State justice and private justice. Comparative study

Ion TUTUIANU, Ph.D
“Vasile Alecsandri” University,
Bacau, Romania
tutuianution@yahoo.com

Ilie DORIN,
Mediating, Bucharest
dorin@mediatoru.ro

Abstract: Justice is the mean by which we can make justice for ourselves when we consider that our rights or interests are affected by those with whom we interact. Our way to make ourselves justice differs depending on person, from community to another, from state to state. Differences of perception of each person, community or state, make justice to be approached, understood or applied differently. State justice conceives litigation as a violation of law and of the order, order that must be reinstated and the violation punished. Private justice conceives the litigation as a conflict of the relation of parties involved, conflict that is made up of the interests and rights of the persons in that dispute, rights and interests which interfere and compose a relation between the parties under conflict and negotiable/disputable. The vision of the private justice is different as compared to the vision of the state justice. This different way makes the settlement methods and the final targets to be completely different. Therefore, there occur a series of approaches of the conflict related to the ways employed to settle it, ways which are part of the justice applicable or applied on the respective conflict. In the broadest sense, justice is the same thing as rightness, equitableness, exactness. Some go beyond that, defining the justice by a moral principle being based in essence on the compliance with the truth [1]. The Latin word Justus – rightfulness make us understand that justice takes into account all that is rightful for the persons under various litigation/conflicts. Therefore, justice is focused on truth, rightness, equitableness, on the rehabilitation and preservation of such active values.

Keyword: justice; State; private; compared.

Introduction

State justice is considered as the lawful institution of each state, in the democratic states it is regulated by the Constitution as the third power in a state. This type of justice succeeded to private justice, being a consequence not of a lack of efficiency of the latter, but of the increase of life and social relations, which become uncontrollable for the state. The state justice is represented by the judicial system of a state, a system made up of the material law and the civil procedure law, the administrative or criminal law. State justice is implemented by the magistrates, who are specially trained in the implementation of the law in each area they are active. State justice is triggered by the request of a person that considers himself/herself affected concerning his/her rights or interests, or by itself, when the rights or interest are general and belong to a segment of society for which the state took full liability of protecting. The principle in the state justice is the fact that the decision in a conflict/litigation is taken by a third party based on strict laws and reasoning.

The private justice is the justice done individually by the parties under conflict or under litigation. It is the first type of justice by which people settle their disputes. Practically it is a personal way to settle a conflict in which the person is a party. “In the pre-state period, conflicts between persons were settled in line with the non-juridical habit, by the system eye for an eye, by implementing the Law of the Talion (lex talionis) or by calling divinity for help by certain ritual procedures” [2]. If in the pre-state era, private justice had its rules inherited from predecessors, the evolution of the people’s relations and of the social conscience made this rules change and evaluate with the variations in the communities from different regions. An important role in the perception, approach and implementation of the private justice by a person that was part in a conflict is taken by his/her religion, culture, the society he/she is part of, his/her intellectual level and other factors, as the case may be. Thus, private justice occurs as being the private, personal way to settle a dispute, without the intervention of the state, without the intervention of a magistrate, without the...
decisional intervention of other third persons under conflict. Private justice is defined by the key element of the voluntary decision of each party under dispute and of all under the conflict related to a private solution to their situation. Private justice is the justice of the parties under conflict to that conflict; their way to consider and implement peaceful, amiable, and voluntary solutions, considered optimal and opportune by them, sometimes with a certain degree of compromise, other times in exchange of certain provisions. The voluntary decision factor of the persons under conflict is the fundamental principle of private justice.

1. Historical considerate

It is understood that the private justice is the oldest form of justice and it precedes long the state justice. In fact, we can talk about state justice only with the occurrence of certain larger communities of people legally grouped and organized. In other words, the political and administrative organization of the society made possible the occurrence of the state justice. Any state is fundamentally based on order and justice, and they are done by offices specially trained and empowered. Private justice did not disappear with the occurrence of the state law system, but it has been always conditioned. The power of a state had and has as essential indicator the judicial factor. The rightfulness under the power of the state gives it power and safety, but also viability and constant features.

Getting from the private to the state justice was done at the same time or after the formation of new states, states which prepared by as many enactments their way to make justice, to maintain social order among the members of the state. Its own justice was given by the law system under formation or adopted from other state. “In the desire to impose speedily and as efficient as possible the new system of settling the litigation between persons, the Roman law introduced a judgement procedure characterized by an excessive formalism; the role of state in the implementation of justice permanently increased” [3]. A new transitory form from the private justice to the state justice can be placed on the ad-hoc courts of law or the traditional courts of law. These forms of justice which were not private nor state owned, lasted longer on the vast territories of the former Empires and on the current territory of Romania, until the formation of the state. Here, under the conditions of the feudalism “the traditional norms are presented related to the judgement of the good and old people and the testimonies with people who sworn under oath and testimony. The new element is under the competence of the court of lords and princes, the magistrates” [4]. It is, under our opinion, the form preceding the arbitrage.

We notice that the place of a judge is impropriate in a first stage by the leaders of different political groups, sometimes religious leaders, sometimes of an Elderly and Wise Men Assembly, and when the state is well organized in the territory and it has an acknowledged legal structure, the judicial apparatus is put into operation immediately. From our point of view, the right of these persons to judge is closer to the institution of the arbitrage, as they have the role more of an arbiter than as a judge, especially considering that they were not judging strictly based on certain laws or legal and juridical reasoning, but settle the disputes according to the custom of the place, according to the justice, according to the equitableness, according to the principles which they considered equitable and could be applied within the settlement of the respective issue. The freedom to think and analyze the situation, as well as the freedom to decide, makes these persons more an arbiter and not a judge, according to the meaning we currently give these terms.

The coexistence of the state justice and the private justice cannot be question. The predominance one to another is given by the historical context and the political and administrative organization of the territory where it is implemented. In all cases, the private justice is a legal justice, which is done legally, legitimately, persons under conflict having the right - given by the legislation or the custom in force on that territory at the time – to call for the settlement of their conflict individually and privately.

The attitude of the state to the traditional ways to settle the litigation/disputes oscillated between the permission and state monopole. In the totalitarian eras, generally, the state interference in the “private matters” being increased, the private justice was amputated. In the communist era in Romania, the state had the exclusive right to settle the civil and criminal litigation between citizens, even if for the lower conflict an ad-hoc judgement was given [5]. The importance of the object of dispute in the civil and the social hazard degree in the criminal area were strictly delimited and regulated by the state, many times under the minimum threshold. It is rightfully said by Romanians that during those time if you stole a chicken, you could be sentenced to prison. In the totalitarian system, the monopole on the settlement of litigation between citizens makes part of the state monopole on all issues of the social life. The private justice is allowed only under
very restrictive conditions. At the same time, institutions and tools are not made available for it to be functional. State justice is the only and the best choice from the point of view of state.

2. Operation conditions for the two types of justice

State justice and private justice need certain conditions to be operational and fulfil their purpose. **State justice** must have available a well organized apparatus related to the territorial distribution and organization, clear procedural regulations related to the material and territorial components, high training of magistrates and of auxiliary personnel necessary for the justice, the help of the compulsory apparatus to take the decisions to enable their enforcement, permanent funds to support the judicial activity. They can be the main conditions for the state justice to be operational. The guarantee of the operation and efficiency of the state justice is a main element of a democratic state. Although, in special, the state justice settles the private conflicts and disputes among the citizens, in general, the role of justice consists in social discipline, meaning the observance of law and rights of other people. The discipline of members of a state by punishing them in case of law violation is part of the state role to maintain social order and to guarantee thus the progress of the society.

**Private justice** needs only one condition to exist – the regulation of a general operational frame, the permission to exist as an amiable way of conflict/litigation management. Therefore, the simple permission of the citizens to settle their conflicts directly, in private, is the minimal condition for the private justice to exist and operate. As mentioned before, the totalitarian systems had the tendency to forestall the settlement of conflicts by their judicial apparatus. The democratic system offers the possibility of choosing the way of settling different disputes. This possibility is the only condition for the private justice to be able to operate. Putting in other words, the freedom to analyze and find an amiable solution in a certain conflict is part of the democratic vision on the social relations, “democracy being exactly that type of policy that considers that all the conflicts must be absorbed at the parliamentarian level and the differences must be settled by negotiation” [6]. State supervises (or it should) not necessarily in the observance of laws, but in their understanding and maintenance of good relations and relations between the citizens. Laws which allow the freedom of citizens are the laws that allow naturally the private justice, as they cannot be broken as long as they allow those they address to different modalities on the issues and situations they are facing.

Where the laws impose certain behaviours and the litigant had another type of behaviour, it can be punished by the law, we cannot talk about private justice when an imperative norm is not observed, a law that expressly provides a civil or criminal behaviour. The condition for the private justice to operate is given by the freedom of the citizen to choose the social behaviour, where they are not provided or expressly provided. The citizen has thus the power to decide what he/she is going to do, how is he/she going to do, as he/she is the only concerned why is he/she going to do a certain thing, taking full responsibility for his/her acts. When you are talking about the conflicts settled in private, we refer to the decision of the citizen to decide what kind of solution is he/she going to choose, how is he/she going to implement, taking full liability for the consequences deriving from this willing act of accepting an amiable, peaceful, private solution for that conflict.

Private justice triggers private methods of settling the litigation. These methods are not conditions for the private justice to exist in state, but there are its actuators. In other words, if the private justice means the settlement of a litigation between two individuals, these individuals have the freedom to choose the involvement of a third party to help and facilitate the amiable settlement of litigation. These third parties thus become participant in the private justice act, being the factors to develop and promote justice, especially within the meaning of state justice currently employed, becoming increasingly suffocated by the cases pending before the court. Institutions as mediation, conciliation, facilitation, negotiation are wings of the private justice, justice that must have an important place and role, beside the state justice.

The operation of private justice does not exclude the state apparatus, civil procedure systems, permanent funds, involvement of state under different forms. The private justice is not a financial burden for the state. Contrary, as we shall see explained below, it brings the state considerable social and financial benefits, on short, medium and long term.
3. Components or “actuators” of private justice

Private justice is the way of persons under conflict to make their justice - legally and legitimately, by understanding and in good faith, voluntarily and amiable. A society with a diagonal culture and history in peaceful settlement of litigation would be a society that the private justice comes first, not the state justice, it is the society to be wanted. Amiable settlement of conflicts - private justice - requires an education of the citizens to be able to analyze the situations they are facing, of possible solutions of that situation and negotiations of certain solutions that can be satisfactory as much as possible.

The law system which the state justice is the main one of settling the conflicts and educating the citizens is dedicated to settling all litigation by a judge, the private justice becomes lapsed, futile, an underpriced method. It has happened within the last centuries. Moreover, the post-totalitarian law systems used to approach the litigation exclusively on the judicial way is a habit inherited of settling the litigation exclusively by the state. State monopole was inherited. In this context, private justice remains an “obsolete tool”, almost all litigation are submitted to the court to be judged; hence the large number of judicial files registered from year to year. Suffocating the judges with such high amount of files to be settled yearly, hindering the interval to judge a file, increasing the stages and phases in a court process, determine the state apparatus to become disabled.

The need of the state to turn to private justice is inherent. Private justice appears under such conditions for the state as a useful clean breath [7]. In this reorientation process of state toward the private justice, certain “actuators” of private justice have been identified. Private justice has means to make itself more visible, more important and fruitful. The settlement of as many litigation cases as possible on amiable way increases the efficiency of private justice. These actuators are means for an amiable settlement of litigation: mediation, negotiation, facilitation, conciliation, peace negotiation [8]. We have to mention that all these methods summarize the way of doing and applying the private justice by the citizens under conflict; although some of them involve the presence of a third party, the decision power related to the solution to that conflict lies with the parties of that litigation, which gives the predominant feature of the private justice as compared to the state justice or arbitrage where the solution is given by the judge/arbiter.

Mediation is a process structured within the mediation meetings where a trained neutral third party analyzes together with the parties the whole conflict situation, relations between the parties, the substance of the conflict, their solutions related to conflict, helping the parties to prioritize the need and interests related to the cause and depending on them to negotiate an amiable solution to the conflict. Mediation is the most known amiable settlement of conflicts, making important progress within the last years in most of the European states and not only [9]. Promoting the mediation and mediators is a concern of the European Union, which is willing to support the litigants by simplifying the settlement of conflicts, but also of states by depletion of the large number of files in the courts of law [10]. In this European vision, the problems which can be negotiated must be headed toward negotiation or mediation.

Negotiation means direct discussion of the parties under conflict of an amiable solution. It is generally used in the commercial industry where the negotiation techniques are well known by each party under the conflict. “Negotiation can be approached by the parties under litigation competitively, by collaboration or probative” [11]. It can be successfully used by any type, as long as the parties are willing and have a dialogue, have a high degree of accepting the situation, and they are decided to discuss the problems on detail and with no coercion. The negotiation is the method that involves no costs for the parties under litigation.

Facilitation and Conciliation mean more an improvement of the relational frame between the parties, by the intervention of a third party neutral, with a conciliatory role. General, conciliators and facilitators inform the parties under the conflict the variation of the perception on the conflict, changing the perception on the parties’ position, determined to change the way to approach the issue. Facilitating and Conciliation are not so much spread and used, as they are not known. Their role and place in the private justice is very important. In this moment, mediation took over the functions of conciliation and facilitation, mediators being the conciliators and facilitators at the same time, in order to determine and generate the amiable solutions for that conflict.

The edificatory negotiation is a concept which is relatively new, but it is part of the private justice. It is the main negotiation, as it is the direct or mediated negotiation, however, the plus brought by the peace negotiation is a plus for the community where the conflict took place. The settlement of conflict must take
into account the incidence and effects of the conflict in the social environment where the conflict took place. “Beside the definition of the joint interest of the parties, they shall also define the interests of the community and when they find together theoretical solutions, they also establish the measures necessary for their implementation without affecting the interests of the community” [12]. Thus, settling the issue also brought the settlement of the negative effects it could have on the community.

All these methods can actuate the private justice. Educating of the parties under litigation for the amiable settlement of disputes must be the constant effort of the state. At the same time, the litigants must consider if the amiable settlement is opportune for their conflict, which are the costs of a private justice and of a state justice, we refer here to financial, time involved and emotional costs. The decision to turn to state or private justice is within the power of the persons under conflict. State and law practitioners must offer the litigant the appropriate frame for the settlement, as efficiently as possible of the litigation.

The amiable ways of settlement of litigations can make the private justice an important part in the management of disputes/litigation, beside the state justice. Private justice must be encouraged at the same time by those the judicial apparatus. We take into account the existence of litigation which are conflicts which can be settled amicably in a high degree, as, on the other hand, there are litigation that have a lower ratio of amiable settlement, which must be deferred to court.

The alternative settlement methods of conflicts are tools that state can successfully use to balance the judicial system and make the justice act more efficient. The advantages of the private justice must have the necessary consistence in order to determine the litigant to turn to amiable methods.

Private justice does not exclude the state justice, but compliments it excellently, in such a way that all the participants into the state justice act - judges, prosecutors, attorneys, judicial police offices and all the participants into the private justice - mediators, facilitators, negotiators, and conciliators know their role and place within this litigation management system.

4. Advantages and disadvantages for the state justice and private justice within the current situation

We shall further look into several advantages and disadvantages of each type of justice, without any intention to decide which type of justice is better. It would be nonsense, as long as any type of justice is good, otherwise it would not be justice. We want to emphasize only the aspects that must be taken into consideration by the citizens when decide which type of justice they approach for the settlement of the conflict.

The greatest advantage of state justice would be the enforceable title of the final and irrevocable decisions of the court. A court decision must be enforced immediately, willingly, contrary, the corrective force of the state can be put into action by the involvement of the Court Enforcement Officers which enforces the decisions of the judge. Failure to observe the decisions of the court is classified into the criminal sector. A judge decision considers that justice was done and that the rights or interests which were affected were reinstated as much as possible as they were before the conflict. Legally speaking, state justice is the only able to decide on the legality and legitimacy of certain actions, rights, interests of people/groups/communities.

We can see three main advantages of the state justice: the high period required to develop a judicial process, bureaucracy, increase of lack of trust in the honesty and correctness of judges and high financial costs. The time necessary to develop a process with the means of attack is of several years, regardless if we are talking about a complex or simple litigation. The fact that the parties do not come before the judges at the terms established and the right of the parties to ask for delays in certain terms, although they can be considered as throwing-back by the other party, are indicators that sometimes increase considerably the duration of a judicial process. The financial costs of the state justice are considerably high. Starting with the fees of attorney, legal stamp duty, fees of the evidence presented, fees of the experts, different judicial expenses, a trial can be very expensive. So many times, in a litigation with a value of several thousand lei, the state justice - the judicial trial can cost half of the value of litigation scope. The expense are increased as the scope of the litigation is higher, the litigation is more complex by the number of parties, their rights and/or legal relations between litigants. There are cases of litigation where the costs of the process are higher than the value of the litigation. A disadvantage of the state justice would be the lack of trust in the neutrality, impartiality, trustfulness, morality, correctness of judges, values that lately are continually decreasing. According to a survey of IRES in August 2012, the judge or attorney profession is featured by a low trust...
level of trust: for the judge profession, 39% of the participants in the survey reported that they trust very much (12%) or much (27%), related to the attorneys, 41% reported that have trust [13]. Some of the decisions are not satisfactory for the parties under litigation. In the files where the parties are people in the upper part of the society (by their political or administrative functions) the trust in the impartiality of the judges is very low, as it frequently happens amid accusations that sometimes founded sometimes unfounded regarding the influence of judges in certain cases, bribery, abuse of office, influence trafficking - especially judicial corruption offenses. Some important cases tend to increase the distrust within the proper administration of justice by the state court.

The advantages of the private justice could be compared with the disadvantages of the state justice. Private justice, either we are talking about negotiation, facilitation or conciliation, involves extremely reduced intervals for the settlement of litigation. If, for example, a divorce with the partition of the shared goods by the court would last for about 3 years, by any of the private justice methods, several meetings of the parties under litigation would settle the matter. At the same time, comparing the high costs which a trial can involve at times, we can say that private justice has very low costs. If we take into account the method of direct negotiation between the parties under conflict, there is no cost at all. If we take into consideration the settlement of the litigation by other forms, the fee of the mediator/facilitator/conciliator is futile as compared to the total of the expenses in a judicial process. Private justice is, from this point of view, a wise approach for those who have the means and the opening toward dialogue, toward amiable and voluntary solutions. Other important advantages of the private justice would be the flexibility of the procedures chosen, of the meetings between the parties under conflict, flexibility of discussions, the large possibilities for discussions and solution proposals, the informal way of negotiating an advantageous solution, high permissively toward concessions or mutual exchanges between the litigious rights or interests. Maintaining the good relations is a very important factor in the conflicts where parties have to, considering their relations, to cohabitate or to collaborate after the settlement of litigation too (litigation between neighbours, litigation between parents related to the joint custody of children, litigation between professionals, labour litigation, etc.). Private justice is the only method which approaches the litigation also by the emotional features, giving emotional satisfaction to participants precisely by their direct and active participation into the generation of an optimal solution.

The disadvantages of the private justice would be the lack of trust in this method, but also the adverse party from the conflict, the lack of a civic culture in the voluntary and amiable settlement of conflicts/litigation, the lack of trust in mediators/facilitators/conciliators, and the lack of executive power of understanding - the agreement which could end the conflict. In other words, even with a written understanding, it has no power of enforcement as the court decision has, although it can be elaborated as an Enforceable resolution or an authenticated notary deed, as it can therefore have a power of enforcement. It makes private justice to be supervised by the state justice, the judge or the notary being the only having the right to legalize the understanding, transaction or the agreement of the parties, as it can have the enforceable title and it can be enforced if needed. The lack of knowing this type of justice and the methods it is composed of – negotiation, mediation, facilitation, conciliation - makes the litigant to call by the power of habit to the court of law. Another disadvantage of this justice would be the unsafely of finding an amiable solution. As we mentioned in the beginning of this paperwork, in the private justice the decision related to a solution of a conflict is taken by the parties of that conflict, or precisely this fact generated the lack of safety for the parties under conflict, which are nevertheless suspicious and distrust the good faith and willingness of the other party. Moreover, some of the litigants do not have the custom of negotiating solutions to their problems. In this regard, the help of a third party mediator or facilitator is welcomed and is aimed to cover precisely this gap of trust and safety as compared to the joint perception of the parties under conflict.

As we can see, the advantages of the private justice would be the disadvantages of the state justice and the disadvantages of the private justice seem to be the advantages of the state justice, which can lead us to the idea that the two types of justice do not exclude each other by the complement each other. We cannot talk about a state without state justice, but nor about a state without private justice. The number of conflicts of the human relations makes the discussion opportune on the type of approaching the conflict. The complexity of a conflict, its intensity but also its social importance should be taken into consideration when the state makes available at the people involved in the conflicts the type of justice recommended for the settlement. A litigation of joint custody, or a litigation of a debt of 10,000 lei, involves a higher possibility of amiable settlement, therefore they can defer to private justice. A dispute with 10 successors and a chart of heirs which involves different types of goods, rights, debts and will revoked, involve a less possibility of
The advantages of using both types of justice are considered as a high advantage for the state. The operation of both state justice and the private justice and the impulsion of the latter as much as possible, would bring high financial advantages for the state. The depletion of the courts of law would bring important economies for the judicial organization budget, the quality of the justice act would be better taking into account the lesser number of files delegated to a judge would bring to judging the litigation within a reasonable period of time as the Constitution specifies; the culture of dialogue promoted by the private justice and its compounding parts would make the society to be more opened and peaceful, the way to approach the situations and conflict relations between citizens would be more diplomatic, more conciliate, more collaborative, more programmatic, creating a social conscience on the pyramidal approach of litigation conflicts. The pyramidal approach of the conflict would refer to the settlement adopted by the party or parties under conflict. Thus, the direct negotiation between the parties would be the first level of the pyramid, after that and only if the parties did not reach an agreement directly they are prompted to turn to a third party (mediator/facilitator/negotiator) which can help the parties to maintain the amiable frame for the relations within the conflict and the settlement thereto and only if not with the help of the third party, on the second level of the pyramid any amiable solution was not reached, to turn to state justice, as the last stage and phase in the settlement of the conflict, as the pick of the pyramid. From our point of view, state must involve in the private management systems of the conflicts/litigation to create the necessary frame for the best development of both types of justice, as much as possible as it handles the social or environment policies.

5. What the citizen must know about the state and private justice?

First of all, justice was created for the citizen. He is the litigant, the person who should make justice (if he turns to private justice) or the one for whom justice should be done (if he turns to state justice).

Most of the times, the citizen does not know where to turn to. He knows only that the way or method he would use for him or for an acquaintance of his. Most of the times, the inertia or the old system lasts more than the conscience and the approach of the conflict by the parties under conflict. More than that, the habit lies with the system too, not only with the citizen. Most of the practitioners of law work based on such inertia. The habit of going into the court of law, lack of self-confidence and lack of trust of the citizens to negotiate a proper solution for the conflict are the factors on which the decision to turn to a judge, no matter what, should be based on. Not even the calculation of the financial costs, not even a programmatic assessment of the situation, not even an evolution of the possible solution given by the law are not subjected to the analysis of the citizen, although he is not directly interested in the settlement of the dispute and he is the one that invests important financial, emotional and time resources.

On these considerations citizen should know what justice is and what the state and private justice require. What costs each of them involve. What results we can obtain in each kind of justice. How many chances we have to be satisfied in judicial proceedings or in the private procedure for direct negotiation or mediation with the party in conflict. An assessment of the possibilities for voluntary and amiable settlement of the dispute would bring significant savings. Of stress, time and money. The citizen only knows if he is educated to know, and to be educated he must know that the state is willing to get involved in his education in addressing and managing the conflict. We have here the dialogue culture of people, culture of disputes, and culture of a peaceful or conciliatory approach when citizens enter into a conflict. The reform in education in terms of relationships of people, interpersonal conflicts, solving any disputes or disagreements between colleagues/partners/relatives seems to be still in its infancy in the former communist countries.

Citizen awareness of the types of state or private justice shall make him realize which ones fits him best in a certain conflict in which he is a party. It shall make him design a strategy to address the conflict. Preparing for an amiable settlement, voluntary or judicial of the conflict always starts from the calculation of the benefits and risks of each option. The citizen is entitled to choose; however he must choose well informed. The attorney as advisor, protector and guarantor of rights and interests should inform him on all methods of solving the dispute, each with advantages and risks, for his client to choose knowing what every type of justice can offer him. The attorney may advise him to negotiate a solution by himself or to negotiate as a lawyer, to turn to a third party specialized in the amiable settlement of disputes, or to turn to judicial proceedings. We remind that all these methods or ways of settling the disputes, both in private and state justice, the attorney has a very important role. He is the one who supervises and advises his client or gives
him advice in good faith to choose the optimal method. Attorneys are guarantors of both rights and freedoms of litigants as well as those who provide the necessary support when a litigant is under dispute.

After which the citizen knows his options and is well informed on the option he holds and what results he can obtain, he can implement the method chosen. Either he chooses direct negotiations, or the mediation, or the facilitation or negotiation, or the judicial proceedings, the litigant is the only one who should choose and decide the father of his conflict.

6. Case studies

We will describe below two classic cases of disputes resolved by mediation within our office. These types of cases are quite common for our society, and quite numerous pending before the courts, due to poor culture in terms of the amiable settlement of disputes.

A. A conflict related to an amount of 2,000 de lei. A former employee of a company was transferred within his account this amount after his labour agreement was terminated and he did not provide effective this work for the company. For the state justice the case being is called undue payment. For the private justice the matter is considered as a conflict related to an amount of money. The state justice would consider the return of payment. For the private justice, the parties under conflict - the company and the former employee - can invent and discuss different solution. For example the former employee can work for 1-2 months which could balance the amount, can return the amount in full or in instalments, or he can return the amount in part and for the rest he can offer the company other services (as he is web promoter) or the campy can ask for the amount to be transferred to an NGO, etc. If this conflict would be solved into the courts of law, it must be considered as a classical judicial process, with case and evidences, with trial terms, with an eventual need of legal counselling, with legal stamp duties, etc. If we would estimate that this litigation is to be settled by a judge within 1-2 years, we are able to know why the number of litigation pending before the courts is so high. Such requests are registered on daily basis with the judges, and all such request increase the number of litigation and saturate the court of law. It is natural that not all the litigation is considered as this one in the soft case, however, most of them are. On the other hand, if this conflict would be settled in the private justice methods (direct or mediated negotiation) we can easily notice that a dialogue between the representative of the company and the former employee is enough to analyze and agree on an amiable solution. The mediation of the conflict above lasted for 30 minutes, costs 250 lei, and the solution discussed and agreed by the parties was to return the money in instalments, a solution resulting after the mediation meeting. The difference by the settlement of the case by the classic justice and the private justice methods is superior.

B. Private conflict with criminal incidences, theft attempt. We mention from the beginning that we refer to theft not only as a crime, but especially as a private conflict between two people. A person is trying to steal a bicycle from another person, but unsuccessfully being caught by the Police. The offender has criminal record, therefore, is can be punished with imprisonment. In theory the affected party cannot have any material claims, as the fact was only an attempt therefore the bicycle was not stolen. In accordance with the criminal legislation, the conciliation of the parties cancels the criminal liability of this type of crime. The conciliation by mediation - a conflict settled by a Mediation Agreement signed until the final sentence, cancels the criminal liability. If we consider the settlement of the matter by the state justice, we can notice that the offender risks going to jail. He has a criminal record; therefore he can be sentenced to imprisonment. The criminal process can take up to several months or years, after which the offender shall be sentenced to imprisonment. For 20 months of imprisonment, the state would spend with this inmate 48,000 lei, calculated at 2,400 lei monthly expenses with an inmate [14]. More than 10,000 Euro spent with a single inmate for a theft attempt. On the other hand, if the parties under conflict would conciliate and reach an agreement by mediation (for offences direct negotiation between the offender and the party affected is a very rare case, preferring the discussions by a mediator), the state would not have to bear any expenses with the respective conflict. The parties can claim different amounts of money; the criminal conflict would be ended within maximum several days by a mediator who would focus the persons toward their interests in the case, with a modest fee. The state can gain that time otherwise dedicated to the settlement of the criminal trial, would save the work of the judicial and enforcement bodies, and would save more than 10,000 Euro. Only for 100 such cases, the state would save 1,000,000 (1 million Euro), money that could be invested in different social programs on the social integration, prevention of antisocial facts, etc. These are huge amounts that could
bring a new perspective into the society, a civilization. The private justice being the one that can bring something new into the old, retributive, de-socialization system which cannot fulfill its purpose under the conditions of social restraining of victims and offenders at the same time.

We see from these cases the major differences between conflict approach by state and private justice. Different approaches lead to different targets, and achieve different goals. Saving time and money for both the state judicial system but for litigants too, and also a social order and discipline assumed/acknowledged seem to be the main factors that should attract the attention of both the legislative, executive as legislators, especially judiciary practitioners – attorneys, prosecutors, judges, judicial police offices that are in contact with these conflicts.

We have above example of small conflicts that create great difficulty for the state system. We note that the State monopoly and control of all private conflicts became to create an almost impossible task, which grows from day to day. Into a democratic society I cannot see what role the state can have in resolving the dispute between two private individuals, only to supervise them as the understanding between them might not affect the laws or social and moral order, this right of the State being a guarantee of understanding that do not affect other people or even the State.

7. Private justice and state justice in the criminal law

A more delicate situation is the incidence of the private justice in the criminal area. We are talking about the criminal laws and other laws in the criminal area if we consider the matter from the point of view of the state justice and we are talking about private conflicts with criminal consequences if we consider the matter from the point of view of the private justice.

In the criminal area, the state justice enacted the facts for which a person can be liable at a given time in terms of criminal law. Those are the facts that are considered highly anti-social, which severely affect the rights and freedoms of the other persons or even of the state, by disturbing social order. These are the criminal facts, and they are punished clearly and explicitly in the criminal laws. Although they seem contrary, the two forms of justice are complimenting each other in a certain way in the criminal law. “The key element of the contrary position is the restorative justice (the so called private justice in the criminal area) and the traditionally retributive referring to the way we consider the conflict” [15]. In the last decades, the private justice - restorative started to increase and by enacted by the judicial offices, especially in West. The emphasis on the settlement of the criminal conflict is lied on the rights and interests of the victim especially, and secondly of the state. The victim, almost ignored in the restorative procedures, although paradoxically is the one who suffers most, regains the first position and has the necessary instruments to choose a solution for the conflict. “The role of the compensating justice is to give the victims the possibility to express within the criminal procedure law system” [16]. The parties affected have a higher process power in the restorative justice, a power given by their decision and its consequences in the criminal process. He may choose to conciliate, can choose to discuss the conditions of this conciliation, he may choose the criminal trial and the offender to bear the criminal consequences of his facts, in this case the state being able to have an executive criminal role. The mediation - as a part of the restorative justice can be considered both as a part of the criminal procedures, and an alternative or a solution adjacent to these procedures [17]. It is natural that the purpose of the criminal process is not only to establish the punishment with the imprisonment of the offender, but that of repairing the damage bought to the party affected and the social integration of the offender; to re-establish the harmony of the social frame. If the damage produced to the party affected can be sometimes easily repaired, the social integration of the offender is a lasting procedure and it must be a part of the important state strategies related to the education of citizens and prevention of the antisocial character and facts. In other words, a part of the judicial system funds must also be used for the education and educational system; as the education is the main fundament of people’s facts and the situations that lead to a certain fact must be analyzed in detail.

In the case study mentioned above we noticed how the restorative justice not only that brings financial savings for the state, but gives it the possibility to invest that money into citizens to decrease the number of antisocial facts and the number of delinquents from the social programs. For it we need a national strategy, a national project, of policies sustained in the criminal area and the restorative procedures.
Conclusions

The culture of dialogue and negotiation are the key for the private justice. Into the state justice, even the spatial placement of the room of the court of law indicates that dialogue and negotiation of a solution into a conflict are not allowed. In order to dialogite and negotiate solutions we need a culture of dialogue, of negotiation, especially of difference. About the culture of difference, H.R. Patapievici said that “the type of warier is opposed by the type of person that strives to turn any conflict into a negotiation - meaning that person that is convinced that any problem (material or spiritual) allows oral negotiation” [18]. To be put in a position to discuss and negotiate, citizens must know that they have this right and especially to know what this right means, what consequences the dialogue and negotiation can have.

We all agree that the dialogue and negotiation can have only positive consequences. Positive results for the citizens, for the state, for the social and relations order of the persons from the community.

References

[3] Idem p. 59;
[5] In the communist era, in Romania, there was the peace judge, the peace judgement being a simplified and extraordinary procedure for the settlement of conflicts with causes especially criminal;
[9] More and more elaborated programs and conference on the ways of amiable settlement of litigation, focusing especially on the mediation are on the agenda of several states in the world, In Hong Kong, the most recent program was the Mediation Week in March 2014 according to http://www.doj.gov.hk/mediationweek2014/eng/programme.html
[12] Idem p. 56;
[14] According to the calculations done by the National Administration of Penitentiaries (ANP), costs of maintenance of a single inmate is of 2,397 lei/month, out of which 1,619 lei costs with the personnel and 422 lei with the goods and services, up to DOLLORES BENEZIC, in http://cursdeguvernare.ro/sistemul-penitenciar-din-romania-cat-costa-un-detinut-si-de-ce-nu-munceste.html seen on 19.05.2014;
[16] Diana-Ionela Anches, Medierea in viata social politica (Mediation into the social and political life), Universitara Publishing House, Bucharest 2010, p. 208;
[17] Idem, pp. 26-27;