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The development of restorative justice and the institution of mediation in Albania

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Abstract

Ensuring respect for human rights is a cornerstone of a democratic society and a fundamental aspect of a rule of law based state. Besides guaranteeing the rights and their recognition (negative obligation), the state has the obligation to protect and implement these rights, by setting up legal and non-legal mechanisms (positive obligation). The rights may be infringed by the State (vertical aspect), and by individuals (horizontal aspect). The state is under the obligation to guarantee and protect the rights and certain legal relationships. A person who violates these legal relationships consuming offense will be put before criminal responsibility. Criminal policy has been built on crime prevention and punishment of offenders, overshadowing the rights of victims. Today the attention is turned by increasing the accountability of states to respect and ensure the rights of victims, providing internal legal mechanisms to ensure the most efficient and swiftest forms of redress the restoration of their rights. This paper will present the restorative criminal justice and mediation, as a new way of resolving criminal conflicts in Albania, in accordance to international recommendations and international legal norms. Mediation institute is regulated by the laws. In this paper we will focus on the development of this institution over the years.

Keywords: restorative justice, mediation, victim

1. Introduction

Besides criminal justice, states should contribute to the development of restorative justice as a way to shape and resolve conflict, especially when the subjects of the conflict are offenses that present a low level of threat to public order. One of the ways by which restorative justice operates is mediation. Mediation as an alternative form of dispute settlement exists in common law and is regulated by a special law. The institution of mediation constitutes an alternative to legal proceedings. It presents a series of advantages such as addressing the issue in a quick and confidential way while it also places the parties on an equal footing. Mediation has been part of customary, and was non-legal procedure to resolve the conflicts using the friendly way.

Restorative justice is a new contemporary form of addressing and resolving conflict. The core of this novel conceptual approach consists in repairing the damage and negative consequences caused by a conflict situation, damage affecting the parties involved in the conflict, their families, social environment where they live and work (www.mediationalb.org., 2011). One of the ways by which restorative justice operates is mediation. Mediation, as a way of non-judicial dispute resolution, has existed since ancient times and is referred to in many countries' legislation and in different legal systems (both civil law and common law).

In Albania mediation, as a way of resolving disputes in criminal matters has been part of the tradition and customary law¹. The mediation institute is prescribed in law too late, accept the fact that this way of resolving conflicts has been part of the customary law. The first law, which provided for the development of the mediation process entered into force in 1999² and has undergone a number of changes over the years.

2. Development History

Restorative justice is not a new concept, but it is only in the last 30 years that a series of attempts were made to define it. Despite these attempts however, there is no unified definition. Restorative justice has emerged as an alternative to crime prevention and restoration of relations between entities that are parties to a criminal conflict. In 1977 state "stole" conflicts between citizens, entrusting professionals (judges, prosecutors, psychologists) to resolve these conflicts. At the same time however, the state neglected the rights and the suffering of the victims (Christie.N, 1977). Restorative Justice operates a range of methods, some of which were practiced in old times. Different countries apply different solutions to prevent crime.

There are three known aspects of development of restorative justice (Jasini.R, 2007):

- Meetings (ranging from traditional practices such as the ones practiced by members of the Maori community in New Zealand)
- The philosophy that follows this practice is about the fact that restorative justice seeks to regulate the "slit" of society, that is part of the offender,
- Some of the earliest forms of restorative justice have become a formal part of the response to crime.

The aim of justice rehabilitation is not only to restore the situation to its previous condition. Its objectives are to address the negative psychological effects, to promote the recovery of social isolation and stigmatization of the offender and the restoration of security and confidence of victims. It is based on the concept of damage, whether material, psychological or social, and focuses more on repairing the damage, rather than on the analysis of specific offenses (Kaçupi.S, 2007).

One of the most important ways in which restorative justice operates is through mediation. Mediation is a way of resolving conflicts that existed in ancient time, it is as old as humanity itself. Examples of mediation can be found in the ancient history and date nearly 3000 years before Christ. They are found in Egypt, Babylon, Assyria, etc. Conflict resolution by means of

¹Chapter 18, Article 99 of the Canon of Lek Dukagjin

² Law no. 8465, dated 11.03.1999 "For mediation to resolve the dispute by conciliation"

amicable dispute settlement had a special place in Greece (where the Gods of Olympus had their mediator, Hermes, who was also the god of Trade, (Jasini.R, 2007)) as well as in ancient Rome. Since that time people began to live in the community, conflicts between members of a community have been the subject of intervention from the other members of the group. Mediation as a traditional form of resolving conflicts found in many societies around the globe and dates back to the earliest beginnings of human society (Mandro.A, 2007:p33). Mediation is the most effective mechanism that shows how "pain controls people" change to mechanism "as people try to control and extinguish it (Christie.N, 1977)

Mediation was practiced for centuries all over Albania from Laberia to Kosovo and beyond. Mediation has a long history in Albania, with the conciliation of the parties in the conflict being conducted through, different mechanisms such as lovers, friends, relatives, and through covenants and conventions (Elezi.I, 2006:p.189). The mediation institute in Albania has played a important role in the reconciliation of blood feuds, a painful phenomenon that exists in our country. Reconciliation is of great historical importance, political, social, and served as union serves Albanians, reconciliation, tolerance and understanding in order to counter the phenomenon of revenge (Elezi.I, 2006:p.154)

3. Restorative justice in relation to criminal justice

Criminal Justice, which essentially seeks to punish the perpetrator of a criminal offense, overshadowing the victim that is harmed by the offense. In Albania, the criminal procedural legislation provides four ways of developing and putting forward criminal proceedings to incur liability of the person that has committed the offense. In most cases, the launching of criminal proceedings (in cases of publicly indictable offences) falls within the prosecutor's mandate; following an investigation, the case is referred to court. Another way of proceeding is by means of filing a private bill of indictment, where the injured accuser himself, for some offenses provided by the Code of Criminal Procedure, raises the charge in court, eliminating the preliminary investigation stage³. Investigations in the case of private prosecution take place during the trial, where the injured accuser has the burden of proving the charge.

Return of attention from the victims and their rights requires states by legal provisions taken, which enable the victim compensation and restoration. Unlike criminal justice, the main focus of restorative justice is the reinstatement of the victim whose rights have been violated (Sherman, L., Strong.H , 2007:p.13). In other words, restorative justice is a way of thinking that aims to find a more efficient way of regulating the relationship between the victim, the offender and the justice system. Nevertheless, restorative justice does not only aim at reaching a settlement between the perpetrator of a crime and its victim but can also be instrumental in preventing crime.

Unlike criminal justice, which requires a lot of time of the proceedings and in many cases regardless of the offender accountability is put forward and the rights of the victims are not restore, restorative justice seeks to avoid court proceedings, using formal or informal dispute resolution.

Restorative justice's main achievements are (Sherman.L, Strong.H, 2007: p.25):

³ Article 59 of Criminal Procedural Code of Albania

- a) A higher responsibility of the author, who has committed the offense,
- b) Provision of assistance to more victims,
- c) Prevention of Crime,
- d) Reduction of court costs

Despite the practicality and advantages of restorative justice, the acceptance of methods which it operates, have not been accepted over the years 1970-1980 (Wetekamp.E, 2008)---- this could mean two ways. Ways in which restorative justice operates are direct and indirect. One of the most common ways is mediation, where the parties to the mediation process are the victim and the offender. Despite the positive effects of restorative justice, it can not be applied to all categories of offenses. For offenses that have a high social risk, the issue should be addressed by the justice system. Restorative justice is not intended to replace criminal justice, but for offenses that have a low risk to public order it is the best way of resolving the conflict. The aim of restorative justice is to rehabilitate the victims and not to exclude the offender from punishment. Another element that must be established is that restorative justice will depend on the cooperation between the victim and the –perpetrator. Unwillingness to reach an agreement does not prevent the parties to turn to the courts. Lawyers, the legal representative of the interests of victims, play an important role in the framework of restorative justice. Unlike criminal justice, where the lawyer should protect "the best interests" of the client, using different ways as discussions, burden the facts in order to win the case, in restorative justice lawyer must learn to do "Peace", to change strategies in the interests of the parties, as in restorative justice neither party should be lost (Walgrave, L, 2010:).

Settlement of disputes is of interest not only to the parties to the dispute, but also to the community because this process contributes towards repairing emotional and financial losses, as well as towards the achievement of peace and public security. Conflict resolution by mediation is the foundation of tolerance between people's "universal value", as Voltaire said, respect for human rights and human freedoms, the full equality of the parties in conflict, because unlike judicial path where one party winning and the other loses, with mediation both parties are winners (Gönczöl, 2010). Institution of mediation as a basis of development of restorative justice has seen development in many European countries. European countries have taken legislative measures to adopt this mechanism, in accord with international recommendations and acts, because of the advantages it has, but also to avoid re-victimization of victims by putting them in a position favorable, unlike criminal proceedings where the victim is left overlooked (Elezi.I, 2006:p.144).

Today the development and application of restorative justice is part of many discussions and recommendations by international institutions and organizations⁴, so it is important that policy makers keep in mind to include in their system the restorative justice and the ways in which it operates.

⁴ Resolution no.26, 28.07.1990 of Economic Council and resolution no. 30, 21.07.1997

4. Mediation as a way of achieving restorative justice in Albania

Mediation in criminal cases is defined, as an extra confidential procedure, regulated by law, where the parties voluntarily participate and which is aimed at resolving disputes arising from the commission of an offense, using the services of an independent and disinterested third party (Kaçupi, 2007: p. 5) Mediation is defined as an agreement by which compensation is determined in proportion to the damage or personal injury⁵. As mentioned above mediation in Albania has origins in customary law, but legitimacy and predictability in the law of conflict resolution through mediation is delayed. The period after 1990, changes in political, economic, social, increase the different crimes. New offenses constituted a threat to society. Some offenses were decriminalized (like the offenses based in “ideological”) and other criminal offenses were rendered. Criminality was changed in quantity and in structure. It therefore appears necessary, in relation for some offenses which have a small risk, to provide a different ways to resolve the conflict, avoiding the long procedural justice.

Mediation was provided by Law no. 8465, dated 11.03.1999 "For mediation to resolve the conflict by conciliation." The law was amended in 2003 and then in 2011.

Adoption of the law was important because (Elezi.I, 2006: p.168):

- a) It institutionalized mediation as a social activity, to be held in accordance with legal principles,
- b) The principles laid down in this law, not only matter of principle, theoretical, but prescribed a legal way of mediation.
- c) Some of the offenses crossed the competence of the court's competence and mediation institute.

By providing for the resolution of criminal conflicts through mediation the law laid the foundations of restorative justice. Despite the legal changes that the law underwent the institution of mediation for criminal offenses has not changed. Mediation is applicable only to criminal cases initiated by the complaint of the victim or the prosecutor's request to raise the injured accuser directly from the court. Some of the offenses are causing of serious injury by negligence, injury due to negligence, defamation, abuse of office, sexual or homosexual relations with persons in custody or under the genus, malicious use of telephone, insulting of the judge etc⁶.

Through mediation, the parties seek resolution of a dispute through a neutral third party (mediation), to reach a mutually acceptable solution to the dispute, a solution that does not violate law⁷. Under the 1999 law, the development of mediation and the mediator's appointment was assigned by nonprofit organizations. Nonprofit organizations that will develop this procedure should receive prior approval from the Ministry of Justice and then register in the local court. The law affirmed some of the basic principles of the development of mediation as the will of the parties, confidentiality, equality and fairness between the parties. An important element of this law is the provision of the right to suspend the investigation or trial when the offense is resolved by mediation as the prosecutor or the court.

⁵ Black's Law Dictionary, 1968, p.1477

⁶ Article 59 and 284 of Criminal Procedural Code of Albania

⁷ Law no.10385 dated 24.02.2011 "Mediation in resolving conflict", www.qpz.gov.al, dated. 10.04.2013

The Law of 2003⁸ as well as the 1999 Law provide for the suspension of the investigation or trial by the prosecution and the court. This law which one brought changes in terms of the procedure, if the previous law provided that this procedure and brokers decided by a nonprofit organization, with the 2003 law are nonprofit organizations that will conduct the mediation process but those who wanted to carry intermediary function should register as such in the court. This procedure was not very effective because there wasn't a coordination of intermediaries, or often parties were not informed of their existence. All these problems will be solve in the new law that regulate the mediation institute⁹.

In the 2011 law, unlike the two previous laws, the court was predicted obligation, but not criminal prosecutor for the aforementioned to invite the parties to resolve disputes through mediation. Failure reason the competence of the prosecutor to suspend the investigation and require the parties resolve the conflict through mediation isn't prescribed in the Code of Criminal Procedure of the Republic of Albania¹⁰.

This law sets out the principles on which mediation should operate, principles that are in accordance with Rec. (99) 12¹¹. Some of the criteria and principles are:

- The will / desire of the victim and the offender is one of the most important elements of the process: only if both parties agree to it will the mediation process be successful. It should also be noted that even though the parties may agree to resolve the dispute through mediation, they are not prevented from sending the case in the court.
- Confidentiality: unlike a judicial process that takes place in accordance with the principle of publicity mediation is a process that is confidential and the data remain between the parties and are not published.
- Mediation as a process can be developed at all stages of litigation. Even though the criminal justice process has begun, should the parties agree to resort to mediation, then the criminal process is suspended pending the outcome of the mediation procedure.
- Mediation is an autonomous process within the criminal justice system, which takes place only if the parties consent to it. Once the parties express their agreement, the only competent organ is the mediator and not the court.

Besides regulating mediation in a special law, the Criminal Procedure Code provides that in cases of the above, the proceedings that begin with the injured accuser filing a complaint against the perpetrator of the offence, the court is obliged to conduct the conciliation / settlement session and if the parties do not reach an agreement, , then the matter shall be subject to judicial review¹².

Mediation as an extrajudicial procedure has some advantages over judicial proceedings such as (Rooven.G.H, 1999):

1. The dispute can be resolved in a very short time
2. Low-cost alternative to a trial, both for the parties and for the justice system in general
3. In mediation the parties are educated to the real and legal situation

⁸ Law no.9090 dated 26.06.2003, "Mediation in resolving conflict", www.qpz.gov.al date 22.04.2013

⁹ Law no.10385 dated 24.02.2011 "Mediation in resolving conflict",www.qpz.gov.al, date 10.04.2013

¹⁰ Commission Acts of Albania Parliament date 17.01.2011, www.paralament.al , seen 22.04.2013

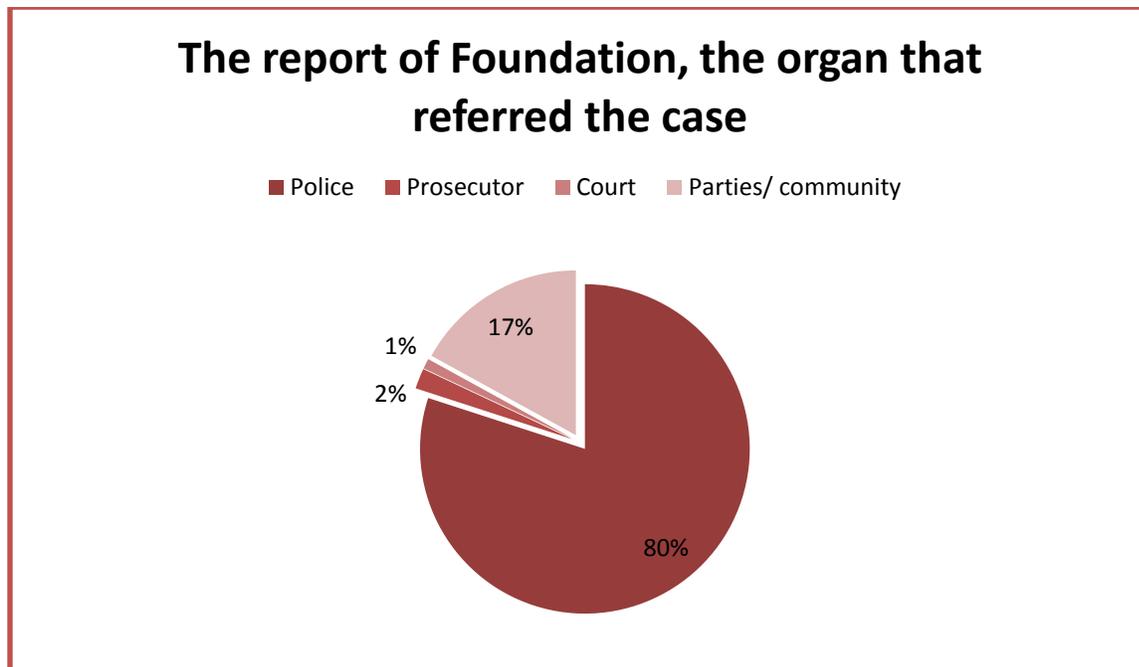
¹¹ Rec.(99)12, dt.15.09.19 99

¹² Article 338 of Procedural Criminal Code of Albania

4. The issue takes place in private, unlike judicial process that is based on the principle of publicity of hearings,

Agreement of reconciliation is an executive title for the parties and the court. But if the parties do not approve the agreement, the court is not required to accept and to take decision under this agreement (Mandro, 2007:p.33).

The Foundation for Conflict Resolution and Reconciliation of disputes has been in force since 1994. Before the law mediation entered into force, the mediation was applied by Foundation. With the adoption of laws and legal regulation of institution of mediation, the Foundation has reviewed and resolved many criminal cases, referred to it not only by the parties in conflict, but also by other legal bodies. Indeed, from the report of Foundation it appears that the vast majority of cases have been referred by the police.



From year to year the issues that are resolved through mediation are increased. During the years 2000-2006 were resolved through mediation 3314 issues (Semini, 2007: p.55). The Foundation assists not only help in resolving disputes, but also in the consolidation of practice for solving criminal cases through mediation, bypassing recourse to courts and putting on parties in comfortable position, ensuring that the victim is provided with redress and compensation. Although the mediation procedure is considered as an institution that helps only the victim, it should be noted that this procedure not only provides redress to victims, but also the person who committed the low-public risk offense, avoids criminal sanctions and stigmatization in the eyes of the society. It could therefore be said that through this procedure, both parties are winners. One of the most important criteria of mediation institute is confidential of issue. For this reason we

couldn't find enough cases to illustrate the mediation institute. We will illustrate the mediation institute with case below¹³:

- Two young men, A and M (first party) have been drinking in the bar of R citizens (second party).
- *After 11 hours R citizens had to close shop, was asked A youth to go because cafeteria will be closed. After having consumed several alcoholic drinks, M wanted to continue to drink and refused to come out of the bar. R, the bar owner, refused to give the drink a few times and tried them out. The young, become nervous and began to strike him with solid R-on, causing a slight fracture on the head. From present some of the injured is coupled to the city civil hospital, where he received first aid. The next day A made criminal complaint to the Police Station for citizens A and M. Charges object was wounded in the head with a club, according to his banal reasons. The issue is rated as "slight injuries in collaboration" under Article 89 of the Criminal Code.*

First step

- *Police officers referred the case to be dealt with through restorative justice and mediation. With their help mediator contacted from the beginning the second party R. The meeting was conducted in the presence of two police officers and defendants. R introduced its own version event, the reasons why the conflict occurred and claims. He was shaken, the angry and afraid that what had happened if young people would not have stopped hit immediately. Then he was asked if he agreed to settle the dispute through mediation and he accepted. The mediators explained that the mediation procedure is free. The second party had not heard of mediation, but agreed to implement and join meeting with the other party. Mediator and officers heard the police version of events from the first party. Two young men, in hot blood, initially had exchanged words with R for trivial reasons, but then the situation was tense and conflict was escalating in severe insult and then blow. The young people were regretted what had happened and then they understood the consequences of their actions. They thought that the conflict could have been avoided. Therefore sought to resolve conflict with the other party, the other party will accept. The complainant appeared and parents boys, really disturbed by what had happened. Mediator in the meeting informed the youth about the mediation process to resolve their dispute with R. Young people were also informed that R had agreed to reach a joint session of mediation between them. So it was decided that a joint meeting be realized after five days at the Center of Mediation.*

Second step

- *The mediator met the parties. Attending the session were and parents defendants. The mediator explained the rules that must be followed in the mediation process, the rights and obligations of the parties. He also explained, to the parties that mediation is offered for free and that eventually they would sign the act of reconciliation between them, which has legal force. Parties were invited to submit claims and discuss among themselves. Parents had very positive attitude and were interested in understanding to*

¹³ Restorative justice and mediation for youth in conflict with the law, publication of the "Conflict Resolution and Reconciliation of Disputes", www.mediationalb.org, date 12.04.2013

solve this conflict, and condemned the actions of their sons. The two boys said, that they were sorry for having committed this action.

Third step

At the end of that process was achieved:

- *The second party, R, draw complaints from the police and the matter was considered closed;*
- *First party, A and M, were expressed regret for what they had done and asked forgiveness citizens R.*
- *Parties signed a act of reconciliation in triplicate. One copy was held by the mediator and was a given to the parties.*

Fourth step

Two months later the mediator contacted the parties and was interested on the progress of relations between them. The parties stated that there had been no problems, rather they become friendships between them.

This case explains mediation institute's advantages. We saw that the way of resolving conflicts by mediation institute is the best way.

5. Conclusions and recommendation

Restorative justice is an important mechanism in the regulation of the relationship between victim and offender. Today, restorative justice is an important part of the criminal policy agenda that states develop. Mediation, as a form of conflict resolution, serves as a regulator of the suffering of the victim, bringing not only compensation but also the reinstatement of the violated rights. Through mediation procedure avoids long way for the offense little risk, and inspires in the parties and in community trust, security, confidentiality and cost less.

The Albanian government has legalized the institution of mediation and has set up bodies for the implementation and monitoring of the law and procedure of the mediation. But it is important that this law undergone to the changes, improving and facilitating the procedure of mediation. Despite that national legislation is drafted based on international principles and recommendations, it is important that the states takes same steps in building infrastructure, to increase cooperation with international institutions in order to exchange experiences and tactics. Another element is the establishment of mechanisms to inform the public of the existence of the institution of mediation and advantages of this procedure in resolving disputes¹⁴.

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