



## THE ROLE OF PENAL MEDIATION IN DISPUTE SETTLEMENT

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### **Abstract:**

The main goal of the present study was to investigate the role of penal mediation. Restorative justice aims to involve the entire sides of disputes in the process of dispute settlement. Through the application of instruments such as mediation, the pursued goal is decriminalization while avoiding the prosecution of the defendant as it is possible. In addition, it tries for compensating for the losses of the plaintiff. The article 82 of the criminal procedure code envisages the issue of mediation in level 6, 7, and 8 discretionary crimes. The former results in reduction of number of cases, reduction of costs inflicted on plaintiffs and, in case of the defendants, it results in the provision of contexts for their faster rehabilitation. Nowadays, most of theorists of criminal justice believe that as a method of dispute settlement, penal mediation must follow certain principles and rules that guarantee the rights of both the plaintiffs and the defendants in a simultaneous manner. The present study is an applied study conducted through descriptive analysis and its results show that penal mediation through meetings involving elders and deans not only results in settlement of disputes, but also it prevents further contentions; hence as a new appearance of criminal justice, it can be considered as a suitable brachium for the justice system.

**Keywords:** settlement, disputes, mediation, restorative justice, criminal justice

### **1. Introduction**

In the past, criminologists' main focus was on the criminals and crimes; but in victimology, the objective is compensation for losses of the victims. Restorative justice is a new movement in the domain of criminology. Since crimes wound social conscious while causing interruption in public order, the criminal justice system is forced to restore the occurred damages while the sides of disputes are also allowed to participate in this process. During the past two decades, criminal justice has been gradually

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opening the doors for public participation and especially, mediation. Mediation refers to a three-fold process that takes place between a victim, a criminal and a third person as the mediator. Penal mediation is of two types: 1) communal penal mediation and; 2) state penal mediation. In some others' views, the former can be divided into the two types of court handled and out of court.

The article 82 of the criminal procedure code envisages mediation in level 6, 7 and, 8 discretionary crimes conditioned at the agreement of the sides of the disputes. The text of the former article states that there is a maximum time length of 4 months dedicated to obtaining the satisfaction of the plaintiff and compensation for the losses caused by the crime; in addition to a maximum time length of 6 months dedicated to the settlement of disputes through referring to mediation and dispute resolution councils. The very nature of this very long 10 months anticipated time length is clearly paradoxical with the article 3 of the same law stating the necessity of processing in shortest times while preventing interferences or prolonging of the criminal procedure.

Despite the entire ambiguities and concerns, considering for the principle of mediation in the text of the modern criminal procedure law is a sign of tendency towards the basics of restorative judgment. We hope that our society takes advantage of the evolutions of time, especially the progresses and advances in the domain of criminology sciences in order to be able to overcome the existing problems and provide the necessary cultural, economic and, social contexts. In addition, we hope that through the combination of the newest legal strategies and human experiences, our society would continue opening new ways for future generations. Using the dispute settlement alternatives for settlement of disputes in criminal affairs has certain basic differences from legal solutions. Criminal justice maintains that making use of mediation, arbitration and or other dispute settlement methods must be effectuated in a systematic manner. In other words, the main and yet the most obvious difference between using dispute settlement alternatives and civil suits is that the latter is more systematic compared to the former.

## **2. Significance of the Study**

Considering the high density of suits in courts and lack of speed in processing them because of shortage of time, and considering the fact that many of the cases are not much of big disputes and can be settled between the sides, elaborating on penal mediation as a new appearance of restorative judgment is one of the necessities and significances of the present study. In addition, accepting the concept of penal mediation can be effective on the reduction of volume of suits in courts; hence it seems necessary to investigate its effectiveness.

## **3. Research Hypotheses**

1. Considering the fact that penal mediation pursues the compensation for losses inflicted on victims in addition to provision of contexts for compromise between

the criminal and the victim, it has a positively effective role in settlement of disputes.

2. Since as a new appearance of criminal justice, mediation pursues peace and compromise, making use of this method has a positive effect on the reduction of suits referred to courts

#### **4. Penal Mediation Concept**

The word mediation applies to two senses: in one sense, it points to mediation between two sides of a dispute with the aim of settlement of the dispute and making a compromise between them. In the other sense, it points to intermediacy with rulers for forgiveness of the fault of the criminal. In Arabic language, the word intermediacy applies to the second definition of mediation. In this sense, the mediator puts his/her credit at stake in order to free the criminal from the punishment that awaits him/her. What the encyclopedia of criminology states regarding the issue of mediation considers mediation as a method other than criminal procedure which can be made use of at any point in time between the occurrence of the crime and the time when the criminal makes presence in the court. Hence, it seems that mediation is a dispute settlement method free from the intervention of the criminal procedure system; a method or process during which emphasis is put on the necessity of negotiation of the participants in order to reach an agreement regarding the dispute at hand. Actions in mediation are based on free decision making combined with the participation of the sides of the dispute. Following the increasing volume of cases in courts on the one hand, and inflation of the criminal population which results in mitigation of the efficiency of the criminal system in the contexts of fighting crimes and rehabilitation of criminals on the other hand, during the past two decades the criminal justice system has been gradually opening its doors on public participation and especially, mediation.

The process of compromise between the plaintiff/victim and defendant/criminal starts in presence of a third person entitled as the mediator with the aim of the settlement of disagreements and disputes caused by the crime. In fact it's the victim and criminal who finally reach a solution for their dispute through numerous meetings and both direct and indirect (mailing and etc.) contacts and the mediator does not inflict his/her opinions. There are various theories presented regarding the varieties of mediation. Conclusively the former theories point to three major types of mediation as follows: 1- communal penal mediation; 2-communal penal mediation monitored by a judicial authority; 3- judicial-police penal mediation; and 4-inner-organizational mediation. The prerequisites for justification of penal mediation include decriminalization through mitigation of the disputes caused by a criminal phenomenon through penal mediation; which is the acceptance of some sort of sheriffdom in settlement of disputes between victims and criminals and societies. Considering the limited capacity of official criminal authorities in confronting crimes and especially in supplication of the satisfaction of victims, and also under the light of the evolutions of the modern criminology, since the past three decades the UN and some of the domestic

criminal justice systems have started to participate the public and or the civil societies in the process of criminal justice. In this path, one of the most important instruments taken advantage of by this very idea has been penal mediation. It is obvious that penal mediation, especially penal mediation monitored by a judicial authority, are appearances of restorative justice that to some extent proximates criminal justice to civil justice and, criminal procedure code to civil procedure code. Hence, the textual borders between criminal rights and civil rights are made paler or even gone in some cases. Nowadays, in addition to criminal rights, civil rights are also known as the main nucleus of criminal policy. In terms of international experiences regarding the institutionalized-ness of penal mediation in its modern form, the country of Canada is considered as the pioneering country.

#### **4.1 Explaining Penal Mediation in Criminal Procedure Code**

Article 82 – in case of level 6, 7 and, 8 discretionary crimes that can be suspended, the judicial authority can in case of criminal's request and victim's consent, give the defendant no more than two months for obtaining the satisfaction of the plaintiff. In addition, the judicial authority can refer the case to a dispute settlement council or a mediator person or institute in order to make a compromise between the sides of the dispute. The mediation process can take no more than three months. The time lengths stated in this article can be extended for only one more three months. If the plaintiff forgives the defendant's crime, and the occurred crime is a forgivable one, the prosecution would be stopped. In other cases, if the plaintiff forgives, the crime or his/her loss is compensated for; and if the defendant has no priors, the prosecutor can suspend the prosecution of the criminal for 6 months to 2 years. In this case, while considering for the appendices of the article 81 of the same law, the prosecutor obliges the defendant to undertake certain commands of the aforementioned article. In case of defendant's lack of commitment without any justifiable excuses, the suspension would be revoked and the prosecution of the defendant would be put back to motion.

Appendix: the prosecutor can ask the judicial authority for suspension of prosecution or reference to mediation.

Therefore, penal mediation is divided into two types:

- 1) Communal penal mediation;
- 2) State penal mediation; monitored by the judiciary like the country of France.

From another point of view, it can be divided into court handled and out of court types.

#### **4.2 The Most Important Methods of Penal Mediation**

##### **Domestic collective meetings**

Holding collective domestic meetings is another method used by the theory of restorative judgment in order to achieve its goals. The firsts of such meetings have been recorded in the country of New Zealand; it is based on the direct intervention of the members of the families of the victim and criminal. The recent results of test run of programs based on development of feeling of shame in criminals have shown that these

methods are desirably effective on the satisfaction of victims. However, this level of satisfaction is much less than the satisfaction obtained through mediation; still holding such meetings can be effective on the participation of the other members of local communities in the process of restorative justice. It also persuades the other community members towards partial compensation for the losses inflicted on the victims so that the negative consequences of poverty of the criminals are somehow mitigated.

### **Correction, Healing and Compromise Rings**

Formation of compromise and healing rings is a restorative method that involves the entire parties involved with the crime including the criminal and his/her relatives, the victim and his/her relatives, the judge, the prosecutor, the attorneys and the members of local communities. These people form the correction, healing and or compromise groups in which they discuss the various aspects of the crime. This process is a societal process that aims to reach an agreement regarding the most suitable punishment which in turn is the main concern of the entire people involved with crimes. The purpose of these rings is to provide the necessary contexts for compensation for the losses of the community members in addition to reaching an agreement and restoring public responsibility. In more precise words, the concept of correction and healing is related to development of compromise and restoration of former situations.

### **The most Important Penal Mediation Rule**

In criminal procedure it is believed that once initiating the process, on the one hand the demands and ideas of the victims should be taken into consideration and on the other hand, the criminal must be involved with rehabilitation, healing and correction programs. In the domain of restorative justice, in most cases, the crimes are not considered as violations of the public order and instead, they are considered as harmful acts against the victims. From the perspective of restorative justice, a pragmatic and realist proceeding must first of all be concerned with compensation for the harms and restoration of the damaged relationships between stakeholders. In this special perspective, the criminals are viewed as persons who have committed harm to another person under special circumstances. In addition, in a very respectful manner and through mechanisms based on the active participation of the entire stakeholders and with emphasis on negotiation and talking, the criminal accepts responsibility for his/her actions and tends to the compensation for the harms of his/her action with the help of the whole community.

### **Solvation Code**

The Arab nomads of the Khuzestan Province have long been having various codes based on which they used to resolve crimes. For example, Arabs had arbitrators who would vote on affairs involving punishments, heritage, water access right and blood money; because Arabs had no religion to refer to and hence they referred to principles such as dignity, honesty, liability and elderly. These conventional solutions known as solvation code are still in effect among some Arab nomads and are referred to when there is a murder, rape or another crime against the values of nomad life. This code is referred to for solvation of most disputes. However, the main application of this code is in case of murder; in this sense, almost 95% of the murder cases are resolved through

compromise. This custom is in effect in most Arabian countries including Jordan, Palestine and also Afghanistan under similar titles such as peace, bad custom and etc. this custom has certain restorative aspects. Some of these restorative features include the presence of a mediator who talks the sides of disputes into compromise, the necessity of respecting both sides of disputes; confession of the criminal to his/her committed crime, compensation for the losses of the victims and ultimately, compromise and agreement. In vocabulary, solvation means settling and mediation and in terms of expression, it means compensation for the harms done to the victims. Some others believe that in terms of expression, solvation points to unwritten sentences, codes and traditions of settlement of criminal disputes that are executed with the aim of compensation for the losses of victims. The sentences of this code are called FOSILEH.

### **The No-blood code**

Lore nomads also have traditions similar to the solvation custom, referred to as no-blood codes. This code is mostly related to murder and it has roots in the fact that these people give a special importance to blood. From legal perspectives, the Lore people can be considered as the most extensive society in which disputes are solved through arbitration and mediation. In case of occurrence of a murder, since in early stages of time the relatives of the victim may still be in shock and grief and hence may be in pursue of taking revenge, the elders of tribes are firstly gathered and try for mediation and afterwards, they go to the victim's house and ask them to forgive the criminal. After the passing of the first hours, the elders make presence among the families of the victim and the criminal and make extensive efforts towards obtaining the satisfaction of the victim's family. They will also ask the victim's family to avoid getting into a fight with the criminal and committing another murder.

If the victim's family accepts to forgive, the elders and the families of the victim and the criminal will agree on meeting on a certain day in order to talk about the occurred crime. On the other hand, if the family of the victim refuses to forgive, the criminal must and has to turn himself in; otherwise, the family and or the tribe of the victim will take revenge. If the victim's family agreed to forgive the criminal, a certain day would be picked by the families of the victim and the criminal for negotiation of the issue. on this day, the elders and the family of the victim will symbolically put a rope around the neck of the criminal and put a Quran and a sword in his/her hands and then they would bring him/her to the family of the victim and will ask them to forgive the criminal for the sake of the respect of holy Quran. If they refuse to forgive, they may take retaliation with the very sword he/she is holding.

## **5. Conclusions**

Penal mediation is a humane method for cases of confronting humane disagreements. Alongside the judicial system, while keeping its dependence on the system and also while envisaging certain limits of independence, penal mediation is considered as a complementary and in some cases, as an alternative for the official process of criminal justice. The very main goal of penal mediation is to make the most viable balance

between the interests and perspectives of the main pillars of criminal justice that are the victim, the criminal and the local community. The article 82 of the criminal procedure code envisages for the issue of mediation for the entire forgivable crimes and crimes in which the forgiveness of the plaintiff is effective on the punishment. The first type of penal mediation is the communal penal mediation and its second type is communal-state penal mediation. In case of agreement on mediation and realization of it, the prosecution would be stopped in case of forgivable crimes; however, in case of unforgivable crimes, a sentence would be issued. This helps the first timers (persons who have committed a crime for the first time) with avoiding the criminal label. In fact they can compromise in the very beginning stages and avoid going to the court. In this case, the necessary contexts for the return of the criminal to the embrace of the society would be provided. The former also results in mitigation of number of cases that are referred to courts while helping the victims with receiving their rights sooner while having to pay fewer costs.

Results have shown that compared to official judicial authorities, people have more confidence in elders and trusted parties for the settlement of their disputes and taking of their rights. Hence, it can be said that penal mediation is a method highly effective on settlement of disputes and realization of rights. Furthermore, penal mediation can be considered as one of the main arms of provincial judicial authorities that helps them with mitigation of volume of cases and reduction of traffic of people in judicial buildings.

If a dispute is occurred and it is processed in by judicial authorities and finally a verdict is issued, the sides of the dispute are still in disagreement and this disagreement may in future cause another dispute or a more severe one. In a contradictory manner, if the same dispute was in the first place resolved through mediation and development of compromise between the sides, there would surely be no more disagreements. Hence it should be taken into account by judicial authorities that mere issuance of verdicts would not necessarily solve the dispute between the sides. Rather we must think of ways including referring them to a dispute settlement council so that the dispute is absolutely settled and resolved.

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