Judicial institutions, ADR reform and their necessity in the Albanian reality

PhD Evelina Çela[1]
Department of Law, Political Science and International Relations, UET, Tirana, Albania
e-mail: evelina.cela@uet.edu.al

Abstract

The concept of separation of powers was put forward by one of the most prominent representatives of the French Enlightenment, a prominent jurist and political thinker Charles Louis Montesquieu (1689-1755) to prevent the abuse of power and create conditions which "different authorities can mutually restrain each other. So, the topic of this paper it is the evidence of the current situation in Albania in terms of judicial institutions, legality, functional and practical importance in a democratic state and the functions they perform.

The separation of powers has political and natural preconditions. The political reason for the separation of powers lies in the danger of the concentration of power by one body, in the need to control three independent powers over each other. Natural preconditions are necessary for the adoption of laws, their implementation, and the administration of justice. Thus, the legislature (Parliament) produces laws while the executive (government) implements the laws. Courts (Constitutional Court, courts of general jurisdiction, courts of arbitration) deal with specific cases to which other government bodies and citizens are parties.

The article analyzes the main criteria, legal bases, and necessary conditions, consequences of the lack of judicial institutions and finally recommends the emergence need of the creation of an arbitration court as an alternative dispute resolution ADR, a tool widely used in developed democracies. A good justice system, both in the legal and organizational framework, in the civil field is an essential guarantee for the rule of law and respect for human rights. These rights take on legal value when the individual goes to a court that administers justice in a short period of time and in this way it creates trust in the public.

A state with a well-organized justice system (where there are alternative means of resolving ADR disputes) for all spheres, be they civil, administrative, criminal or family, etc., is the main indicator for institutional reform, distribution of the burden enabling the delivery of justice on time and without delay. Above all, the individual has the opportunity to choose the means by which he will solve his problem. On the other hand, such a good organization would also enable the increase of work efficiency and the quality of the given judgments.

Key words: *institution, law, principle, jurisdiction, arbitration court, international law, dispute, human rights*

I. Introduction

The judiciary is a sphere of public power, characterized by the following characteristics: exclusivity; independence and impartiality; carried out through legal procedures; procedural stages for the implementation of actions and court documents, defined by law, the binding nature of court decisions etc. The judicial system of the state is to administer justice, so it must ensure the stability of sentences and decisions, the possibility of correcting judicial errors and the strict observance of procedural rules at all levels. The most important, the sentences and decisions of the courts, which have entered into force, must be executed without fail, allowing no evasion for reasons of utility. One of the most important constitutional freedoms is the equality of all before the courts, which is the foundation of the rule of law.

People who thought of this problem long time ago, noticed that the concentration of state power in someone's hands inevitably leads to negative consequences. The higher this concentration, the higher the chance of arbitrariness and abuse. This is evidenced by the decades old experience of mankind. The most devoted rulers, in whose hands all the threads of power were concentrated indefinitely, sooner or later became obscene tyrants who knew only their authority, who violated freedom and disregarded the inalienable human rights. This experience prompted the search for ways to overcome such negative phenomena.

The idea that the main directions (branches) of state power should be divided and trusted in "different hands" has gained wider recognition and continues to

[1] From 2015 onwards, she is a lecturer of following subjects "Public International Law", "Alternative dispute resolutions", "Arbitration, Mediation and Bankruptcy Law" at the Law Department of the Faculty of Law, Political Science and International Relations. She has published several scientific articles in Albanian and international scientific journals, as well as participated in national and international conferences.

maintain it to this day. This will interfere with usurping intentions, and with it the abuse of power and arbitrariness. Most often, the supporters of this idea (concept) are of the opinion that state power includes three branches - legislative, executive, and judicial. The spheres of their organization should be clearly defined, they should not interfere with each other. The division of powers would follow each of them, would place it in a certain framework and balance.

The principle of separation of powers not only distributes the functions of state power among the three branches of government, but also establishes their independence and mutual balance. The principle of separation of powers is also important to ensure that mutual control and balance of powers do not lead to the appropriation of judicial power by any other power (Bradley & Ewing, 2007).

State power is exercised by the relevant bodies. Power is related not only to institutions, officials, but also to the functions that belong to them, and the implementation of such functions. The meaning of the word "power" is interpreted in the basic sense as a right, power and will over someone, freedom of action and orders, in other words leadership and the right and ability to dispose of, command, control someone, something.

It would be wrong to reduce the judiciary simply to the court just as a state body because power is what this body can and should do. Basically, it is a power, a function, but not an executor. So, power should be understood not as a body or system of bodies that exercise it, but as a right, based on law, one should understand the ability of these bodies to perform certain actions and the very implementation of these actions.

The correct understanding of the relationship between the functions of law and the courts is very accurately expressed by the principle established in the UK: "the law is there where the means of protection are". The judiciary, on the other hand, it is the competence given to the special bodies of the state, the courts, to resolve issues in their competence that arise in connection with the implementation of the law and the implementation of these competencies through constitutional, civil, criminal, administrative or arbitration procedures and so on, in accordance with procedural forms that create guarantees of legality and justice.

In a democratic state governed by the rule of law, there is a general rule that both the state itself and citizens' associations and free individuals must relate their actions to the law. But, conflicts of their interests, different understandings of the law are inevitable, which causes legal conflicts. The adoption of laws by the representative bodies, the implementation of these laws by the executive power itself cannot prevent such conflicts and ensure the unwavering observance of the law by all its subjects, to ensuring order and law. This task is performed by law enforcement agencies, and above all the courts as an independent link of state power, including its specific tools and apparatus protects the rights and freedoms of the people, protects law and justice.

A democratic state governed by the rule of law adheres to completely different ideas about the role of judicial institutions (Costa, Zolo & Santoro, 2007). A market economy based on private property and free enterprise, the scope of the courts is growing tremendously, and the most important task of state power is the protection of human rights and freedoms Cela E. (2015). In defense of constitutional freedoms, the court is placed in the position of a mediator between the state and the individual, between different natural and legal persons. Zurn (2007) in its studies found that, an independent judiciary, becomes the core of the rule of law and constitutionalism which is the main guarantee of the freedom of the people. The rule of law is based on the executive branch, from which comes the main threat to rights and freedoms. On the other hand, this threat is counterbalanced by the legislature, which produces democratic laws, (ratifies bilateral agreements BIT, conventions, approximates domestic legislation with that of the European acqui communitaire, recognition of the decisions of foreign courts) as well as by the courts, which the law essentially control the executive branch (Bermann, 2017).

The judiciary, in terms of material and technical basis, is the weakest of the three powers, but it is above them, possessing the weapon of the natural law, that the main burden falls on preventing the transformation of violence into a method of law. It is not difficult to imagine the large volume of legal conflicts that must be faced in this case, especially in such a dynamic developing society as the Albanian society today. But the mediating role can only be more effective if it is based on the respect and trust of both parties, if the independence, professionalism, and incorruptibility of the judiciary are real.

II. Civil Justice and Courts as a Public Good

The state targets some goods, the value of which depends on legal provisions, and some of these goods must be provided by private entities. Privatization of justice is a government responsibility rather than an asset. The judiciary should be understood as an essential element of a democratic state where the courts have the power to give binding decisions to anybody based on the Constitution and law.

States have less interest in the civil judicial system and reforms have a bill and they have not always been successful. The private market on the other hand offers ADR competing courts (Bercovitch & Jackson, 2009).

The state is not engaged in direct management but is engaged in policy modernization. The state is the main actor in overseeing and guaranteeing the standard of civil justice provided by private professionals. Given that the civil process is costly, complex and delays, and given that many of the reforms are done in the dark and are not based on research and evaluation, the solution to this

situation would be the Alternative Dispute Resolution - ADR (which has less costs, stress-free, no delays, a more effective and faster process). We can say that we are facing the privatization of dispute resolution and the establishment of an arbitral tribunal would be the best and alternative form to the ordinary courts.

And this has its efficiencies and advantages: It has more access to justice and then access to court. Especially for disputes in the field of trade, investment, consumer - ADR solution with free and full will of the parties to the dispute. The tendencies of the private courts are towards the protection of the private interest and not the public one as it happens in the state courts.[2] At the end of the process there is a final decision, which is binding for the parties to the conflict. Procedural rules are designed to ensure a fair legal process. Arbitrators are trained and professionals in the field, who are obliged to respect the legal framework and protect the rights of individuals.

From a comparative point of view with ordinary courts, the judicial process is costly and there are delays until the final decision, a process which is of several stages. The parties have no control over the process and the outcome which is uncertain. In the courts not all disputes maintain a standard, while in the courts there is a standard that leads to the setting of precedent. In arbitration the parties voluntarily decide the procedural rules and the process itself is more flexible and friendly.

III. Due process in Arbitration under the ECHR[3]

According to human rights, people have the right to go to the court, but they as well, have the right to resign from court. In the case of Strain Greek Refineries and Stratis Andreadis v. Greece (1994) the ECtHR set a minimum of procedural guarantees under Article 6/1 of the ECHR), (Føllesdal, Peters & Ulfstein, 2013:288). Further, in the case of Lithgow & others v. UK (1986), the ECtHR ruled that each trial panel and not only state courts, but also bodies set up to deal with several specific cases. In the case of Bramelid & Malmstrom v. Sweden (1979) it was held that the state should provide a mechanism to check the fairness and correctness of arbitration proceedings. In Suda v. Czek Republic (2010) there was the following decision: "the applicant may not be required to undergo an arbitration procedure for which he has not previously agreed". In Suovaniemi & other v. Finland case (1999) the ECtHR stated that: "the waiver of an applicant's rights to an impartial judge should be seen as effective for the purposes of the Convention". In the case

[2] Multinational investors can no longer view emerging economies as passive recipients of whatever benefits investors wish to bestow or as dominated by corruptible leaders willing to make deals for personal gain.

[3] https://www.echr.coe.int/Documents/Convention_ENG.pdf

of Tabanne v. Switzerland (2016), itwas also stated that, the applicant voluntarily and without obligation waives the opportunity to file disputes in ordinary courts.

The Geneva Convention of 1961[4] provides that: "States Parties shall develop their own domestic law relating to arbitration for the settlement of cross-border trade disputes". After that, the ICSID Convention was constituted for exclusively investment disputes referring to bilateral agreements. The European Community legislation gives priority and legal development of ADR (alternative and extrajudicial procedures). In 2002 the European Commission introduced the Green Paper on ADR. In 2008 the European directive was issued: Directive 2008/52 / EC "On some aspects of mediation in civil and commercial matters". Later, in 2013 came out Directive 2013/11/ EU "On consumer ADR"; Digital Agenda for Europe 2010 (COM (2010) 245) Consumer Protection- improvement of ADR system for e-commerce.

The new EU legal system related to ADR provides that they have a great potential to provide not only an effective solution, but also a fast and cheap one between consumers and traders (independence and impartiality; transparency of proceedings; effectiveness; legality and justice). Arbitration courts, as opposed to state courts, are completely independent of the general judicial system. But all these courts have common tasks such as: the duty to protect the constitutional system, the political and economic system, the provision of law and order, the protection of the rights and interests of citizens.

Unfortunately, the judiciary is still a weak point in Albania. The principles of constitutional and judicial procedure are being implemented with difficulty because there is opposition and pressure from other powers. Despite the declared legal and social guarantees of a judge, such as impartiality, immunity, independence, etc., they can often not be fully secured due to the lack of a technical and material basis. In addition, corruption of judges has become a major problem for the judiciary today. Moreover, the problem of the effectiveness of the courts in Albania is ensuring the execution of Court decisions, which are sometimes ignored. Non-compliance with court decisions is a characteristic feature of the entire Albanian legal order. The court is in fact the highest and last instance, and it should enter into force only when the rest of the system of power fails.

The solution to this problem is not the eradication of these reasons by coercion, but the formation of such a state of public awareness and legal culture, in which no body, official or citizen has the part of the desire to act contrary to a court decision. This will be the best guarantee for the full and short execution of court decisions.

In conclusion, despite the significant changes in the legal foundations of our society, many fundamental new normative legal acts and other court documents that regulate it are still far from being perfect. Much work needs to be done to

[4] Law No.8687, dated 9.11.2000 On the accession of the Republic of Albania to the "European Arbitration Convention".

improve the "quality" of the judiciary, for which it is necessary to ensure the real independence of judges, the material and technical basis for the bodies that administer justice and, most importantly, to bring the regulatory and legal framework in place in accordance with current requirements (such as the Code of Arbitration Procedures), the basis of which will serve and the Constitution of the Republic of Albania, which although has provided the basic principles of the work of the judiciary, cannot regulate all aspects of the work of judicial authorities. This requires newer Codes and a larger number of regulations governing the administration of justice.

IV. Mediation

Today, in Albania mediation to resolve disputes amicably who completed the previous law (2003 no. 9090) conducted in accordance with the applicable provisions of law no. 10385 of 2011 "About mediation in resolving disputes". Article 1 of Law No. 10385 defines mediation as an activity (a non-litigation case), by which the parties seek to resolve their dispute by an independent third party (the mediator) to achieve a solution that does not conflict with the law. The necessity for creating the law on mediation in Albania came shortly after the adoption of Directive 2008/52 / EC, 21 May 2011 of the Council and the European Parliament "On certain aspects of mediation in civil and commercial matters", the purpose of which was the facilitation and promotion of friendly approach to solving / alternative disputes by encouraging the use of mediation and ensuring a balanced relationship between mediation and litigation.

The importance of mediation from the viewpoint of the characteristics of the procedure stems in the fact that based on - the principle of equality of parties, the confidentiality of data, respect the flexibility of transparency of procedures, neutrality will of the parties in the process and finally, the final decision has advisory nature rather than binding to the parties.

On the other hand, though the mediation procedure is less formal than for example arbitration proceedings, however, the reconciliation agreement is binding for the parties (article 22, 1, Law No. 10385). Compared to the law No. 9090, of 2003, the new Law No. 10385 of 2011 expands the types of disputes that are permitted to be resolved through mediation. Besides the civil, commercial, family and some criminal cases, the new Law No. 10385 of 2011 includes also also disputes related to labor law which are laid down in the Labor Code, but specified also as matters falling within the scope of the law on mediation. Another novelty regarding mediation procedure in Albania is that the disputes in cases where only one of the parties to the conflict resides in the Republic of Albania.With this regard, there are two cases when the mediation procedure is initiated: The first case is voluntary, depending on the request of the interested parties involved in the conflict who ask for mediation resolution . Another case is when the court is the initiator of the mediation procedure, particularly in the field of civil, commercial, family or labour law. In conclusion, regarding the legal power of mediation, it is worth noting that if an agreement is reached, it is necessarily applicable. Parties are obliged to implement them immediately and voluntarily, otherwise this agreement required the issuance of the writ of execution.

Mediation as a profession in Albania is still in development; recently it has been institutionalized in legal culture and relatively innovative in our jurisprudence. Despite this fact, the Albanian judicial practice has proved that a majority considered civil cases, such as in family, in certain cases from the criminal has been resolved amicably.

V. Role and the importance of the Arbitration Court

The basis of welfare of any country can be called the economic activity of natural and legal persons, one of the indicators of which is the stability of economic circulation. It should be noted that the manner and duration of resolving an economic dispute depends on the degree of development of legislation and the level of legal knowledge of the participants in the legal relationship.

Most such conflicts are resolved by the participants in the circulation themselves without the involvement of intermediaries. But it must be acknowledged that a significant proportion of disputes remain unresolved due to a lack of willingness to understand or due to a misunderstanding between the parties regarding the object of each other's conflict, ignorance of the legislation or negligence and violations of the principle of entrepreneurs' trust in the activity and most importantly the lack of alternative means of resolving disputes such as domestic arbitration. The party of the conflict, which considers its rights violated, goes to the ordinary court to protect them and to resolve the conflict competently. Regarding the guarantee of the domestic legal infrastructure for the absorption of foreign investments, Albania has taken a step by ratifying the 1965 Washington Convention "Convention on settlement of investment disputes between states and national of other states" (Hepburn, 2017, Gjuzi, 2018). But this is for foreign citizens on the one hand and the host country, in this case Albania. Regarding natural and legal persons within the Albanian legal framework, there is no arbitration court.

After the 1990s in Albania, with the honoring of systems, institutional and legal reforms began for the adoption of new legislation, new codes (changes or edits that regulate their procedural activity), private law was developed, etc. In

Albania, the current state of economic relations must be considered and trends in the improvement of legislation must be present, including foreign legislation, regulation of ways of resolving disputes arising in the field of business, which allows us to call it a conceptually new legal act.

It is indisputable that among the aspects of assessing the attractiveness of a country's market investments, aspects such as transparency and predictability of the legal regulation of the procedure for resolving potential economic conflicts are very important. One of the central countries in the group of legal norms that form the basis for the development of entrepreneurial activity belongs to the institute of arbitration for dispute resolution and analysis of the practice of applying different types of conciliation procedures in case of economic conflicts.

The emergence of this type of courts, with special jurisdiction and representing an appropriate structure, rapidly influencing changes in economic life, among others should be one of the serious steps of justice reform (the possibility of developing effective mechanisms for the law, protection of the market economy in Albania). Of particular importance is the criterion for determining the jurisdiction of cases in arbitral tribunals in accordance with the nature and object of the dispute.

Regarding the increase of economic activity of commercial organizations and the development of a system of legal regulation of this activity, it is necessary to separate the category of litigation related to the implementation of business law, as the essentially economic conflict is examined in courts of general jurisdiction (commercial section as in the case of bankruptcy law enforcement) and in arbitral tribunals courts that have issued sometimes conflicting decisions. As a result, this category of disputes can be passed into the jurisdiction of the arbitral tribunals, based on their economic, entrepreneurial nature. In accordance with the nature of arbitration procedure, promoting the formation and development of business partnerships, the formation of customs and ethics of business circulation, is one of the main purposes of the arbitral tribunals.

The implementation of this task is facilitated by the presence of two factors: the need to maintain the stability of economic circulation through the development and establishment of civilized partnerships between its parties, based on the norms of business ethics and trust, and the ability of competent judicial bodies to led to the settlement of the dispute. All of this offers the arbitral tribunals an excellent opportunity to be mediators influencing the resolution of the dispute. This problem is resolved by the arbitral tribunals by all possible legal means, namely through a trial based on following principles: the principle of free access to arbitration; the principle of good faith; the principle of procedural equality of the parties; adversarial principle; the principle of combination of oral and written language; the principle of optionality; the principle of collegiality; the principle of legal certainty and the principle of confidentiality Cela E. (2016).

VI. Conclusions

Civil justice cannot be provided by state institutions alone. A good justice system (both in the legal and organizational framework) in the civil field is an essential guarantee for the rule of law and respect for human rights, and these rights acquire legal value when the individual goes to a court which gives justice in a fast period of time and in this way it creates trust in the public. Developed countries in the world today, have reached evolution in terms of alternative ways of resolving disputes ADR, a non-judicial order to reduce the workload of the ordinary courts such as negotiations, mediation, arbitration, reconciliation. The state must ensure an efficient judiciary, provide a budget for the courts and implement long-term reforms, which guarantee an effective judiciary as people need flexibility, speed and as little cost as possible, as well as guarantees of a fair legal process. People are tired of the long process in the courts which means we have to move towards organizing and strengthening ADR tools.

Researchers and practitioners recognize the great potential of this procedure as the proceedings confidential saving cost and time, a process of relationship that gives parties control over the issue and often the results are more satisfactory than those of a judicial process. At the same time, try to strengthen civil justice as a public good, which meets the expectations of the social purpose in the effective execution of individual rights, which is healthy in a developed society. Thus, generally, the larger states of the European Union have developed policies aimed at reducing the workload of the courts and improving the indirect consequence of the quality of administering justice through mediation or other procedures. Given that Albania is in the process of implementing justice reform (and the reforms have a bill and have not always been successful), it is recommended that there be a strategy for promoting and strengthening ADR in Albania. An assessment of the situation so far should be made to realize a strategy for the near future.

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BOOK REVIEW

Human rights & constitutionalism

Global phenomenon and its impact on the Albanian Constitutional Acts-DR. DENAR BIBA

Dr. Sofiana Veliu

In November last year (2021) Dr. Denar Biba promoted at premises of the European University of Tirana his book "human rights & CONSTITUTIONALISM", a philosophical and legal analysis on human rights in general and their outline in Albanian constitutional law - under the logo of publishing house- UET Press.

This book is introduced in a field of special interest such as human rights, when these rights from the global historical perspective, are becoming increasingly indispensable to be protected and guaranteed. An ambitious, multifaceted and interdisciplinary work is intended through this book which, although generally appears like a structure divided into two parts, (on one hand human rights and, on the other hand, their constitutionalisation,) all its chapters have a linking bridge between the two which in every respect complements each other's meaning.

In the words of the author himself, "this book aspires modestly to shed light on the *concept* of human rights, its *genesis* and *philosophical basis* on which they rely, as well as to reflect the *capacity* of international human rights law and Albanian constitutional law to create a synergy, focusing on the standards achieved, in recognition and acknowledgment of the fact that human rights, beyond any reasonable question, enable us to live a life with more dignity, a life that only so deserves to be lived".[1]

The book is introduced on the cover as a provocation to the reader: the title is clearly grammatically incorrect, but it is no coincidence if one learns that the author's goal is the humanization of human rights, their descent from the pedestal where we naively placed them, not to trivialize and demystify them, but

[1] Denar Biba, *Human Rights and CONSTITUTIONALISM*, Publishing House UETPRESS, Tirana, September 2021.