


A Few Remarks About Challenges in Application of Restorative Justice: A Case Study of Bosnia and Herzegovina

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Abstract: Restorative justice is without any doubt one of the most important steps in the development of criminal law, which at the same time increased the level of humanity in the approach towards perpetrators and victims and managed to achieve the principle goals of criminal law. A few decades have passed since its idea and approach was borrowed from the traditional communities that among themselves applied it for centuries and it was transformed into the new approach of justice offering many benefits to the community where it is established. Formally, it has been more than 20 years since Bosnia and Herzegovina embraced restorative justice within its criminal law. This paper aims to discuss how much de facto it has been applied in this country and to present results of interviews with representatives from legal theory and practice where they refer to restorative justice and its major challenges for application and propose mechanisms for overcoming existing difficulties. In this article, the authors use normative, descriptive scientific methods and statistics and interviews as tools for the collection of data.

1. Introduction

After centuries of ignoring the victim¹ and their role in the conflict that resulted from the crime, and the application of primarily a retributive attitude towards the perpetrator², adopting the approach that had been present in many traditional communities³, as the concept of restorative justice, meant a revolution in the approach to the perpetrator and the victim. Just as Christie⁴ indicated in 1977 and later on with the spread of the restorative justice in the world, the possibility of returning the conflict to its rightful bearers was opened, with the intention of overcoming it and creating a situation as if there was no crime. This is what restorative justice, along with a number of other achievements, has managed to achieve conceptually. And yet, it is much more than that. Marshall finds restorative justice to be a “problem-solving approach to crime which involves parties themselves, and the community generally, in an active relationship with statutory agencies”⁵. So, apart from the perpetrator and victim, it includes the community in the solution of the conflict. Therefore, in the *UN Handbook on Restorative Justice Programs*⁶, it is seen as “a way of responding to criminal behavior by balancing the needs of the community, the victim and the offender”, while veterans of restorative justice Zehr and Gohar define it as “a process to

¹ The role of victim was usually consumed with the role of witness within the criminal procedure. Upon giving testimony within the criminal procedure, they did not play any role in the decision making process regarding the type and duration of criminal sanction.

² See more about the criticism of retributive justice in: Daniel W. Van Ness and Karen Heetderks Strong, *Restoring Justice: An introduction to Restorative Justice* (New Jersey: Routledge, 2014), 9–14 and about the concept of three Rs in Janine Natalia Clark, “The Three Rs: Retributive Justice, Restorative Justice and Reconciliation,” *Contemporary Justice Review*, vol. 11, no. 4 (November 2008): 3. Accessed August 5, 2021. <http://www.tandfonline.com/toc/gcjr20/11/4>. DOI: <https://doi.org/10.1080/10282580802482603>.

³ Many traditional societies such are Aborigines, Native Americans, Africans, and other indigenous people used to solve the conflicts within their communities in the manner that represents the nature and idea of restorative justice. See more at: “The Origins of Restorative Justice,” last modified August 1, 2021. <http://www.restorativeapproaches.eu/origins>.

⁴ Nils Christie, “Conflict as Property,” *The British Journal of Criminology*, no. 17, issue 1 (January 1977): 3.

⁵ Tony Marshall, *Restorative Justice: an overview* (USA: Research Development and Statistics Directorate, 1999), 8.

⁶ United Nations, *UN Handbook on RJ Program* (New York: United Nation Office on Drugs and Crime, 2006), 6. Accessed August 5, 2021. <https://digitallibrary.un.org/record/617572>

involve, to the extent possible, those who have a stake in a specific offence to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible”⁷.

Just as O'Brian indicates, restorative justice “is a social movement which promises to do justice differently and perhaps better”⁸. Laxminarayan correctly notices that “while other models – for example that of criminal justice or rehabilitation – may be able to partially tend to victim and offender needs, the restorative justice paradigm’s focus on restoration and reparation takes an even more inclusive and humane approach.”⁹

In the Report of the European Forum for Restorative Justice¹⁰ which is referring to the effectiveness of restorative justice, a number of benefits of restorative justice have been determined, with the emphasis on the impact it produces for both victim and perpetrator. Victims in some cases want to meet the offender as they may have questions about their victimization and also, they may present their interest for reparation¹¹. Perpetrators may also show their interest in meeting with victims, as many of them wish to express regret for the harm they have caused¹². In addition to that, they see restorative justice as an alternative¹³ approach to the classical criminal

⁷ Howard Zehr and Ali Gohar, *The Little Book on Restorative Justice* (USA: Good Books, 2003), 40.

⁸ Sandra Pavelka O'Brien, “Restorative Justice: Principles, Practices and Application,” *The Prevention Researcher*, vol. 14 (December 2007): 2, accessed August 14, 2021, <https://link.gale.com/apps/doc/A173513899/AONE?u=anon~fb1236a5&sid=googleScholar&xid=f4be597a>

⁹ Malini Laxminarayan, *Accessibility and Initiation Of Restorative Justice* (Leuven: European Forum for Restorative Justice, 2011), 12, accessed August 14, 2021, https://www.euforumrj.org/sites/default/files/2019-11/accessibility_and_initiation_of_rj_website.pdf.

¹⁰ *Effectiveness of restorative justice practices. An overview of empirical research on restorative justice practices in Europe* (Leuven: EFRJ, 2017), 1, accessed August 5, 2021, www.efrj.org.

¹¹ *Ibid.*, 1.

¹² *Ibid.*, 2.

¹³ Jones notices that “Alternative sentencing is desirable because it theoretically reduces recidivism through allowing the offenders to avoid institutionalization and become a contributing member of society, while drastically reducing state corrections costs”. See more in: Cooper Jones, “Does Alternative Sentencing Reduce Recidivism? A Preliminary Analysis,” *Xavier Journal of Politics* 5 (2014–2015): 19, accessed August 5, 2021, https://www.xavier.edu/xjop/documents/vol5_2014/XJOP_Vol_V_2014_Jones.pdf. The reason why many see it as an approach alternative to traditional sanctions is because alternatives to sanctions are often

procedure, or coexisting type of justice to the traditional one¹⁴. And indeed, many legislatures accepted some forms of restorative justice as alternatives to sanctions.

From 1977, the year that is noted as a year of birth of the restorative justice concept in the modern context, until now, many countries introduced it in their criminal legislation (with different interpretations of it and its different programs and forms) or they are in the process of accepting it¹⁵. Although some of those programs include, but are not limited to: victim-offender mediation, community and family group conferencing, circle sentencing, peacemaking circles, and reparative probation¹⁶, many would agree that victim-offender mediation is the most often used form of

being used within juvenile justice, and restorative justice is often used in the context of juveniles. See more: Ineke Pruin et al., "The Implementation Of Alternative Sanctions And Measures Into Juvenile Justice Systems," *Romanian Journal of Sociology*, no. 1–2 (2011): 5. In the same paper, they name most notorious types of alternative sanctions: "1. Warnings, reprimands, conviction without sentence, educational "directives"; 2. Fines, community service, reparation orders, mediation; 3. Social training courses and other more intensive educational sanctions; 4. Mixed sentences, combination orders (which can be characterized as a more "repressive" way of dealing with juvenile offenders); 5. Suspended sentences without supervision by the Probation Service; 6. Probation; 7. Suspended sentences with supervision by the Probation Service, electronic monitoring; 8. Educational residential care, youth imprisonment and similar forms of deprivation of liberty".

¹⁴ Gravelides quotes Dignan (2002) and correctly reminds on discussion whether restorative justice is a sole concept – "a distinctive type of decision-making process", or part of the existing criminal justice. See more about these two different approaches in: Theo Gravelides, "Restorative justice—the perplexing concept: Conceptual fault-lines and power battles within the restorative justice movement," *Criminology and Criminal Justice*, vol. 8(2) (May 2008): 27. DOI: 10.1177/1748895808088993.

¹⁵ Borbala Fellegi in 2005, in the report *Meeting The Challenges Of Introducing Victim-Offender Mediation In Central And Eastern Europe*, correctly notices that due to the shift from communism to another type of governance, restorative justice acceptance and forms are disputable in Central and Eastern Europe (when compared with Western Europe). See more in: Borbala Fellegi, *Meeting The Challenges Of Introducing Victim-Offender Mediation In Central And Eastern Europe* (Leuven: EFRJ, 2005), 4. So, Laxminarayan in *Accessibility and Initiation Of Restorative Justice*, at p. 8, concludes that "high level of democracy combined with intensive social polarisation would lead to a greater need for vengeance whereas intensive civic engagement combined with social trust would lead to a mix of restorative and restrictive approaches".

¹⁶ *UN Handbook on RJ Programs* (New York: United Nations Office for Drugs and Crime, 2006), 14–15.

restorative justice in the world¹⁷. Maryfield et al. (remind that originally it was used “in the juvenile justice system with first-time offenders of minor crimes”¹⁸, while nowadays it is increasingly used in “adult cases as a diversion from prosecution or alternative to incarceration for more serious offences”¹⁹.

Regardless to which form(s) of restorative justice are being accepted within the criminal law, its objectives, according to Marshall²⁰ are:

- “To attend fully the victims needs (material, financial, emotional, social);
- To prevent re-offending by reintegrating offenders into the community;
- To enable offenders to assume active responsibility for their actions;
- To recreate working communities that support the rehabilitation of offender and victim is active in preventing the crime;
- To provide means of avoiding escalation of costs of justice and associate delays”²¹.

However, Zehr and Gohar in their work “A Little Book on Restorative Justice”, explicitly name what restorative justice is not:

- “...primarily about forgiveness or reconciliation, as it is being applied on a voluntary basis;
- mediation;
- Created to reduce recidivism, but it is its byproduct;
- Particular program;
- Primarily for minors of first time offenders;
- New development;
- Replacing the legal system;
- Opposing to retribution...”²².

¹⁷ Laxminarayan, *Accessibility and Initiation Of Restorative Justice*, 17.

¹⁸ Bailey Maryfield, Roger Przybylski, and Mark Myrent, *Research on Restorative Justice Practices. USA: Justice Research and Statistics Association's Brief Report* (USA: Justice Research and Statistics Association, 2020), 2, accessed September 1, 2021, <https://www.jrsa.org/pubs/factsheets/jrsa-research-brief-restorative-justice.pdf>.

¹⁹ *Ibid.*, 2.

²⁰ Tony Marshall, *Restorative Justice: an overview*, 9.

²¹ *Ibid.*, 9.

²² Zehr and Gohar, *The Little Book on Restorative Justice*, 6–11.

Having all this said, it is important to wonder if in the countries that introduced it into their legislation, it achieved success in a sense that it satisfied the expectations, became *de facto* applicable and hence achieved its goals. Laxminarayan²³ in her research from 2011, that included many countries of Europe, concluded that even though restorative justice is included in the legislation of many countries, it is not practiced enough and that it has not reached its full potential²⁴. She names unwillingness to embrace something foreign, or softer than the classical punitive response is²⁵, or the limited awareness about restorative justice and its benefits within the public and referrals²⁶ as the main reasons for that.

With same questions in mind, the authors will point the discourse of the paper to Bosnia and Herzegovina, and after establishing existing forms of restorative justice and statistics about its applications in that country, they will present the results of their quantitative research. Namely, they conducted interviews²⁷ with ten correspondents who are involved in the restorative justice practice or theory, and who through these interviews revealed potential challenges in application of restorative justice and proposed the measures for its improvement. In this paper normative, descriptive legal scientific methods have been used, and quantitative research has been conducted through interviews.

2. Embracing Restorative Justice in the Criminal Law of Bosnia and Harzegovina

De iure, restorative justice became a part of the legal system of Bosnia and Herzegovina when its certain forms have been prescribed within a set of criminal substantive and procedure codes. Dating from 1998 and 2003 with

²³ Laxminarayan, *Accessibility and Initiation Of Restorative Justice*, 8.

²⁴ In that sense: Ibid. 8, through Shapland et al., 2004.

²⁵ In that sense: Ibid, 8.

²⁶ Ibid., 8.

²⁷ The interviews that will be presented here had been conducted within the project “Methodology for Mapping - Criminal Justice Systems in CEE“, by the authors of this article, and haven’t been published before. The results of interviews represent experts opinions on the topic and are not intended to offend any person or any institution by any means. Authors use the opportunity to thank all the participants of interviews and CEOs of their respectable institutions for collaboration, without which this research would not be possible to conduct.

the creation of the *legi generali*²⁸ in the criminal law field, and continuing with 2010 and 2014 with *legi speciali*²⁹, restorative justice was embraced indirectly. The term “restorative justice” is not even mentioned, however, in order to establish if it is present as a form of justice in those codes or not, one has to analyze all the institutes, statuses of subjects, and types of sanctions carefully, and led by the known theoretical definition of restorative justice, its principles, aims and nature, and then compare them and make a conclusion whether or not there is the spirit of restorative justice in them. Based on that kind of approach, forms of restorative justice for adults and for juveniles may be identified³⁰. When it comes to the adult offenders, the

²⁸ Those are criminal substantive and procedural codes that are being applied in Bosnia and Herzegovina: Criminal Code of Brčko District of Bosnia And Herzegovina (“Official Gazette of Brčko District of Bosnia and Herzegovina”, No: 10/03, 45/04, 6/05, 21/10, 47/11, 52/11, 33/13); Criminal Code of Bosnia and Herzegovina (“Official Gazette of Bosnia and Herzegovina”, No:3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15, 35/18); Criminal Code of Federation of Bosnia and Herzegovina (“Official Gazette of Federation of Bosnia and Herzegovina”, No: 36/06, 37/03 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, 46/16, 75/17); Criminal Code of Republic of Srpska (“Official Gazette of Republic of Srpska”, No: 64/17); Code on Criminal Procedure of Bosnia and Herzegovina (“Official Gazette of Bosnia and Herzegovina”, No: 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13, 65/18); Code on Criminal Procedure of Brčko District of Bosnia and Herzegovina (“Official Gazette of Brčko District of Bosnia and Herzegovina”, No: 10/03, 48/04, 6/05, 14/07, 19/07, 21/07, 2/08, 17/09, 9/13); Code on Criminal Procedure of Federation of Bosnia and Herzegovina (“Official Gazette of Federation of Bosnia and Herzegovina”, No: 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09, 12/10, 8/13, 59/14); Code on Criminal Procedure of Republic of Srpska (“Official Gazette of Republika Srpska”, No: 53/12);

²⁹ Among many others, most notorious ones are related with juveniles in conflict with law, as forms of restorative justice are most visible in those cases. These are the following codes: Code on Protection and Dealing With Juveniles in Criminal Procedure in Republika Srpska (*Official Gazette of Republic of Srpska*, no.13/10, 61/13); Code on Protection and Dealing With Juveniles in Criminal Procedure in Brčko District of Bosnia and Herzegovina (*Official Gazette of Brčko District of Bosnia and Herzegovina*, no. 44/11); Code on Protection and Dealing With Juveniles in Criminal Procedure in Federation of Bosnia and Herzegovina (*Official Gazette of Federation of Bosnia and Herzegovina*, no. 7/14);

³⁰ Rialda Čorović, *Restorativna pravda u sistemu krivičnog pravosuđa [Restorative Justice in the Criminal Justice System]-doctoral dissertation* (Sarajevo: Faculty of Law of University of Sarajevo, 2018), 56; and Ena Kazić and Rialda Čorović, “Restorative Justice Within Legal System of Bosnia and Herzegovina” in *Restorative Approach and Social Innovation: From theoretical Grounds to Sustainable Practices*, ed. Giovanni Grandi and Simone Grigoletto

nature of restorative justice may be identified in cases: “when the victim submits a property claim for damages as a result of the offense, when requiring community service as an alternative to a prison sentence, and when requiring the offender to fulfill certain obligations as a condition of probation”³¹. While the property claim opens an opportunity for mediation³² between perpetrator and victim, which is not compulsory, the other two may reflect the idea of restorative justice through certain activities perpetrator must conduct in favor of the victim or community³³. Restorative justice for juveniles, which is dominant in Bosnia and Herzegovina, may be identified in educational recommendations, police warnings, and educational measures (obligations of juvenile)³⁴. All above-mentioned forms of restorative justice are found to have a restorative impact, as they involve both perpetrator and victims in their realisation, and are directed into overcoming the harm done with the perpetration of a criminal offence. When compared with the criteria of their application, mostly they are prescribed to be used for more lenient criminal offences³⁵.

When it comes to data about the application of restorative justice forms in Bosnia and Herzegovina, it is evident there is no specific database about

(Padua: University Press, 2019), 171–180; and Ena Kazić and Rialda Ćorović, “Is Restorative Justice an appropriate legal remediation for Sexual Violence,” *Review of European and Comparative Law*, XXXVII (June 2019): 82–83. DOI 10.31743/recl.4774.

³¹ Ibid., 171 and 84–85.

³² Articles 193–204 of the Code on Criminal Procedure of Bosnia and Herzegovina.

³³ Articles 43, 58–65 of Criminal Code of Bosnia and Herzegovina, Articles 44, 62–68 of Criminal Code of Federation of Bosnia and Herzegovina, Articles 34, 46–52. of Criminal Code of Republic of Srpska, Articles 44, 59–68. of Criminal Code of Brčko District of Bosnia and Herzegovina.

³⁴ Kazić and Ćorović, “Restorative Justice Within Legal System of Bosnia and Herzegovina,” 174.

³⁵ For application of some of them objective and subjective criteria has to be fulfilled. For instance, regarding the educational recommendations, in order for them to be used, objective criteria is that the criminal offence is punishable with imprisonment of up to three years or with money fine, and subjective criteria: juvenile plead guilty, plea was voluntary, there is enough evidence that the crime had been perpetrated, juvenile in written form expresses the readiness to make up with the victim, both victim and juvenile give their written approval for application of educational recommendation. See article 24(2) of the *Code On Protection And Dealing With Juveniles In Criminal Procedure In Federation Of Bosnia And Herzegovina*.

the frequency of application of these programs³⁶. Instead, researchers usually depend on semi-annual or annual bulletins from the statistic institutions of Bosnia and Herzegovina and its entities, and the data delivered by the judicial institutions per request. This is the reason why collecting all this data with unique parameters is a challenging process.

However, Ćorović³⁷ collected the data for the period 2004–2015 about the statistics related to the application of restorative justice in Bosnia and Herzegovina. At the level of the Federation of Bosnia and Herzegovina (merged data for all cantons), educational recommendations are dominantly prescribed by prosecutors (441)³⁸, and in 18 cases by the municipality courts³⁹. Republika Srpska shows the opposite trend since courts decided the most frequently about the educational recommendations (93 cases)⁴⁰ and the prosecutors office in 11 cases⁴¹. These data shows no educational recommendations applied in Brčko District BH⁴². Additionally, the applicability for the most populated canton in Bosnia and Herzegovina, Canton Sarajevo was also tested⁴³, and it was found there was no educational recommendation being applied by Prosecutorial Office nor Municipality Court of Canton Sarajevo, for the period 2006–2015⁴⁴. The same trend is confirmed for the period 2012–2017 in that Canton for educational recommendations⁴⁵.

³⁶ Rialda Ćorović, *Restorativna pravda u sistemu krivičnog pravosuđa [Restorative Justice in the Criminal Justice System]-doctoral dissertation* (Sarajevo: University of Sarajevo, 2018), 56; and Kazić and Ćorović, “Restorative Justice Within Legal System of Bosnia and Herzegovina”, 181.

³⁷ Rialda Ćorović, *Restorativna pravda u sistemu krivičnog pravosuđa [Restorative Justice in the Criminal Justice System]-doctoral dissertation* (Sarajevo: University of Sarajevo, 2018), 175.

³⁸ Ibid., 175.

³⁹ Ibid., 175.

⁴⁰ Ibid., 175.

⁴¹ Ibid., 175.

⁴² Ibid., 175.

⁴³ This canton is one of the most populated cantons in Bosnia and Herzegovina with the highest rates of the crime. That was the reason for selecting it.

⁴⁴ Kazić and Ćorović, “Restorative Justice Within Legal System of Bosnia and Herzegovina,” 181, and Ćorović, *Restorativna pravda u sistemu krivičnog pravosuđa*, 179.

⁴⁵ Ena Kazić and Dževad Mahmutović and Mirza Ljubović, *Primjena odgojnih preporuka kao oblika restorativne pravde u Kantonu Sarajevo u periodu 2012–2017 [Application of*

The retrieved data for the analyzed period, regarding the police warning, shows that it had been most often used in Republika Srpska (243 cases), while only in 14 cases in Federation of Bosnia and Herzegovina and 18 cases Brčko District BH⁴⁶. On other hand, work for the common good at liberty was most often used in the Federation of Bosnia and Herzegovina (244 cases), in Brčko District in 16 cases, while only in one case in Republika Srpska⁴⁷.

2.1. The application and challenges of Restorative Justice in Bosnia and Herzegovina: the interviews

With these statistics, it is easy to conclude that although the legislator managed to identify the importance and benefits of restorative justice, it is present in the traces and it is not easily recognizable. Even when its component is recognized as a form of restorative justice, just as many researchers and statistics indicate, it is rarely or not applied at all. That brings questions on what makes it challenging to apply and what is its real perspective.

Those questions are of importance not only for Bosnia and Herzegovina but apparently, they appear to be important in the region as well. The Albanian Foundation for Conflict Resolution and Reconciliation of Disputes implemented the research as a part of the project named “Methodology for Mapping - Criminal Justice Systems in CEE”. The project consisted of mapping that was composed of a desk review and qualitative interviews, with an aim to gather data and insights on the criminal justice systems and its stakeholders in seven CEE countries, respectively in Albania, Croatia, Bosnia and Herzegovina, Ukraine, Hungary, Czech Republic, and Slovakia⁴⁸. The results of this research, including the ones for Bosnia and Herzegovina, were never published or presented. Therefore, as the problem of application of restorative justice in the practice has been above indicated, further, in this article, we will present results of interviews that were part of the

Educational Recommendations as a form of Restorative Justice in the Canton Sarajevo for the period 2012–2017, (Sarajevo: International University of Sarajevo, 2019), 66–67.

⁴⁶ Ćorović, *Restorativna pravda u sistemu krivičnog pravosuđa*, 175–195.

⁴⁷ Ibid., 175–195.

⁴⁸ The authors of this paper were national consultants for Bosnia and Herzegovina within this project.

mapping process for Bosnia and Herzegovina, which may help in revealing and understanding the problems and potential solutions.

2.2. Methodology

Interviews had been conducted with 10 participants who are closely involved in the application of restorative justice. They either directly practice restorative justice and criminal justice or restorative justice is an object of their scientific research. As most of them declared they wished to stay anonymous, here we will not reveal their identity, instead, we will name their positions within institutions they are affiliated to: Legal Advisor at The High Judicial and Prosecutorial Council of Bosnia and Herzegovina; Assistant Minister of The Ministry of Justice of Bosnia And Herzegovina; Expert Advisor (Psychologist) of The Cantonal Prosecutor's Office of Canton Sarajevo; Cantonal Prosecutor of Cantonal Prosecutorial Office of Canton Sarajevo; Prosecutor of Federal Prosecutorial Office; Retired Judge of the State Court of Bosnia and Herzegovina (who worked with juveniles throughout their judicial career), Judge for Juveniles of the Municipality Court of Sarajevo and two professors from the Faculty of Law of University of Sarajevo. Clearly, they are representatives of judicial and executive power, and of legal science in this country.

The interview was a *semi-structured, open questions* type of interview, that was conducted through conversation. It consisted of three parts, but related to the topic of the paper, we will present only two parts (as the second was about vulnerable groups, a topic that doesn't fit in the aim of this paper).

First part was named "Attitudes and roles towards 'alternatives'" and it consisted of these questions:

- a) *Who are the governmental and non-governmental actors involved in rehabilitation and reintegration programs, as well as in promoting restorative practices?*
- b) *What do you know about the attitudes of actors involved in the policy of criminal justice reform towards restorative justice measures, alternatives to imprisonment, and rehabilitation policies?*
- c) *Which legal actors have an important role in creating obstacles or supporting the development of such policies and practices?*

- d) *Is there any research done on general attitudes of criminal justice actors towards victims and offenders?*
- e) *What do you know about the attitude of people in your country towards restorative justice measures, alternatives to imprisonment, and rehabilitation policies?*
- f) *Is there any research done on general attitudes of people in your country towards victims and offenders?*

The third part was named “Challenges and Opportunities” and it consisted of these questions:

- a) *What are some of the challenges, obstacles and deficiencies in the legislation and/or implementation of restorative justice measures?*
- b) *At what level the challenges and deficiencies of the implementation of restorative practices occur? E.g.: legislative framework, enforcement / implementation in practice, (inter-institutional) cooperation, financial constraints, perceptions of key stakeholders or the larger public, lack of awareness, education, other?*
- c) *At what level do you think these challenges could be resolved? E.g.: legislative framework, (inter-institutional) cooperation, financial constraints, perceptions of key stakeholders or the larger public, lack of awareness, education, other?*
- d) *Are you aware of/can you tell us success stories in applying alternative measures used for offenders and good examples of applying restorative justice involving victims and offenders?*
- e) *Where do you think intervention is most needed, and where would it make the most difference?*

2.3 Results

Further, we will in details represent the findings from the interviews.

I a) Who are the governmental and non-governmental actors involved in rehabilitation and reintegration programs, as well as in promoting restorative practices?

All participants of the interview unanimously underlined the importance of the Center for Social Work as the institution involved in rehabilitation and reintegration programs and emphasized that that institution is the only one that works extensively on this topic. The importance of educational institutions (such are faculties) in the promotion of restorative justice

practices was high lightened by the professors of law, while Cantonal Prosecutor recalled on good collaboration and practice of Gerontology Centre and Service for family aid and disabled people aid “Give us a chance”.

When it comes to NGOs, these are the actors participants mentioned: UNICEF, Bureau for Human Rights Tuzla, Ministry for Human Rights and Refugees, Mediators Association of Mediators, Body of Coordination of Restorative Justice Strategy within the Council of Ministries, NGO named PROACTA and through projects related to the execution of sanctions of the USA, Great Britain, Switzerland.

I b) What do you know about the attitudes of actors involved in the policy of criminal justice reform towards restorative justice measures, alternatives to imprisonment, and rehabilitation policies?

While scholars noticed that the majority of the Restorative justice-related actors are very skeptical towards the concept of restorative justice, alternatives and rehabilitation policies since they rather believe in a classical, retributive approach, other interviewees find that the general approach of these actors is that alternative measures bring positive results. The juvenile judge thinks that judges lean on alternatives because there they exclude institutionalization, while the Ministry of Justice representative thinks there is a big international influence on those actors to accept restorative justice related reforms.

I c) Which legal actors have an important role in creating obstacles or supporting the development of such policies and practices?

Within this question, there is a diversity of opinions. Participants from Cantonal Prosecution Office and Juvenile Judge agreed that there is a problem in the implementation of restorative justice and alternatives in criminal procedure because of the lack of institutions for its implementation. According to Federal Prosecutor, ministries as legal actors have an important role in creating obstacles, since the implementation of restorative justice and alternatives depends on their opinions about it. Similarly, professors find courts and prosecutors as legal actors who make obstacles since they prefer more the traditional approach of justice and that judicial institutions don't promote these policies and practices enough.

I d) *Is there any research done on general attitudes of criminal justice actors towards victims and offenders?*

All participants except of professors agreed they were not aware of any of these research. Professors stated that these kind of research might have been done through master and Ph.D. theses, and within the course Victimology that is being thought at the law schools throughout Bosnia and Herzegovina.

I e) *What do you know about the attitude of people in your country towards restorative justice measures, alternatives to imprisonment, and rehabilitation policies?*

In this question, there is a diversity of responses. While representatives of academia and of the Ministry of Justice think that the attitude of people is positive, and in even 80% it is supported by them, others think people know very poorly about restorative justice. Namely, education that exist are made primarily for experts, not for the general public. Cantonal Prosecutorial Office Psychologist's opinion about this is divided: people support it when it is applied to minors, but don't understand its application and importance of use for adults. The juvenile Judge is very skeptical about public understanding of restorative justice. Namely, according to her, people think that criminal politics is too mild and even probation shouldn't be applied as much it is already applied. The judge in retirement gave an example of a lack of understanding of restorative justice among people, through the problematic process Code for minors had gone through in its creation process, since most of the people didn't support the idea of maximum sanction for juveniles imprisonment to be decreased.

I f) *Is there any research done on general attitudes of people in your country towards victims and offenders?*

All the interviewees stated they were not aware if such research had been conducted and think experts should be more engaged in the research. However, professors find OSCE and UNDP as important institutions where such research might have been conducted.

III a) *What are some of the challenges, obstacles and deficiencies in the legislation and/or implementation of restorative justice measures?*

Most of the participants agreed that deficiencies in the criminal legislature and in implementation acts are the biggest obstacles in the implementation of restorative justice measures. Together with that, Cantonal Prosecutor noted that prosecutors should have more jurisdiction within the criminal procedure because she thinks that educational recommendations would be used more if the jurisdiction of the Prosecutor would be wider. The juvenile judge also referred to one of the biggest deficiencies in our criminal legislation. Namely, there is no clear structural emphasis in code nor title named restorative justice, restorative justice for juveniles or adults. Instead, institutes should be analyzed in detail, and in that way, restorative justice elements can be found. Professor finds that the Directive on the application of educational recommendations is written in too many details. The true challenge is to release the burden on criminal justice. Opposite to these opinions, the Representative of High Judicial and Prosecutorial Council of Bosnia and Herzegovina thinks there are no challenges, obstacles nor deficiencies in the legislation of restorative justice measures, while the Representative of Ministry of Justice of Bosnia and Herzegovina stated that restorative justice is more or less new in criminal justice of BH, and all the needs related to it are observed.

III b) *At what level the challenges and deficiencies of the implementation of restorative practices occur? E.g.: legislative framework, enforcement / implementation in practice, (inter-institutional) cooperation, financial constraints, perceptions of key stakeholders or the larger public, lack of awareness, education, other?*

Many participants answered that one of the biggest challenges and obstacles occur at the legislative level. Bylaws such as the Statute on the application of educational recommendations are that much written in detail, that actually is very difficult to apply⁴⁹. Moreover, there is a need for harmonization of all legal acts at the entities and State levels. The juvenile judge reminded on the financial side of the problem and pointed out that mediation is too expensive what causes it to be less used. Few participants

⁴⁹ Kazić and Mahmutović and Ljubović, *Primjena odgojnih preporuka*, 72.

determined a lack of understanding of restorative justice, together with the lack of motivation for its use as a challenge in its application.

III c) At what level do you think these challenges could be resolved? E.g.: legislative framework, (inter-institutional) cooperation, financial constraints, perceptions of key stakeholders or the larger public, lack of awareness, education, other?

Half of the participants agreed that education plays a vital role in spreading the idea about restorative justice, and education would help in raising the awareness of the importance of its application in practice. Four of the participants agreed that legislative changes should be also made, in order to overcome challenges. Together with education and raising awareness, it is important to establish better collaboration among institutions and it is vital to motivate judges and prosecutors to apply restorative justice, through the positive valuation of their work when they apply it. Finally, the representative from the High Judicial and Prosecutorial Council of Bosnia and Herzegovina said that it is important to promote restorative justice, to widen human resources working in those cases.

III d) Are you aware of/can you tell us success stories in applying alternative measures used for offenders and good examples of applying restorative justice involving victims and offenders?

Retired and juvenile judges and professor presented examples on good practice of restorative justice. Retired Judge, named a case of 16 years old juvenile who had his best friend, who was 9 years old. He was working at the farm and driving a tractor. His young friend asked him to allow him to drive with him, and he allowed him to do that. Unfortunately, there was an accident and the younger child died. 16 years old friend was found guilty of a criminal offense. Parents of the child asked the judge not to punish him, but instead, to make him work for them at the farm. He accepted that as well and worked for them, almost as a member of the family, for ages.⁵⁰ The juvenile Judge generally mentioned that the communication established in one different case, helped all parties to establish their broken relationship. Professor mentioned the case of an old lady that was a victim of a criminal

⁵⁰ In that sense: Kazić and Mahmutović and Ljubović, *Primjena odgojnih*, 40.

offence of theft committed by a juvenile. The judge decided in that case that the most suitable measure for the juvenile would be for him to buy newspapers out of his pocket for the granny every day, for years. Both victim and perpetrator agreed on that and eventually they managed to overcome the negative effects of the criminal offence.

III e) Where do you think intervention is most needed, and where would it make the most difference?

Most of the participants of this interview agreed that the most important intervention required would be in the field of education. It is crucial for the public to understand the point of both restorative justice and alternatives in order to create a better environment for its further application. The education is required among practitioners as well, because it takes time for them to move away from traditional, retributive justice. Together with education, according to many participants (4), building up the infrastructure would be an important step forward, since some forms of restorative justice and alternatives that are introduced in our criminal justice face difficulties in their application since there is a lack of infrastructural support. Federal Prosecutor pointed out the importance of harmonization of *lex specialis* with *lex generalis*, while cantonal prosecutors stressed that prosecutors should be given wider jurisdiction in deciding upon restorative justice and alternative measures. Finally, the professor said that it would be good if changes in executive legislation would be made, in order to widen a number of restorative justice forms, including restorative justice in prisons and post prison.

3. Conclusion

Restorative justice with all its benefits for the parties of the conflict and for societies they belong to, has been recognized throughout the world and confirmed in Bosnia and Herzegovina as well. It has been recognized at the legislative level and interpretatively, some of its forms may be identified. Some of them are set to be applied for juveniles (educational recommendations, police warning, educational measures-obligations), and some for adults (property claim-related mediation, community service, probation). However, the state in practice shows that it is facing challenges in its

application as many of its forms remained just as an option *de iure*, but not applied *de facto*. Statistics show that the highest number of educational recommendations for the analyzed period had been used in the Federation of Bosnia and Herzegovina, and mostly by the prosecutorial offices. In one of the most populated cantons – Canton Sarajevo no educational recommendation have been applied recently. Similar is the situation with Brčko District BH. Republika Srpska appears to be very devoted in the application of police warnings (243) within the analyzed period, while a very low number of them is being applied in the Federation of Bosnia and Herzegovina and Brčko District BH. The opposite trend is present when it comes to work for the common good at liberty (community service), as the Federation applied it in 244 cases, Brčko District in 16, and Republika Srpska only in one case. It can be concluded that there is an inconsistency of the rates and the tendencies of application of restorative justice forms in the territory of Bosnia and Herzegovina.

Ten interviews that had been conducted with the leaders in restorative justice practice and theory, helped in establishing main concerns, challenges, and recommendations for better application of restorative justice. Our correspondents agreed that the problems related to restorative justice are of legislative, infrastructural, financial, but of motivational nature as well. The traditional attitude towards the sanctions is what prevails in the wider public and among practitioners. While the random public knows very poorly about restorative justice, practitioners face a lack of motivation in applying restorative justice forms. Although the legislative framework provides certain forms of restorative justice, the formulation lacks restorative justice terminology. Many interviewees agreed that other forms of restorative justice should be introduced in the Bosnian and Herzegovinian law. Bylaws should be prescribed in a more clear manner and details such as being prescribed for the time being are simply excluding the innovation in practice and adjustment of restorative justice forms for different cases. Mediation, one of the most notorious forms of restorative justice in the world, is not being used very often in Bosnia and Herzegovina, not only because it is not obligatory, but also because it is expensive in its application.

The interviewees recommend modifications of the legislative framework and the establishment of other forms of restorative justice. They all agree it would be necessary to create a better environment for the application

of restorative justice, which includes harmonization of *legi generali* and *legi speciali*, educations and motivation of practitioners, promotion of the concept of restorative justice, and raising the awareness about it and its benefits among the wider population, wider jurisdiction of prosecutors in the application of restorative justice.

All these recommendations may be of use for overcoming the barriers to effective and efficient use of restorative justice.

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