 Journal of the European Union, 55*(L 315), 57–73.

European Commission for Efficiency of Justice (CEPEJ). (2014). *Report on European judicial systems – Edition 2014 (2012 data): Efficiency and quality of justice.* Strasbourg: Council of Europe. Retrieved from http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport_2014_en.pdf

Family Law of Republic of Serbia [FL RS]. (2005, 2011, 2015). *Službeni glasnik Republike Srbije,* (18/2005, 72/2011, 6/2015).

Fattah, E. A. (1998). A critical assessment of two justice paradigms: Contrasting restorative and retributive justice models. In E. A. Fattah, & T. Peters (Eds.), *Support for crime victims in a comparative perspective* (pp. 99–100). Leuven: Leuven University Press.

Fellegi, B. (2005). Meeting the challenges of introducing victim-offender mediation in Central and Eastern European countries. In *Final report of AGIS project JAI/2003/AGIS/088*. Leuven: European forum for victim-offender and restorative justice. Retrieved from http://euforumrj.org/assets/upload/FinalAGIS-2publication.pdf.

Flinck, A., Säkkinen, S., & Kuoppala, T. (2011). *Statistical report: Mediation in criminal and civil cases 2010*. Helsinki: National Institute for Health and Welfare. Retrieved from http://www.stakes.fi/tilastot/tilastotiedotteet/2011/Tr19_11.pdf

Gaudreault, A. (2005). The limits of restorative justice. In *Proceedings of the Symposium of the École nationale de la magistrature*. Paris: Edition Daloz. Retrieved

from http://www.victimsweek.gc.ca/symp-colloque/past-passe/2009/presentation/arlg_1.html

Gavrielides, T. (2007). *Restorative justice theory and practice: Addressing the discrepancy* (Report Series, 52). Helsinki: HEUNI.

Girdner, L. K. (1990). Mediation triage: Screening for spouse abuse in divorce mediation. *Mediation Quarterly, 7*(4), 365–376.

Haller, B., Pelikan, C., & Smutny, P. (2004). The Austrian protection against domestic violence act. 1996. In *Crime policy in Europe: Good practices and promising examples* (pp. 37–46). Strasbourg: Council of Europe Publishing.

Joutsen, M. (1987). *The role of the victim of crime in European criminal justice systems.* (Publication Series, no. 11). Helsinki: HEUNI.

Jovanović, S. (2010). *Pravna zaštita od nasilja u porodici* [Legal protection from domestic violence]. Beograd: Institut za kriminološka i sociološka istraživanja.

Konstantinović Vilić, S., & Petrušić, N. (Eds.) (2004). *Krivično delo nasilja u porodici: pravna praksa u Republici Srbiji* [The criminal offence of domestic violence: Legal practice in Republic of Serbia]. Niš: Ženski istraživački centar za edukaciju i komunikaciju.

Lappi-Seppäla, T. (2003). *Techniques in enhancing community-based alternatives to incarceration: A European perspective* (Resource material series No. 61). Retrieved from http://www.unafei.or.jp/english/pdf/RS_No61/No61_10VE_Seppala2.pdf

Law of Mediation of the Republic of Serbia [LM RS]. (2005). *Službeni glasnik Republike Srbije,* (18/05).

Law on Settlement and Mediation in Resolving Disputes of Republic of Serbia [LSM RS]. (2014). *Službeni glasnik Republike Srbije,* (55/14).

Liebmann, M. (2007). *Restorative justice: How it works.* London: Jessica Kingsley Publishers.

Liebmann, M., & Wotton, L. (2008/2010). *Restorative justice and domestic violence/abuse: Summary of the report commissioned by HMP Cardiff.* Retrieved from http://restorativejustice.org.uk/sites/default/files/resources/files/RJ%20and%20domestic%20violence%20summary%20.pdf

Lukić, M., & Jovanović, S. (2001). *Drugo je porodica: nasilje u porodici – nasilje u prisustvu vlasti* [Something is violence in family – violence in in the presence of authorities]. Beograd: Institut za uporedno pravo.

Milikić, M. (2011). Porodičnopravna zaštita od nasilja u porodici u parničnom postupku [Family law protection from domestic violence in the civil proceedings]. *Bilten Vrhovnog kasacionog suda*, *3*, 185–202.

Mrvić Petrović, N. (2006). Alternativne krivične sankcije i novo zakonodavstvo Republike Srbije [Alternative criminal sanctions and new legislation of the Republic Serbia]. *Temida, 9*(1), 55–59.

Mrvić Petrović, N. (2010). *Alternativne krivične sankcije i postupci* [Alternative criminal sactions and procedures]. Beograd: Medija centar Odbrana.

Nikolić Ristanović, V. (2002). *Porodično nasilje u Srbiji* [Domestic violence in Serbia]. Beograd: Viktimološko društvo Srbije & Prometej.

Nikolić Ristanović, V. (2013). *Praćenje primene zakonskih rešenja o nasilju u porodici u Srbiji: nalazi pilot istraživanja* [Monitoring the implementation of legal provisions on domestic violence in Serbia is a pilot survey]. Beograd: UN

Women. Retrieved from http://rs.one.un.org/organizations/18/Pracenje%20primene%20zakonskih%20resenja%20o%20nasilju%20u%20porodici%20u%20Srbiji.pdf

Pelikan, C. (2000). Victim offender mediation in Austria. In The European Forum for Victim-Offender Mediation and Restorative Justice (Ed.), *Victim-offender mediation in Europe* (pp. 125–152). Leuven: Leuven University Press.

Pelikan, C. (2002). Victim-offender-mediation in domestic violence cases – A comparison of the effects of criminal law intervention: The penal process and mediation. Doing qualitative research. *Forum: Qualitative Social Research (Sozialforschung), 3*(1). Retrieved from http://www.qualitative-research.net/index.php/fqs/article/view/880/1918

Pelikan, C. (2010). On the efficacy of victim-offender mediation in cases of partnership violence in Austria, or: Men don't get better, but women get stronger: Is it still true? *European Journal of Criminal Policy Research. 16*(1), 49–67.

Petrušić, N., & Konstantinović Vilić, S. (2006). *Vodič kroz sistem porodičnopravne zaštite od nasilja u porodici* [Guide of family law protection from domestic violence]. Beograd: Autonomni ženski centar.

Petrušić, N., & Konstantinović Vilić, S. (2010). *Porodičnopravna zaštita od nasilja u porodici u pravosudnoj praksi Srbije* [Family law protection from domestic violence in judicial practice in Serbia]. Beograd; Niš: Autonomni ženski centar, Ženski istraživački centar.

Počuča, M. (2010). Nasilje u porodici [Domestic violence]. *Pravo teorija i praksa*, *27*(9–10), 49–62.

Republički zavod za socijalnu zaštitu [Republic Office for Social Protection] (2012). *Izveštaj o radu Centara za socijalni rad u Srbiji u 2011. godini* [Report on the work of the Centers for Social Work in Serbia in 2011]. Retrieved from http://www.zavodsz.gov.rs/PDF/izvestavanje/Izvestaj%20o%20radu%20CSR%202011%20-.pdf

Republički zavod za socijalnu zaštitu [Republic Office for Social Protection]. (2013). *Sintetizovani izveštaj o radu Centara za socijalni rad u Srbiji u 2012. godini* [Synthesis report on the work of the Centres for Social Work in Serbia in 2012]. Retrieved from http://www.zavodsz.gov.rs/PDF/izvestajoradu2013/IZVESTAJ%20CSR%202012%20FIN1.pdf

Roach, K. (2000). The victim support perspective. In M. Whright, & B. Galaway (Eds.), *Mediation and criminal justice, victims, offenders and community* (pp. 44–56). London: Sage.

Statistical Office of the Republic of Serbia. (July 15, 2014). Pravosuđe: punoletni učinioci krivičnih dela za 2013 (RZS, 2013) [Justice: adult offenders for 2013]. *Saopštenje, 64*(191). Retrieved from http://webrzs.stat.gov.rs/WebSite/Public/PageView.aspx?pKey=146

Supreme Court of Serbia [VSS] solution Rev 96/07 of 14. 3. 2007. *Bulletin jurisprudence of Supreme Court,* (2/2007), 43-45.

Supreme Court of Cassation [VKS] Rev 2857/10 of 9. 6. 2010. *Bulletin jurisprudence of Supreme Court of Cassation,* (2/2011). Retrived from http://www.sudskapraksa.com/Pravna%20shvatanja%20i%20presude%20Vrhovnog%20kasacionog%20suda-2-2011.html

Supreme Court of Cassation [VKS]. (2010). Conclusion of the Civil Division from 13. September 2010. *Bulletin jurisprudence of Supreme Court of Cassation,* (1/2010). Retrieved from http://www.sudskapraksa.com/Bilten%20sudske%20prakse%20Vrhovnog%20kasacionog%20suda-1-2010.html

Supreme Court of Cassation [VKS] Rev 2844/10 of 26. 6. 2010. Retrieved from http://www.vk.sud.rs/sr/solr-search-page/results?redirected=213&court_type=vks&matter=19&registrant=_none&subject_number=2844%2F2010&date_from%5Bdate%5D=26-05-2010&date_to%5Bdate%5D=&keywords=&phrase=&sorting=by_date_down&results=10&level=0

Sladović Franz, B. (2006). Obilježja obiteljske medijacije [Characteristics of family mediation]. *Ljetopis socijalnog rada, 12*(2), 301–320.

Strang, H., & Braithwaite, J. (2002). Restorative justice and family violence. In H. Strang, & J. Braithwaite (Eds.), *Restorative justice and family violence* (pp. 1–22). Melbourne: Cambridge University Press.

Willemsens, J., & Miers, D. (2004). *Mapping restorative justice: Developments in 25 European countries*. Leuven: European Forum for Victim-Offender Mediation and Restorative Justice.

Wright, M. (2009). Restorative justice: Victims' needs and rights: Experiences of building up mediation services in the UK. In *Implementing alternative measures to detention in penal case - Introducing and sharing experiences on restorative justice and victim offender mediation application for juveniles and beyond* (pp. 23–28). Tirana: Albania. Retrieved from http://www.unicef.org/albania/RJ_forum_-_publication.pdf

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