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Restorative Justice – an Initial View on the Development of Justice

Restorative justice is one of the most popular paradigms of criminal justice. It is oriented on the victim and focuses on repairing the damage occurred as a result of a criminal act committed by individuals or society. In the modern world, the role and importance of restorative justice is increasingly growing. Over the past few years, international organizations such as the United Nations, the Council of Europe and the European Union have firmly recognized the potential of restorative justice and called on their Member States to introduce restorative processes and further expand their application. Georgia's Juvenile Justice Code was the first to introduce the concept of restorative justice in the legislature of Georgia and thus reinforced the view that despite the passive role of the victim, the peaceful settlement of the conflict between the offender and the victim outside the criminal court and the reparation of the damage (or loss) have long played an important role in the criminal political discussions regarding the attempts to reconcile the parties, which is followed by the avoidance of a punishment – a special legal consequence of the sentence.

The issues discussed in the present paper – the basics of restorative justice; the role of the mediation court in the peaceful settlement of conflicts in the old customary law of Georgia; the programs that have influenced the development of restorative justice and that from today's perspective are considered to be very important for its further development, and application of restorative processes – will help us to understand what factors influenced the shift from restorative justice to other concepts of justice and why we may have a desire to return to this model.

Keywords: *restorative justice, diversion, mediation, restitution, victim, offender, damage.*

1. Introduction

The principles of humanism and protection of human rights and freedoms are main issues of criminal law and criminal process. In this regard, they are gradually improving and developing. Recently, both the society and the relevant state structures have gradually come to the conclusion that punitive justice should be restricted within a legitimate framework. This is confirmed by the fact that through the legislative regulation of the institutions of diversion and mediation, the Criminal Procedure Code of Georgia (hereinafter – the CPCG) and the Juvenile Justice Code of Georgia (hereinafter – JJCG) have implemented restorative justice – an alternative way of criminal prosecution. Currently, restorative justice is already an important part of the criminal proceeding. It seeks to integrate all three elements of juvenile justice – the offender, the victim and the community.[1] Over the last thirty years principles and practices of restorative justice have become very popular in justice systems around the world. It is worth noting that the theories of restorative justice have influenced juvenile justice systems in Australia, Canada, Hong Kong, Israel, South Africa and most part of Western Europe.[2]

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1 *Shahovich N. V., Doek I. E., Zermaten Zh.,* Child Rights in International Law, Tbilisi, 2012, 348 (in Georgian).

2 see *Mulligan S.,* From Retribution to Repair: Juvenile Justice and The History of Restorative Justice, University of La Verne Law Review, Ontario, 2009, 139.

The history of modern criminal mediation in Georgia dates back to 2010 and is connected with the introduction of the Juvenile Diversion and Mediation Program based on the amendments made to the CPCG[3]. "On the one hand, the new program diverts juveniles from the criminal justice and punishmen and on the other hand it helps to restore justice, prevent recidivism and promotes the development of the adolescent as a law-abiding person."[4] According to international standards and approaches, the starting point of the diversion and mediation program is to divert juveniles from the formal justice system and create an environment that will help prevention of the recurrence of a crime by juveniles.[5]

It should be noted that by amendment made to the CPCG on June 21, 2011 the legislator further opened the door to non-traditional methods[6] of intervention in criminal cases and by introducing Articles 168^1 and 168^2 in the CPCG, adults were also given the opportunity to be diverted from criminal liability in the case of less serious and serious crimes.

In Georgia a new stage in the development of restorative justice began in 2018-2019. In particular, a criminal mediation program for accused was launched in a pilot mode. After the enactment of these regulations, mediation represents an independent mechanism in Georgia and is applied independently of the diversion program as a victim service and/or an accused resocialization and realization program.[7]

Restorative justice represents a movement for justice, which provides an opportunity to restore the original situation with the involvement of the parties and the society; to seek the way that will help not only a damage to be compensated but also will encourage social reintegration of the offender and reduce punishment – a criminal coercive measure. Restorative justice is needed not because traditional justice should be abolished, but because in a particular situation and in the absence of public interest to resolve the problem through face-to-face meetings and negotiations between two individuals – victim and accused – and when both parties achieve the desired result not by applying punishment, which is the most severe measure of state coercion, but by compensating for material and moral damage.

The purpose of the paper is to study the concept of restorative justice and, in general, its historical origin and development based on the analysis of the literature regarding this institution. Earlier practices and methods of restorative justice may provide some guidance for the development of future models. Reviewing the history of restorative justice will also help us to identify the factors that encouraged the shift from restorative justice to other concepts of justice and why we may want to return to this model.

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3 The Law of Georgia on Amendments to the Criminal Procedure Code of Georgia, №3616, Legislative Herald of Georgia, 24.09.2010.

4 *Shalikashvili M.,* Criminal, Criminological and Psychological Aspects of the Juvenile Diversion and Mediation Program, Tbilisi, 2013, 4 (In Georgian).

5 *Javakhishvili L.,* Review of the Juvenile Diversion and Mediation Program, Journal of Alternative Dispute Resolution - Yearbook, *Burduli I. (ed.),* Tbilisi, 2016, 179 (In Georgian).

6 *Tumanishvili G.,* Restorative Justice and its Development Perspective in Georgia. Proceedings of the Scientific Symposium on Criminal Science: The Science of Criminal Law in the Development of a Common European Framework, Tbilisi, 2013, 260 (In Georgian).

7 *Ertsni I., Javakhishvili J., Javakhishvili L.,* Textbook of Restorative Justice for University and Vocational Education, Tbilisi, 2020, 123 (In Georgian).

2. Origins of Restorative Justice

Restorative justice is considered as a movement for restoring justice that complements the formal form of justice, engages the parties and the community themselves in eliminating the consequences of crime, promotes the social reintegration of the offender, and reduces application of criminal punishment. As criminologist John Braithwaite states "restorative justice has been the dominant model of criminal justice throughout most of human history for all the world's people".[8] Therefore, a historical perspective represents a discussion of the events that led to a re-emergence of restorative principles. The roots of the concepts of restorative justice are originated from both Western and non-Western traditions. Therefore, returning to the restorative model of justice might be perceived as returning to the roots of justice and not as "all healing medicine for sick system"[9] of a modern era.

There are two narratives regarding the history of development of restorative justice that compete with each other: supporters of the the first narrative describe restorative justice as a relatively recent approach to the criminal justice, which started in the North American continent in the 1970s and has become an international phenomenon since then. According to this opinion, the restorative justice is perceived as a new and innovative system that, for the last three decades, has managed to influence the juvenile justice systems on the global level; According to the second narrative, the restorative justice is not something new and unusual and like the human community, it is the old archetype of justice. As Mulligan notes, "throughout most of human history it has been the most ancient and prevalent approach in the world to resolve harm and conflict."[10] Resolving a conflict has always been an important component of a society, starting from the problems in the hunter-gathering community, which already used elementary forms of farming and were also engaged in fishing.[11]

Mulligan provides the explanation by Elmar G. M. Weitekamp saying that in early societies nomadic tribes responded to inter-clan transgressions through a form of restorative justice called "restitution negotiations."[12] Howard Zehr notes that in communal society crime was considered as interpersonal relationship. The crime was most often meant to be a conflict between two people or making damage. In case of damage, obligations for compensating it occurred – the latter was the most common method of restoring justice. The offenders and victims, as well as their relatives and communities played an important role in this process.[13]

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8 *Llewellyn J. J., Howse R.,* "Restorative Justice" - a Conceptual Framework, Prepared for the Law Commission of Canada, 1998, 5, cited: *Braithwaite J.,* Restorative Justice: Assessing an Immodest Theory and a Pessimistic Theory. Review Essay Prepared for University of Toronto Law Course, Restorative Justice: Theory and Practice in Criminal Law and Business Regulation, 1997. The paper is also available at World Wide Web, Australian Institute of Criminology Home Page, 3 <http://www.aic.gov.au> [21.06.2021].

9 Ibid.

10 *Mulligan S.,* From Retribution to Repair: Juvenile Justice and The History of Restorative Justice, University of La Verne Law Review, Ontario, 2009, 142, <https://docplayer.net/60248070-From-retribution-to-repair-juvenile-justice-and-the-history-of-restorative-justice.html> [21.06.2021].

11 *Ertsen I., McKay R., Pelikan K., Willemsens D., Wright M.,* Reconstruction of Relations in a Community – Mediation and Restorative Justice in Europe, №2, Kiev, 2007, 79 (in Russian).

12 *Mulligan S.,* From Retribution to Repair: Juvenile Justice and The History of Restorative Justice, University of La Verne Law Review, Ontario, 2009, 142, <https://docplayer.net/60248070-From-retribution-to-repair-juvenile-justice-and-the-history-of-restorative-justice.html> [21.06.2021].

13 *Zehr H.,* Restorative Justice: A New Look at Crime and Punishment, Judicial and Legal Reform, Moscow, 2002, 48 (in Russian).

In case the members of another clan were engaged in thievery or murder, the elders of the clan organized negotiations between the clans, which resulted in some form of compensation to the affected party. In this way Blood Revenge and other violent actions were avoided. Weitekamp concludes that restitution "was probably the most common form of resolving a conflict in acephalous societies."[14] H. Zehr explains that reconciliation following the conflict resolution was carried out in the framework of the family and community; elders of the Church and community also played the leading role in resolving conflicts and they were responsible for all entries related of the reached agreement. The execution of justice, first of all, was based on mediation and negotiations and not the use of laws and making the decisions compulsory.[15]

We should also take into consideration the fact that justice in communal society had serious shortcomings. The methods for determining the guilt in arguable affairs were willful, inaccurate and did not provide any guarantee for justice. This form of justice was the most successful in resolving disputes between persons at the same stage of hierarchy. In other cases, the communal justice could have been disobedient and severe.[16] Communal justice was also a heavy burden for the victim, as investigation of the case dependes on the initiative and material means of the latter. In spite of this, in communal justice conflicts were regulated by negotiations and compensation – maintaining relations and reconciliation took the first place in communal justice.[17]

The details of restorative justice's implementation in the justice systems of the early societies is documented in a number of other historical sources, many of which indicate that punishment', in today's sense, was the exception rather than the norm[18] When talking about the historical origins of restorative justice, scholars often cite codes from ancient societies to support their claims. In their book Restorative Justice, Van Ness and Strong provide a few examples from ancient Babylonian codes. including the Code of Hammurabi (C.1700 B.C.E.).[19] The Code of Hammurabi is one of the first examples of a written legal document that shared the practice of individual compensation. On several occasions, this served as a substitute for the death penalty.[20] In addition, it prescribed restitution for property offesnses.[21] Other

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14 *Mulligan S.,* From Retribution to Repair: Juvenile Justice and The History of Restorative Justice, University of La Verne Law Review, Ontario, 2009, 143, <https://docplayer.net/60248070-From-retribution-to-repair-juvenile-justice-and-the-history-of-restorative-justice.html> [21.06.2021].

15 *Zehr, H.,* Restorative Justice: A New Look at Crime and Punishment, Judicial and Legal Reform, Moscow, 2002, 48.

16 Ibid, 51.

17 Ibid.

18 *Gavrielides T.,* Restorative Practices: From The Early Societies To The 1970s, Internet Journal of Criminology, United Kingdom, 2011, 8, <https://docs.wixstatic.com/ugd/b93dd4_b68b3e905ddb480695a6a7c703d13630.pdf> [21.06.2021].

19 *Mulligan S.,* From Retribution to Repair: Juvenile Justice and The History of Restorative Justice, , University of La Verne Law Review, Ontario, 2009, 143, <https://docplayer.net/60248070-From-retribution-to-repair-juvenile-justice-and-the-history-of-restorative-justice.html> [21.06.2021], Cited *Van Ness D., Strong K. H.,* Strong Restoring Justice, Cincinnati: Anderson Publishing Co., 1997.

20 *Gavrielides T.,* Restorative Practices: From The Early Societies to the 1970s, Internet Journal of Criminology, United Kingdom, 2011, 6, <https://docs.wixstatic.com/ugd/b93dd4_b68b3e905ddb480695a6a7c703d1-3630.pdf> [21.06.2021], cited from: *Gillin J. L.*, Criminology and Penology, New York: Appleton-Century, 1935.

21 *Mulligan S.,* From Retribution to Repair: Juvenile Justice and The History of Restorative Justice, University of La Verne Law Review, Ontario, 2009, 143, <https://docplayer.net/60248070-From-retribution-to-repair-juvenile-justice-and-the-history-of-restorative-justice.html> [21.06.2021], cited from: *Van Ness D., Strong K. H.*, Strong Restoring Justice, Cincinnati: Anderson Publishing Co., 1997.

ancient Middle Eastern codes required restitution even in the case of violent crimes. The Sumerian Code of Ur -Nammu (C.2050 B.C.E.), dictates: "If a man knocks out the eye of another man, he shall weigh out ½ a mina of silver."[22] In addition, in the Iliad (Book IX) Homer mentions a case in which Ajax criticized Achilles for not accepting Agamemnon's offer of compensating the damage. Ajax pointed out to Achilles that even a brother's death may be compensated by the payment of money. The two segments needed for the enactment of the criminal norm and the fulfillment of the goals – guilt and punishment – were originally related to payment, i.e. compensation for damages. It is worth noting that the word 'punishment' derives from the Greek word pune (ποινή), which means an exchange of money for harm done, while the word 'guilt' may derive from the Anglo-Saxon word 'geldam', which means payment.[23] Based on the ancient Hebrew Law, Van Ness & Strong argue that "shillum", "the Hebrew word for "restitution", comes from the same root as "shalom" which translates as "peace". According to the authors, this linguistic link supports the notion that the aim of ancient Hebrew justice was to restore peace by restoring wholeness.[24]

Howard Zehr also agrees with the above view and notes that "shalom" is a core concept which is essential for understanding the biblical notions of law and justice. The traditional translation of the word "Shalom" is peace. This is only one meaning of this concept and does not include all the richness of its meanings in the ancient Hebrew language. " Shalom" means order, a state when there is harmony everywhere.[25] Based on the views of Perry Yoder and other Mennonite theologians, Howard Zehr describes the three dimensions of Shalom, which include: 1. material or physical well-being; 2. right relationships with other people and with God; and 3. moral or ethical "straightforwardness," referring to both honesty in dealing with others and moral integrity or a condition of being without guilt or fault.[26]

Based on these meanings, Howard Zehr concludes that "Shalom" is peace, prosperity, which refers to material conditions of human life, the sphere of social and political relations between individuals.[27] The author thinks that the word for paying back (shillum) and recompense (shillem) have the same root word as shalom. Compensation was an attempt to

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22 *Mulligan S.,* From Retribution to Repair: Juvenile Justice and The History of Restorative Justice, University of La Verne Law Review, Ontario, 2009, 143, <https://docplayer.net/60248070-From-retribution-to-repair-juvenile-justice-and-the-history-of-restorative-justice.html> [21.06.2021], cited from: *Van Ness D., Strong K. H*., Strong Restoring Justice, Cincinnati: Anderson Publishing Co., 1997.

23 *Gavrielides T.,* Restorative Practices: From the Early Societies to the 1970s, Internet Journal of Criminology, United Kingdom, 2011, 6, <https://docs.wixstatic.com/ugd/b93dd4_b68b3e905ddb480695a6a7c703d136-30.pdf> [21.06.2021], cited from: *Braithwaite J*., Restorative Justice & Responsive Regulation Oxford: Oxford University Press.

24 *Mulligan S.,* From Retribution to Repair: Juvenile Justice and the History of Restorative Justice, University of La Verne Law Review, Ontario, 2009, 143, <https://docplayer.net/60248070-From-retribution-to-repair-juvenile-justice-and-the-history-of-restorative-justice.html> [21.06.2021], cited:*Van Ness D., Strong K. H.,* Strong Restoring Justice, Cincinnati: Anderson Publishing Co., 1997.

25 *Zehr H.,* Restorative Justice: A New Look at Crime and Punishment, Judicial and Legal Reform, Moscow, 2002, 64-65.

26 *Wides Saade M.,* Social Work Values and Restorative Justice, Book: Restorative Justice Today, Practical Applications, *Van Wormer K.S., Walker L. (eds.),* Sage, Los Angeles, London, New Delhi, Singapore, Washington DC, 2013, 216.

27 *Zehr H.,* Restorative Justice: A New Look at Crime and Punishment, Judicial and Legal Reform, Moscow, 2002, 64-65 (in Russian).

restore order. "Compensation" was sometimes translated as "reward" and meant satisfaction rather than revenge.[28]

In the same paper Howard Zehr refers to the phrase “eye for an eye” mentioned in the Old Testament for several times, which expresses the essence of Biblical law. The phrase "eye for an eye" meant a certain restriction and did not represent a call for punishment. The German theologian Martin Buber translated this phrase as “eye for eye and tooth for tooth”, which, as Zehr thinks means to bring peace through compensation and aims at maintaining the balance of power between different groups.[29] Herman Bianchi particularly emphasizes the fact that neither Roman nor Greek languages had a word for crime or punishment. The most widespread anachronism regarding the concepts of justice is probably application of the Bible and Jewish law to justify the punishment. For this purpose, the phrase "eye for an eye" is constantly used in the Old Testament. Many believe that the theme of the Old Testament and the Hebrew justice is mainly devoted to punishment, which has served as a strong argument in shaping the existing system of punishment, although the use of the Old Testament as such an argument is related with serious problems. When referring to Zehr's ideas, Bianchi notes that the phrase "eye for an eye", which is considered to express the basic essence of justice in the Old Testament, is mentioned for just three or four times in the text. In addition, not the frequency with which the phrase is used, but its misinterpretation is the most serious problem here. In Zehr’s opinion, the interpretation of the phrase "eye for an eye" as a demand for retribution is "oversimplification." Bianchi is much stronger in his censure. “We are here concerned with a gross example of intentional “error” in the translation of a Biblical text.” As he explains, “nearly all passages in the Old Testament where English and European translations use such terms as retribution, retaliation, Vergeltung (German), and vergelding (Dutch), we find in the Hebrew text the root sh-l-m, well known as shalom, signifying “peace”.” In fact, as he notes, not only is retribution not intended it is specifically forbidden as the bible commands “Don’t retaliate, for mine is the peace, says the Lord.” When tribes presented the constituent elements of society as was the case in the time of the Old Testament, sacrificing a member of the perpetrator’s tribe in compensation for the loss of the victim from her tribe was possible for restoring social equality. Therefore, the focus was compensation, re-establishing the balance disturbed by the loss of a member of the tribe. The idea of shalom – restoration and not retribution – was central to the concept of justice in the Old Testament. “Restitution and restoration of relations overshadowed punishment as a theme because the goal was restoration to right relationships.”[30]

From historical perspective, for supporting their claims regarding restitution Van Ness and Strong cite European sources. For example, the Roman Law of the Twelve Boards (449 BCE) required thieves to pay compensation for stolen property and it also included restitution as an alternative punishment to certain physical offenses; Under the laws of the early Germanic tribes, restitution was allowed for a wide range of crimes, including murder; while

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[28] *Zehr H.,* Restorative Justice: A New Look at Crime and Punishment, Judicial and Legal Reform, Moscow, 2002, 64-65 (in Russian).

[29] *Llewellyn J. J., Howse R.,* Restorative Justice” - a Conceptual Framework, Prepared for the Law Commission of Canada, 1998, 6, cited from: *Zehr H.,* Changing Lenses: A New Focus for Crime and Justice, Waterloo: Herald Press, 1990, 106.

[30] Ibid.

the Laws of Ethelbert, a seventh century collection of English laws, included a detailed compensation plans for the physical harm caused to the victim. Even Anglo Saxon law was based on the principles of restorative justice.[31]

Numerous historical sources on restitution indicate that "this concept was used for both property and personal crimes".[32] Ian Drapkin argued that restitution was practiced in almost all ancient societies, including both property offences and "crimes against persons".[33] In addition, according to Stanley Diamond's research on the sanctions imposed for murder, monetary restitution was an accepted form of punishment throughout the whole Western world.[34]

The period before the development of the centralized, or so-called public justice is often referred to as the period of private justice. However, such a term may be source of some misunderstanding. The image of private justice often includes personal revenge and a violent response to any harm. However, this does not provide a balanced portrayal of the operation of justice before state involvement. On the contrary, "the administration of justice was primarily a mediating and negotiating process rather than a process of applying rules and imposing decisions." Zehr suggests that "community justice" is a more appropriate term to describe this early period as disputes were connected to community and were resolved by the community. Community justice "...recognized that harm had been done to people, that the people involved had to be central to a resolution, and that reparation of harm was critical. Community justice placed a high premium on maintaining relationships, on reconciliation."[35] Van Ness and Strong consider that "...goal of the justice process was to make things right by repairing the damage to those parties, whether the damage was physical, financial or relational."[36] Hoebel compares the work of primitive law with the work of a doctor – just as doctors are responsible for maintaining the balance of human health, law keep is responsible for the social body in good health by "bringing the relations of the disputants back into balance."[37]

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31 *Mulligan S.,* From Retribution to Repair: Juvenile Justice and The History of Restorative Justice, University of La Verne Law Review, Ontario, 2009, 144, < https://docplayer.net/60248070-From-retribution-to-repair-juvenile-justice-and-the-history-of-restorative-justice.html> [21.06.2021].

32 *Gavrielides T.,* Restorative Practices: From the Early Societies to the 1970s, Internet Journal of Criminology, United Kingdom, 2011, 6, <https://docs.wixstatic.com/ugd/b93dd4_b68b3e905ddb480695a6a7c703d136-30.pdf> [21.06.2021], cited from: *Weitekamp E.,* The History of Restorative Justice, in: *Walgrave L., Bazemore G. (eds.),* Restorative Juvenile Justice: Repairing the Harm of Youth Crime, Monsey: Criminal Justice Press, 1999.

33 *Gavrielides T.,* Restorative Practices: From the Early Societies to the 1970s, Internet Journal of Criminology, United Kingdom, 2011, 6, <https://docs.wixstatic.com/ugd/b93dd4_b68b3e905ddb480695a6a7c703d1363-0.pdf> [21.06.2021], cited from: *Drapkin I.,* Crime and Punishment in the Ancient World, Lexington, MA: Lexington Books, 1989.

34 Ibid.

35 *Llewellyn J. J., Howse R.,* „Restorative justice" - a Conceptual Framework, Prepared for the Law Commission of Canada, 1998, 7, cited from: *Zehr H.,* Changing Lenses: A New Focus for Crime and Justice, Waterloo: Herald Press, 1990, 100.

36 *Llewellyn J. J., Howse R.* „Restorative justice" - a Conceptual Framework, Prepared for the Law Commission of Canada, 1998, 7, cited from: *Van Ness D.W., Strong K.H.,* Strong Restoring Justice, Cincinnati: Anderson Publishing Co., 1997, 6.

37 *Llewellyn J. J., Howse R.,* „Restorative justice" a Conceptual Framework, Prepared for the Law Commission of Canada, 1998, 8, cited from: *Hoebel E. A.,* The Law of Primitive Man: A Study in Comparative Legal Dynamics, New York: Atheneum, 1973, 279.

According to Bianchi, it is necessary to reach some agreement on the issue that the shift from community justice to what we know today as public, state centered, retributive justice began in the 11th and 12th centuries. However, in the following centuries, "...the old systems of conflict resolution, repair, and dispute settlement survived, openly or covertly, in many countries."[38]

There is a common opinion in the literature that restorative practice in Europe started to deteriorate during the Middle Ages and that major changes took place in the 9th century.[39] It is also believed that restorative justice's erosion as a formal paradigm for "criminal justice systems" was complete by the end of the 12th century.[40]

Most historians claim that between 1100 to 1500 AD Anglo-Saxon monarchs and Germanic rulers gradually made the administration of justice a profitable institution by taking away victims' rights to compensation, and by imposing fines that were payable to the State.[41]

It took quite a long time, until the 19th century, before a new model of justice gained dominance. Whatever other factors may have prompted this change, it is obvious that, at least partly, it was motivated by the desire for gaining political power both in the secular and religious spheres.[42]

Legal Historian Harold Berman claims that this change led to a "legal revolution." This revolution resulted in a new conceptualization of the nature of disputes. The role of the courts changed and their task was no longer to act as a mediator between the parties to the dispute. The courts have now assumed the role of defending the crown. They began to play an active role in prosecution, taking ownership over those cases in which the state acted as a victim.[43]

Nowadays, state prosecutors, defendants and their attorneys have the right to participate in criminal proceedings. The affected party is removed from the main scene. The government no longer cares about the victim, punishes the offender and fines him in favor of the state budget. According to Lorenn Walker, as a result of such a change the sense of personal accountability to the victims of crime in the offenders has disappeared, as this feeling has been replaced by care to escape the punishment imposed by the authorities.[44]

It is obvious that forgiveness, restitution, the restoration of the pre-conflict relations are key segments of the restorative justice process. The origins of such methods of conflict resolution are to be found not only in pre-Christian laws but also in the Old Testament and

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38 *Llewellyn J. J., Howse R.,* „Restorative Justice" - a Conceptual Framework, Prepared for the Law Commission of Canada, 1998, 8, cited from: *Bianchi H.,* Justice as Sanctuary: Toward a System of Crime Control Bloomington: Indiana University Press, 1994, 15-16.

39 *Gavrielides T,.* Restorative Practices: From The Early Societies To The 1970s, Internet Journal of Criminology, United Kingdom, 2011, 7, <https://docs.wixstatic.com/ugd/b93dd4_b68b3e905ddb480695a6a7c70-3d13630.pdf> [21.06.2021].

40 Ibid, 9.

41 Ibid.

42 *Llewellyn J. J., Howse R.,* Restorative justice a Conceptual Framework, Prepared for the Law Commission of Canada, 1998, 9, cited from: *Zehr H.,* Changing Lenses: A New Focus for Crime and Justice, Waterloo: Herald Press, 1990, 106.

43 *Llewellyn J. J., Howse R.,* Restorative Justice" - a Conceptual Framework, Prepared for the Law Commission of Canada, 1998, 9, cited from: *Berman H. J.,* Law and Revolution: The Formation of the Western Legal Tradition, Cambridge, Mass.: Harvard University Press, 1983.

44 *Walker L.,* Restorative Justice Definition and Purpose, Book: Restorative Justice Today, Practical Applications, *Van Wormer K.S., Walker L. (eds.),* Sage, Los Angeles, London, New Delhi, Singapore, Washington DC, 2013, 5.

Sumerian sources. Unfortunately, we do not know how effective the settlement of the conflict in this early society was compared to traditional, punitive justice. However, it should be also paid attention that neither the dominant role of the state nor the complete ignoring of personal interests in sentencing turned out to be good for the society and has become a global problem. The need for seeking a new, alternative form has occurred. The new approaches to criminal justice formed on the North American continent in the 1970s, which seemed to push us toward an innovative system of restorative justice, have in fact brought us back to the roots of justice that were considered to be the oldest and most common approach to conflict resolution throughout most of human existence. "Restorative justice remains a promising but marginal phenomenon in criminal law that is still in search of 'fundamental principles'.".[45]

3. Rules for the Peaceful Settlement of Conflict and Reconciliation in Old Georgian Law

Ancient institutions of restorative justice also existed in Georgia a long time ago. Mediation court was an integral part of the legal culture in the early period of development of society. It was applied through intermediaries for compensation of the damage and reconciliation between parties. "When judging the case through intermediaries, the parties would nominate their judges and the latter would decide the case."[46] "As Mikheil Kekelia observes, the word 'mediato' did not exist in Georgian reality until the beginning of the 19th century. The word is only used since 1802."[47]

In the "Hsjuli" (legal act) compiled at the beginning of the 19th century in the times of Georgian kings, both 'Bche' (judge) and 'Mediator' are mentioned; According to this document, "decision of the secretaries, Bches and judges appointed locally" is final and does not require the approval of the king.[48] Mediation court was set up for the ruling class, while a court under the control of the Mouravi and the landlord served as judge for serfs deprived of liberty."[49]

It is obvious that the parties applied to the mediation court to avoid retaliation and reach the agreement through the means prescribed by customary law – the imposition of compensation. G. Davitashvili points out that "in fact, representation of the institute of mediators in "Georgian customary law", a document created at the beginning of the 19th century, gives a reflection of the situation at that time. Article 60 of this document says: "Two litigants in Georgia do not choose Bche on a written basis. These two litigants, whoever they are, on the basis of mutual agreement elect two, three or even six Bche, but not more than that. Either by the order of the king, or of the official of the place they were from, would be the dispute resolved; the verdict of decision would be written for both parties."[50]

I.Surguladze notes: the main characteristic of a mediator and a Bche should be the fact that they are voluntarily addressed by the parties. References to cases selected by judges

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45 *London R.,* A New Paradigm Arises in: A Restorative Justice Reader, *Johnstone G. (ed.),* 2nd ed., London and New York, 2013, 10.

46 *Surguladze I.,* For the History of the State and Law of Georgia, Tbilisi., 1952, 347 (in Georgian).

47 *Davitashvili G.*, Judicial Organization and Process in Georgian Customary Law, Tbilisi, 2004, 5 (in Georgian).

48 *Surguladze I.,* For the History of the State and Law of Georgia, Tbilisi., 1952, 351 (in Georgian).

49 Ibid, 356.

50 *Davitashvili G.*, Judicial Organization and Process in Georgian Customary Law, Tbilisi, 2004, 13.

elected by the parties can be found in various sources. There are various sources that provide evidence about the cases judged by the judges elected by the parties. According to I. Surguladze, in this regard, the deed of 1789 is interesting in many ways as the document shows that the parties had first applied to the king's court but could not finish the case, probably because one of the parties did not recognize the court's decision. They afterwards applied to the Queen for the mediation justice and received the Queen's approval.[51] This case clearly shows that the parties required their dispute to be resolved by mediators on their own initiative; the Queen gave her approval and handed the case over to the mediators to be peacefully resolved.

Historically, as we have already noted at the beginning of our paper, the main goal of restorative justice is to "treat" both sides of the conflict and "heal their wounds." In this case, the state body could not manage to resolve the dispute while the individuals elected by the parties were able to reach a compromise through negotiations, and both parties agreed with that decision. According to that source, it becomes clear that alternative methods for dispute resolution were used as early as the end of the 18th century.

This is not the only case described in the monuments of Georgian law. There are a number of other facts when with the participation of mediators the dispute ended in an agreement, even in the case of a serious crime. The customs of Svaneti and Khevsureti attract special attention in this regard.

In his work "Crime and Punishment in Georgian Customary Law" G. Davitashvili often applies to the decisions related to the reconciliation and forgiveness among parties. In particular, while discussing the cases of reconciliation between parties in Georgian law, the author points out that a number of Khevsurian informators note that in determinig the sentence it did not matter whether the murder took place intentionally or unintentionally, although they indicated that in the latter case reconciliation was easier. Reconciliation in Khevsureti did not imply full forgiveness and release of the offender by the victim. First and foremost reconciliation meant that the victim agreed not to seek revenge and to receive compensation for a definite crime in return. The payment of the compensation would be followed by a reconciliation ceremony between the parties.[52]

"'Rjuli people' were actively involved in the execution of the sentence. Upon getting approval of both parties, they go to the party to whom the payment is due, receive a 'drama'[53] from him and take it to the victim." [54]

G. Davitashvili notes that in case of an unintentional crime (including murder) in Svaneti, like in Khevsureti, it was relatively easy to persuade the victim's family to refuse revenge and to agree to reconciliation on the basis of the sentence passed by mediator judges (Morves). For final reconciliation, it was necessary for the offender to pay the victim the compensation imposed by the Morves. In Svaneti, in case of unintentional murder, the community of the gorge, or the community and village, was more actively involved in the

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51 *Davitashvili G.*, Judicial Organization and Process in Georgian Customary Law, Tbilisi, 2004, 13.

52 *Davitashvili G.*, Crime and Punishment in Georgian Customary Law, Tbilisi, 2004, 111-113 (in Georgian).

53 The Names of the Unit of Money and Weight in the old Georgian Law, in *Davitashvili G.*, Mediatory Court or "Rjuli" in Khevsureti, Tbilisi, 2001, 72 (in Georgian).

54 *Davitashvili G.*, Mediatory Court or "Rjuli" in Khevsureti, Tbilisi, 2001, 73. Cited from: *Kekelia M.,* Materials on Costomary Justice in Khevsureti, Ethnographic Notebook, №2, Tbilisi, 1977, 66 (in Georgian).

reconciliation process, as in such case there was less need to keep away from the family of the murdered person. Obviously, when murder took place intentionally, the community would refrain from participating in the reconciliation process and would keep away from the family of the murdered person. As A. Davitiani notes, Khevi (community) “would never allow the family of the murdered one to take the blood revenge for an unintentional murder, run directly after the murderer and kill him or any of his family members." Informator from Kala is much more categoric: “unintentional murder always ends in an agreement, in case of intentional murder it is much difficult to reach an agreement, which is preceded by a great mediation."[55] As soon as the mediators completed their secret meeting, they had a mutually agreed verdict. In most cases, the announcment of the verdict and reconcilation of the the parties took place at the same time. The verdict was announced in the family of the offender where dinner was prepared with the purpose to reconcile the parties. Here the victim was given the prescribed amount of money and gifts.[56] The judgment of the mediatory court is obligatory to be enforced, the Svanetian custom does not recognize facultative nature of the decision and this rule is still preserved.[57]

It should be noted that the similar situation is observed in Adjara. In Adjara, too, reconciliation was easier in case of unintentional murder; and, as informers point out, blood revenge was not taken (unlike in case of intentional murder). Both in Khevi and Pshavi reconciliation was also easier in case of involuntary murder or wounding.[58]

The above examples show that in Georgia, especially in the mountainous regions, it was not a priority to punish the offender and impose corporal or other kind of punishment over him, but mediators focused on reconciliation and restoration of the original relations even in the case of the crimes such as involuntary murder. It is clear that reconciliation was easier during involuntary murder, but, according to the references, there were cases of reconcilation even in case of voluntary murder. It is noteworthy that the restitution for murder was justified not only under Georgian customary law, but throughout the Western world (including ancient Greece). The administration of justice took place, first of all, through mediation and negotiations. Justice was carried out through mediators and negotiations.

Although the role of mediator in the restorative justice process is to facilitate reconciliation rather than coercion, Georgian historical reality shows that in the case of an unintentional crime, sometimes coercive reconciliation also took place through community intervention.[59]

The reconciliation process in Georgian customary law usually emphasizes the active participation of the offender, the victim and the community, the identification of facts and the analysis of the information provided by the people involved in the process. The person causing the damage takes responsibility for the crime committed by him and pays

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55 *Davitashvili G.*, Crime and Punishment in Georgian Customary Law, Tbilisi, 2011, 115-116 (in Georgian).

56 *Davitashvili G.*, Mediatory Court in Svaneti, Tbilisi, 2002, 100-111 (in Georgian).

57 *Oniani S., Davitashvili G.*, The Impact of Customary Law on Modern Balszemo Svaneti, Tbilisi, 2016, 34 (in Georgian).

58 *Davitashvili G.*, Crime and Punishment in Georgian Customary Law, Tbilisi, 2011, 118 (in Georgian).

59 For more details see monographs by *Davitashvili G.*, Crime and Punishment in Georgian Customary Law, Tbilisi 2011 (in Georgian); Judicial Organization and Process in Georgian Customary Law, Tbilisi, 2004 (in Georgian); Mediatory Court in Svaneti, Tbilisi, 2002 (in Georgian); Mediatory Court or "Rjuli" in Khevsureti, Tbilisi, 2001 (in Georgian).

compensation for the damage caused to the victim. This, in turn, allows for repentance, forgiveness and reintegration, which represents the ultimate goal of restorative justice. Moreover, the most important fact is that Svanetian customary justice is still alive today, in the 21st century and though partly transformed it still continues to exsit. This is evidenced by a survey of a number of respondents by Sulkhan Oniani and Giorgi Davitashvili during the field ethnographic expedition on June 20-30, 2015. Moreover, as the researchers note, the majority of the respondents themselves participating in the survey "are madiator-judges of the customary law."[60]

4. Restorative Justice Development Programs

From the standpoint of the research topic, it is interesting to talk about the narrative of the restorative justice development, whose history covers only a few decades, still actively continues to expand its borders and whose supporters have contributed to the restoration and development of this institution. The strengthening of the state institutions and the pace of globalization have influenced the transformation of restorative justice programs. Restorative justice focused on individuals and societies to find out what they wanted. The experiments carried out in the 1970s showed that modern restorative justice emerged when those who committed offences were brought face-to-face with the people, who were harmed as a result of the offence. They discussed the accountability arising as a result of crime; talked about how people were harmed, and how that harm could be remedied.[61] Rosner and Klaus pointed out that by involving a neutral third party in the overall negotiation the accused and the victim should be able to talk to each other about what has happened. Both the pain of the victim and the consciousness of the offender should be taken into consideration in this case. Intangible compensation in the form of an apology by offender often facilitates further actions to be implemented by the parties to the negotiation. Paying compensation for the material damage caused by the crime can also play an important role in reaching an agreement.[62] Such an approach to crime is radically different from the criminal justice system, whose main purpose is to identify and punish the offender.

In our opinion, it is also important to discuss the history of the origin of the term “restorative justice”. Generally, it is believed that the term was first used by Albert Eglash in 1977 in his paper "Beyond Restitution: Creative Restitution";[63] however, it should be also noted that this term was used by Albert Eglash about 20 years earlier. In 2005 Ann Skelton traced Eglash’s source for the restorative justice to a 1955 book The Biblical Doctrine of Justice and Law.[64] The section of this book, which addresses the connection between justice and love

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[60] *Oniani S., Davitashvili G.*, The Impact of Customary Law on Modern Balszemo Svaneti, Tbilisi, 2016, 8 (in Georgian).

[61] *Walker L.,* Restorative Justice Definition and Purpose, ნიგნში: Restorative Justice Today, Practical Applications, *Van Wormer K.S., Walker L. (eds.),* Sage, Los Angeles, London, New Delhi, Singapore, Washington DC, 2013, 4-5.

[62] *Kaspar J.,* WiederguTmachung und Mediation im Strafrecht, München, 2004, 3.

[63] *Eglash A.*, Creative Restitution, The Journal of Criminal Law, Criminology, and Police Science, Vol. 48, No. 6, Northwestern University Pritzker School of Law, 1958, 619-620.

[64] *Ness D.W., Strong K.H.,* Restoring Justice, An Introduction to Restorative Justice, 2010, Matthew Bender & Company, Inc., a member of the LexisNexis Group, New Providence, NJ, 2010, 4th publishing, 22.

says: "...Restorative justice alone can do what law as such can never do: it can heal the fundamental wound from which all mankind suffers and which turns the best human justice constantly into injustice, the wound of sin. Distributive justice can never take us beyond the norm of reparation; commutative justice can provide only due compensation; retributive justice has no means of repairing the damage save by punishment and expiation. Restorative justice, as it is revealed in the Bible, alone has positive power for overcoming sin."[65] Creative Restitution: Its Roots in Psychology, Religion, and Law by Albert Eglash published in 1955 is also worth to mention. According to the author, creative restitution represents one of the methods of re-socialization in the field of penology, which will affect the offenders. He concludes that justice has a restorative element. Restorative justice can bring about the result that the law can never achieve – it can heal the deepest wound and overcome sin; In case of restitution, with our help the offender should be able to compensate for the damage done to the victim.[66] In Eglash's opinion, the offenders themselves and their relatives also represent the victims of the crime as they also have "wounds to be healed". According to Eglash, the group of people affected by the crime includes those who were directly harmed, the relatives of the victim, as well as the offender and his relatives. Restorative justice provides a possibility for the latter to take responsibility for what they have done and heal wounds.[67]

At first Albert Eglash considered that "restorative justice and restitution, like its two alternatives, punishment and treatment, is concerned primarily with offenders. Any benefit to victims is a bonus, gravy, but not the meat and potatoes of the process."[68] Later, with the development of restorative justice, the idea that caring for the victims represents a central issue of this movement has also become acceptable.[69]

Lauren Walker states that the contribution of H. Zehr in the development of restorative justice around the world is the greatest. In his work Restorative Justice, Zehr defines restorative justice as follows: "Crime harms people and relationships. In search of solutions that promote rebuilding of relations, reconciliation and building a sense of self-confidence, restorative justice creates an obligation for everything to be rectified; the victim, the offender and the community are involved in the justice process.[70] Marshall described it as a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future. The author believes that although this definition can be further extended in many ways, even this one is quite sufficient for its functioning.[71] Martin Wright claimed that in case of the new

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65 *Eglash A.*, Creative Restitution, The Journal of Criminal Law, Criminology, and Police Science, Vol. 48, No. 6, Northwestern University Pritzker School of Law, 1958, 620.

66 Ibid. 619-620.

67 *Walker L.,* Restorative Justice Definition and Purpose, in a book: Restorative Justice Today, Practical Applications, *Van Wormer K.S., Walker L. (eds.),* Sage, Los Angeles, London, New Delhi, Singapore, Washington DC, 2013, 5, cited from: *Eglash A.,* Beyond restitution: Creative Restitution, inÖ *Hudson J., Galaway B. (eds.),* Restitution in Criminal Justice, Lexington, Mass.: D.C. Heath, 1977.

68 Ibid. 7.

69 *Walker L.,* Restorative Justice Definition and Purpose, in a book Restorative Justice Today, Practical Applications, *Van Wormer K.S., Walker L. (eds.),* Sage, Los Angeles, London, New Delhi, Singapore, Washington DC, 2013, 7.

70 *Зер Х.,* Восстановительное правосудие: Новый взгляд на преступление и наказание, „Судебно-правовая реформа", Москва, 2002, 64-65.

71 *Marshall T. F.,* The Evolution of Restorative Justice in Britain, journal: Restorative Justice and Mediation European Journal on Criminal Policy and Research, 1996, 38.

model “the response to crime would be, not to add to the harm caused by imposing further harm on the offender, but to do as much as possible to restore the situation. The community offers aid to the victim; the offender is held accountable and required to make reparation. Attention would be given not only to the outcome, but also to evolving a process that respected the feelings and humanity of both the victim and the offender.”[72] Collaborative and participatory processes are essential for restorative justice. Within the framework of restorative measures "those harmed by the actions of others should be active participants and not passive recipients."[73]

The UN plays a key role in developing strategies of criminal justice, international rules, standards and recommendations. According to the UN standards, restorative justice is a way of responding to criminal behaviour by balancing the needs of the community, the victims and the offenders. It is an evolving concept that has given rise to different interpretation in different countries, one around which there is not always a perfect consensus (2006).[74] In 1999, the Committee of Ministers of the Council of Europe adopted a recommendation on the use of mediation in penal matters. That same year the European Union (EU) funded creation of the European Forum for Victim-Offender Mediation and Restorative Justice. As a result, the EU adopted legislation to encourage use of restorative justice in its members countries. In 2002, the United Nations Economic and Social Council (ECOSOC) endorsed a Declaration of Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, designed not only to encourage the use of restorative justice on the global level, but also to provide guidelines for incorporating restorative approaches into criminal justice without violating the human rights of victims and offenders.[75]

Restorative justice programs are used for solving various criminal situations in different regions of the world. These programs were partly formed under the influence of the traditional culture of the indigenous peoples. Restorative justice programs are concerned with restorative processes and restorative outcomes. Restorative process refers to active involvement of all the persons involved in the crime and active participation of the mediator (fair and impartial third party) in solving the problem. Restorative outcome focuses on fulfilling the agreement reached at the restorative process. In this case the sequential order of specific actions to be taken by the offender is determined, which includes compensation for the damage caused to the victim and promoting the restoration of the offender's reputation in the social environment.

Three main programs have influenced the development of restorative justice:

● The first and most widespread program is Victim – Offender Reconciliation Programs (VORP), also known as Victim-Offender Mediation Program (VOM). The first modern use of

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72 *Van Ness D.W., Strong K.H.,* Restoring Justice, An Introduction to Restorative justice, 2010, Matthew Bender & Company, Inc., a member of the LexisNexis Group, New Providence, NJ, 2010, 4th publishing, 23.

73 *Takahashi R.,* Restorative Justice Almost 50 Years Later: Japanese American Redress for Exclusion, Restriction, and Incarceration, ნიგნში: Restorative Justice Today, Practical Applications, *Van Wormer K.S., Walker L. (eds.),* 2013, 227.

74 *Walker L.,* Restorative Justice Definition and Purpose, in the book: Restorative Justice Today, Practical Applications, *Van Wormer K.S., Walker L. (eds.),* Sage, Los Angeles, London, New Delhi, Singapore, Washington DC, 2013, 7.

75 *Van Ness D.W., Strong K.H.,* Restoring Justice, An Introduction to Restorative Justice, 2010, Matthew Bender & Company, Inc., a member of the LexisNexis Group, New Providence, NJ, 2010, 4th publishing, 27.

these meetings, which allowed victims to explain the impact of the crime to the offenders is found in Elmira, Ontario (Canada) in 1974. Howard Zehr, Ron Claassen, and Mark Umbreit were earliest practitioners and writers on mediation in the United States were. Umbreit has published a series of articles and books about mediation between the victim and the offender, explaining and evaluating victim offender mediation, including the use of such programs in cases of violent crime. Zehr and Claassen, who themselves were members of the Mennonite Christian tradition, argued that church-based—or at least, community-based—programs offer greater potential than state-run programs for helping the parties move toward genuine healing. The community base strengthens the vitality of victim-offender mediation, and it is preferable (even though it may include harder work) to organize programs in this way rather than as a part of, or funded by, the criminal justice system.[76] VORP was first launched in a pilot mode in Norway in 1981; it spread throughout Europe and went beyond its borders.[77]

● Family Group Conferences (FGC) – the second program of restorative justice was established in New Zealand and is based on indigenous Maori traditions. The conference differs from victim and offender mediation in several ways, but one of the most remarkable fact is that more people attend the meetings and in addition to the offender and the victim, family members, supporters, and government officials are also involved.

● Conferences are organized and led by paid social services personnel called Youth Justice Coordinators. Zehr notes that as Family Group Conferences take the place of court, they have to develop the entire plan for the offender that, in addition to reparations, includes elements of prevention and sometimes punishment. Charges may be also negotiated within the framework of this meeting. Interestingly, the plan should be the outcome of the consensus of everyone in the conference. Victim, offender, police (prosecutor) can all block an outcome if they are unsatisfied.[78]

● Sentencing Circles are the third form of restorative meetings. They have first emerged in Canada in the 1980s and were based on the aboriginal understanding of justice of the indigenous peoples living in Canada. Judges, police officers, lawyers, probation officers, victims, offenders, local community members and representatives are allowed to participate in the meetings.[79] Van Ness and Strong highlighted that circles rejected the monopoly of the professionals, it improved the amount and quality of information available, led to a creative search for new options, promoted a sense of shared responsibility, encouraged the offender to participate, involved the participation of the victim in sentencing and created a constructive environment. Circles allowed everyone to better understand the limitations of the justice system, it extended the focus of the criminal justice system, it helped mobilize community resources, and it helped merge the values of the aborigines with those of the Canadian government.[80]

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[76] *Van Ness D.W., Strong K.H.,* Restoring Justice, An Introduction to Restorative Justice, 2010, Matthew Bender & Company, Inc., a member of the LexisNexis Group, New Providence, NJ, 2010, 4th publishing, 27.

[77] Ibid, 28.

[78] *Zehr H.,* A Little Book on Restorative Justice, Tbilisi, 2011, 52-54 (in Georgian).

[79] Ibid, 30.

[80] *Van Ness D.W., Strong K.H.,* Restoring Justice, An Introduction to Restorative justice, Matthew Bender & Company, Inc., a member of the LexisNexis Group, New Providence, NJ, 2010, 4th publishing, 29.

Restorative justice is becoming one of the most competitive approaches to crime and punitive justice in more and more countries, which is regularly discussed by courts and legislators. As a result, government systems support the development and expansion of restorative justice programs. Legislative changes are being made to make it possible to incorporate restorative justice into legislation.

5. Conclusion

The study has shown that restorative justice has been the oldest and the most common approach to resolving conflicts between victim and offender throughout most of humanity. The roots of restorative concepts of justice go back to both Western and non-Western traditions. Therefore, returing back to the restorative model of justice might be perceived as returning to the roots of justice and not as latest institution of the the modern era. The study of the previous historical events in the development of restorative justice has revealed the stages of development of this phenomenon. It is worth noting that restorative justice is global. It has been influenced by the traditions and customs of peoples around the world, but it has also been introduced into different cultures and legal systems. In fact, one of the most important features of restorative justice is that its foundations were practically simultaneously introduced in different parts of the world. In some cases, a program or a theory began to develop before its direct contact with the ideas of restorative justice. While analyzing the restorative processes and their impact on the criminal justice system, we can conclude that the field of restorative justice is growing rapidly and new concepts are being developed to describe and characterize the field.

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