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Redaktur Office
Faculty of Sharia and Law UIN Syarif Hidayatullah Jakarta
Street Ir. H. Juanda 95 Ciputat Jakarta 15412
Phone. (62-21) 74711537, Faks. (62-21) 7491821
Website: www.fsh-uinjkt.net, E-mail: jurnal.citahukum@uinjkt.ac.id.
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Mediation from the Penological Viewpoint*

Mohammad Hossein Hajaryan,[1] Iraj Golduzian,[2] Ehsan Hajarian[3]
Islamic Azad University, Khorramabad, Islamic Republic of Iran

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Abstract:

Due to increasing population and heaviness of the judicial system's burden and high expense of referring to the courts for the people of society, the judicial system tries to settle disputes through traditional and low-cost ways. Mediation is a body which has a long history in settlement of disputes between persons however the use of mediation has advantages and disadvantages. As mediation cost is lower than cost of referring to court, the parties will prefer to use this body. The result of mediation creates liability for the criminal although the liability has no predetermined legal punishment, it is criminal liability which is enacted by the nongovernmental persons under supervision of government for the status quo of the dispute. Punishment has different function at different times. It sometimes had authoritarian function and was controlled by the states and sometimes had preventive-corrective function and aims to protect people against the offender's behavior. This article attempts to show purpose of the mediation result in societies.

Keywords: Mediation, Penal, Penology

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[1] **Mohammad Hossein Hajaryan** is a Senior Lecture at Department of Law, Islamic Azad University, Khorramabad, Islamic Republic of Iran.

[2] **Iraj Golduzian** is a Professor at Department of Law, Islamic Azad University, Khorramabad, Islamic Republic of Iran.

[3] **Ehsan Hajarian** is a Professor at Department of Law, Islamic Azad University, Khorramabad, Islamic Republic of Iran.

***Corresponding Author**: hajaryan@gmail.com

Mediasi Dari Sudut Pandang Penological

Abstrak

Peningkatan populasi dan beratnya beban sistem peradilan dan mahalnya biaya merujuk ke pengadilan untuk masyarakat menimbulkan sistem peradilan mencoba menyelesaikan perselisihan melalui cara tradisional dan berbiaya rendah. Mediasi adalah suatu badan yang memiliki sejarah panjang dalam penyelesaian perselisihan antar orang-orang, namun penggunaan mediasi memiliki kelebihan dan kekurangan. Karena biaya mediasi lebih rendah daripada biaya merujuk ke pengadilan, para pihak akan lebih suka menggunakan badan ini. Hasil mediasi menciptakan pertanggungjawaban bagi pelaku kejahatan, walaupun pertanggungjawaban tersebut tidak memiliki sanksi hukum yang telah ditentukan. Dia adalah pertanggungjawaban pidana yang diberlakukan oleh orang-orang non-pemerintah di bawah pengawasan pemerintah untuk status quo dari perselisihan tersebut. Hukuman memiliki fungsi yang berbeda pada waktu yang berbeda. Kadang-kadang memiliki fungsi otoriter dan dikendalikan oleh negara dan kadang-kadang memiliki fungsi preventif-korektif dan bertujuan untuk melindungi orang terhadap perilaku pelaku. Artikel ini berupaya menunjukkan tujuan hasil mediasi di masyarakat.

Kata Kunci: *Mediasi, Penal, Penology*

Посредничество С Пенологической Точки Зрения

Аннотация

Рост населения, тяжелое бремя системы правосудия и высокая стоимость обращения в суд для сообщества породили идею для судебной власти - попытаться разрешать споры с помощью традиционных и недорогих средств. Посредничество - это досудебное урегулирование с помощью лиц, которые имеют долгую историю разрешения споров между людьми. Однако использование посредничества имеет свои преимущества и недостатки. Стоимость посредничества ниже, чем стоимость обращения в суд, и стороны предпочтут воспользоваться этим лицом. Результаты посредничества создают ответственность для лиц, совершивших преступления, даже если ответственность не имеет заранее определённых правовых санкций. Это - уголовная ответственность, налагаемая неправительственными гражданами под государственным контролем за статус-кво в споре. Наказание имеет разные функции в разное время. Иногда оно выполняет авторитарную функцию и контролируется государством, а иногда выполняет превентивно-корректирующую функцию и направлено на защиту людей от поведения преступников. Эта статья пытается показать цель посредничества в сообществе.

Ключевые слова: *посредничество, уголовное наказание, пенология*

Introduction

Punishment is the result of a violation of the legislator's orders. When the legislator speaks about do's and don'ts, he resorts to punishment to enforce these do's and doesn't. In other words, Criminal Law defines the actions which are regarded harmful for society and specifies punishments of its perpetrators (Bulak, 2008: 25). Therefore, the order of society is provided by applying law whether criminal or civil law. When societies become more advanced and relations become more complex, there is more need for laws especially criminal law to provide disorder and security of society. After period of private retaliation, and public justice, period of enlightenment questions many goals of punishment. Thinkers of this period presented different theories for punishment which are divided into two classes:

The first theory is the philosophical–ethical theory about crime and punishment (Safari, 2015: 59). There are thinkers who regard punishment equal to justice. According to them, human is regarded as a free-willed person. As a result, person's breaking of the structure accepted by the majority of society can be admonished reasonably or ethically. According to them, the most important function of punishment is administration of justice and protection of ethical fundamentals and social values to the extent that they have been disrespected (Safari, 2015: 59).

Some philosophers such as Kant and theories of absolute justice and its followers are included in this class. The second theory is based on the type of experimental and scientific attitude toward punishment of crime, measures and evaluates crime with external realities as a human behavior beside other behaviors (Safari, 2015: 60). Thinkers of this theory do not assume human as a free-willed creature unlike the previous theory and believe that committing crime results from the internal factors (optional and non-optional) and external factors. Therefore, the perpetrator does not deserve to be punished due to committing crime but he is regarded as a patient who requires mental or physical treatment.

Therefore, they cure perpetrator instead of physical punishment and take protective actions to protect society against the subsequent actions of these people. In the second theory, his dangerous state and the damages which he causes for benefits of society are mentioned instead of discussing his deserving to punishment. Followers of this thought believe that such perpetrator should be treated based on the danger which they cause in society to defend the benefits of society (Safari, 2015: 60). Social defense school can be regarded as subset of this theory.

The restorative justice is one of the latest terms which were introduced by the criminologists, sociologists, and lawyers in recent century and arose out of the second theory after theories of retributive justice and rehabilitative justice. Concepts of mediation and restorative justice had no clear border and were applied with concepts of the same weight but these two categories were separated from each other and had special concept.

Mediation cannot be regarded as the same as restorative justice. Although the term "mediation" has been accepted in the field of restorative justice, it has been replaced with the terms and circulations such as conference, meeting, and discussion (Howard, 2012). Although form of mediation and restorative justice may be the same, goals of these two cases are different. Tony Marshall defined restorative justice as a process in which all persons who play role in special crime gather to make decision collectively about how to treat effects and results of crime and the result of problems in the future and find a solution (Gholami, 2003: 40).

In fact, restorative justice is a way for compensation for damages and restoration of the damages resulting from crime so that the crime victim can be restored to the previous state mentally and financially. Now, mediation is an attempt by the mediator to settle conflict between parties. This settlement may lead to restoration of the criminal to the previous state which results in restorative justice and may lead to any other agreements. Sometimes, the criminal victim prefers to select a simpler solution for settling disputes instead of being involved in the judicial system process. This solution may not compensate for damages resulting from crime but the criminal victim prefers this process to be protected against the subsequent losses of involvement with the judicial system. Therefore, goals of the restorative justice are different from those of mediation. The main question of this article is whether mediation is a subset of the first theory or the second theory. In other words, is the result of mediation inherently equal to justice administration and does it have punitive aspect? Does it have preventive-corrective function?

History of Mediation

Mediation is defined in Dehkhoda Dictionary as mediating and intervening between parties, brokerage. *Tureh* means a girl who mediates between the lovers *(Montaha Alarb).* Mediation: interceding and intervening between the parties *(Nazem Alatba).* Mediation has an ancient root in cultures and religions. It is also found in Islamic, Christian and Jewish religions. This peaceful method

of resolving conflicts was particularly prevalent in communities of Confucians and Buddhists.

China and a large part of Asia have a special attitude toward mediation due to thoughts and beliefs of Confucians. *Confucius* believed that the best way of conflict settlement was ethical encouragement, not force. There is harmony in issues of humans which should not be disrupted. Peace and understanding have basic role in philosophy of *Confucius.* Buddhism encourages dispute settlement instead of applying force through conciliation. In these cultures, war is regarded as the last option. In China, there is emphasis on peace, mediation and right to make optional decision in conflict resolution (Garshasbi, 2007: 34).

Great and important cultures such as Iranian, Roman, Egyptian and Chinese cultures used these tools for dispute settlement. Mediation is found in Islam, Christianity, and Buddhism. The historians mentioned the first cases in Phoenician commerce. Mediation has been known later in Roman civilization, (Justinian in 530-533). The Romans named mediators differently such as interceders, interveners, mediator, benevolent, philantropus interpret and finally intermediate. In some cultures, mediator is a respectful holy character. In the Middle Ages, mediation was different so that it was sometimes prohibited and sometimes performed by special people. In Iran, the elders and great men assumed this responsibility and settled disputes between people, villages and cities. Their role somewhat overlaps with role of the traditional wise men or head of tribe. These people have brought peace to societies and local leaders and wise men have settled disputes before that time.

In Japan, mediation is highly prevalent. History of Japan took advantage of this tool and has been converted into a culture. Expenses of bringing action in Japanese courts are high, for this reason, they prefer to take action regarding dispute settlement through mediation. In Africa, dispute is settled by the elders of the tribe or a person who is respected by the parties. In this regard, the parties can ask for informal meeting with their relatives. Considering special kinship patterns, this type of mediation is responsive in Africa.

In the history of Islam, there are abundant examples in this regard. The most important example is mediation for conflict settlement in two Aws and Khazraj tribes by Prophet Mohammad (PBUH) leading to unity of these two tribes and finally higher power of Islam's world. Medina treaty can be regarded as another example of Islamic approach to dispute settlement in which many mediation cases are also applicable now.

This treaty first introduced this region as state-city and determined rights and duties of its citizens and first created tools for seeking justice through society and law (contrary to the tribal struggles). In this regard, Medina treaty was used as a tool for dispute settlement. Prophet Mohammad (PBUH) could gather the fighting groups, discuss their demands and needs and execute a proposal which all involved groups accept and end the dispute which they had for a long time.

Prophet Mohammad (PBUH) in Mecca was reputed for his ability to mediate which was due to his contribution to dispute settlement in Mecca. For example, different tribes in Mecca selected Prophet Mohammad (PBUH) to place the Black Stone in Kaaba and in this way, the bitter dispute between these tribes was resolved (Bakhtiari, 2015).

Mediation plans which affected the criminal justice system since the mid-70s in 20th century was first manifested in 1977 and as one of the probation officers initiated in Canada then it was transferred to other cities in Canada and America. The probation officer mentioned above suggested the judge in one of the cities of Ontario state that the two young men who had been convicted destruction face the crime victims and as the judge agreed, the probation order issuance was postponed to compensation for damages and obtaining the goodwill of the crime victim. Following this experience, mediation was supported financially by the government and spiritually by the Church and transferred from Canada to America than Europe in late 70s.

Mediation which is rooted in decriminalization from the settlement of disputes resulting from criminal phenomenon to mediation and acceptance of settlement of disputes through arbitration has played undeniable role in drawing of the participative criminal justice policy (Samavati, 2006: 123). Modern mediation with legal and formal mechanisms was formed and evolved in USA and particularly with emergence of the concept of ADR (Alternative Dispute Resolution).

In 1896 in England, Law of Conciliation in Industrial Relations which had a sort of mediating function but in USA, mediation was discussed since 1913 as initiated by United States Department of Labor when a group called Peace Commissioners was established. These commissioners were responsible for settlement of disputes among managers and workers. In America, peace-related research centers were established about 40 years ago to study disputes and the manner of resolution. These centers later created base of establishment of some mediation centers. These mediation centers were also created gradually in

Australia, New Zealand, England, and Canada. Since early 1980s, mediation was formed Canada and started growing formally and technically.

Penal Changes

Different punishments have been considered for crimes since a long time ago from burning and dismemberment to imprisonment and other punishments than imprisonment which have been introduced recently. All types of punishment have been divided into three periods each having special characteristics for executing punishments.

The first period is called private retribution when there was no public body such as government for determination and execution of punishment and that period is called human life period when there were no organized society, government and consequently, crime and punishment in modern sense or they were limited in number.

The second period is known as retaliation. Retaliation and blood money period are referred to as a special period in the history of change of punishment when family and tribe merged gradually and more organized societies were established from primary tribes based on equalization and relative adjustment of punishments at least based on the crime i.e. retaliation not more than the crime. In this period, principle of equality of crime and punishment was observed that the criminal was treated as he committed the crime, for example, as the criminal victim was murdered, the criminal would be killed and they also observed the spatial specifications. In fact, attempt was made to reconstruct the scene and execute the punishment to observe equality.

The third period is called public justice administration. In this period, fundamentals of order and interest of society were mentioned and the public rights were considered. In this period, once the central governments were established and societies became more advanced, the government was responsible for providing order and security but in public punishment period, some crimes become public and committing. It was regarded as a violation of rights of all members of society with a fully authorized agent of the head of government. Naturally, punishment was a reaction of the society which should be determined and applied by its agents.

Period of Enlightenment

After these historical changes, we see a new period which starts with the enlightenment era after the Middle Ages in Europe. In this period, punishments

moved toward more human approaches and changes continue until now. Enlightenment movement in centuries 17 and 18 A.D. emerged due to thoughts of the thinkers and penal schools. Enlightenment-era changed the direction of punishments and forced political governments to accept specified and defined frameworks for determination and imposition of punishments. Nonhuman physical punishments were eliminated and imprisonment was applied instead of it as a usual punishment.

Concept of Penology

Penology is one of the branches of analytical or interpretive criminal sciences and has a restrictive approach and sense of an extended approach. In a restrictive sense, it means knowledge of the management of prisons. After European enlightenment movement and since the first half of the 19th century based on neoclassic school lessons, it was known as punishment law and then prisons management science. The previous title of this science was *science pénitentiaire* or prison management science but the second meaning i.e. extended meaning is called punishment science. Since the second half of 20th century and following changes in 70s later on, including failure of imprisonment punishment and development of alternative punishments, penology also replaced the said titles to logically cover all types of new sanctions and their importance and evaluation and different discussions of the punishment executive bodies in addition to better conformity of the title with subject and content.

Mediation and Penology

Considering historical trend mentioned above, it is observed that penology in enlightenment era has paid more attention to imprisonment and alternative punishments and sometimes proceeds not to punish criminal such as suspension of the award or suspension of punishment or not to enter the criminal system and to resolve the dispute in other ways such as mediation. The punishments which deprive the person of freedom and financial sanctions have replaced physical punishment and the final punishments, conditional sanctions such as suspension, suspending person's sentence on probation and the sanctions with stronger social aspect such as probation of punishment, exemption from punishment and replacements of the imprisonment particularly for the public works and public services have been added.

However, it may be said how mediation may be regarded as punishment. Since mediation tries to make complainant and accused close to each other to cause satisfaction of the complainant and also the satisfaction of the accused

with the mediation award, therefore, some cases such as apology or compensation for damages by the accused are regarded as punishment without person entering the criminal process. In fact, it can be regarded as a private punishment or public supervision. Therefore, use of the mediation capacity for punishment is found in new perspectives as Article 1 of the Criminal Procedure 2013 of Iran has referred to mediation as one of the criminal subjects.

The use of mediation has privileges which encourage the parties to use this structure. Although mediation should be satisfactory to the parties to a suit, the parties sometimes prefer to use this body instead of using the criminal system. The complainant can administer justice through mediation and not enter the criminal process so that lower expenses will be imposed. The criminal also reduces heavy burden of the judiciary system and saves face while using these privileges, though the perpetrator may prefer to apply heavier punishment for him he tries to save face without public knowledge. Therefore, it is observed that it cannot be said that mediation structure is a structure based on restorative justice because restorative justice tries to restore the previous state to the crime victim while mediation is an attempt to settle dispute.

But it should be said that considering that punishments which are applied through mediation have not been predetermined and are specified considering circumstances of the crime and condition of the party to a suit whether in terms of social and job conditions, therefore, these punishments are fluctuating. When mediation is ended, if there is a balance between the complainant, accused and society and view of the parties about mediation is retrospective, it can be regarded as a subset of the philosophical-ethical theory and the absolute justice can be accepted. If there is mediation view about future and retrospective so that liabilities of the perpetrator are regarded as preventive-corrective, it can be said that mediation follows scientific–experimental view.

However, following each of these two views in mediation process depends on the culture of society as people prefer individual interest over collective interest and may follow philosophical–ethical view and in case personal interest is taken into account, they will follow experimental–scientific view. Therefore, factor of culture and view of the people in society in mediation process is highly important for the parties based on all types of liability.

The function of Mediation in Local Society

Mediation in different cultures has special forms meaning that each culture resorts to its special tradition and custom. In the eastern societies, the elders of

the tribe or great man of the family takes action regarding mediation and this is assumed by some institutes in western societies. In Iran, as mentioned in the new Code of Criminal Procedure, some people or institutes have been selected for criminal mediation as legal supervision and interference of the ordinary people or educated lawyers (See: Article 82 of the Code of Criminal Procedure). Therefore, it is observed that mediation which was assumed by the elders of the family or done under influence of the elders was transferred and most people of society can perform this duty.

Mediation in local societies considers the goal of survival of the local society before compensating for damages between the parties. Therefore, compensation for damages may not be done in practice under influence of the local elders in mediation and despite demand of the losing party, it may lead to forgiveness. Here, mediation can pressure on the parties instead of compensating for damages.

The perpetrator may be punished more what he has committed and the aggrieved party may receive damage less than what he has incurred. Considering *Durkheim*'s Solidarity theory, the solidarity of the advanced societies is moving toward organic state and the more complex the duties, the more the solidarity loses its mechanic nature, the more the unit values of the people will be broken. Therefore, once the thoughts and tendencies of people are differentiated and the government support people instead of local and tribal society, people will no longer need family and local society's support, therefore, influence of the elders will lose their function. In such case, survival of the local society will be forgotten and interested in the parties to suit will be taken into account.

Application of The Mediation Goals to The People of Society

As mentioned in the definition of mediation, mediation is an attempt of the mediator to create agreement between the parties to suit. However, the aggrieved party seeks to rehabilitate and compensate for damage may be considered in the second category, therefore, the aggrieved party tries to prove his priority over the perpetrator. In such case, neither mediation can be efficient nor should the mediator attempt to bring the criminal under influence of the aggrieved party. Therefore, the perpetrator may be punished more than necessary. Such case can be compared with the preventive-corrective punishments but it should not be forgotten that these punishments may aim at peace of the aggrieved party, not the whole society. So, extending these special punishments to people of society will be problematic and cannot meet goals of

the preventive-corrective punishments though these two types of punishments are of equal form.

Prevention of Recidivism in Mediation

One of the goals of preventive-corrective punishments is to prevent recidivism. The main factor of mediation process which can be effective in prevention of recidivism is to include people of society awareness of the people in the process so that the result of mediation can be corrective and punitive directly for the criminal and indirectly for the people in society. Umbreit (Mark), Coates and Voos in their meta-analysis concluded that mediation is as effective as the traditional options of criminal justice in reduction of recidivism and sometimes is more effective than the traditional option in some cases (Ardabili, 2014: 1407) but one cannot generalize their study to all societies.

This meta-analysis seems to be true in smaller and local societies but the emergence of very large cities led to loss of ethical and cultural unity and integrity and there are different cultures dependent on different parts of the city. Even phenomenon of immigration from smaller cities to larger cities led to cultural abundance even in a small zone of the city so that definition of district and solidarity of the local people in these societies has been forgotten. Therefore, as people of society is not included in this process and result of mediation is not accompanied by its lateral effects such as complementary and consequential punishments and case of the criminal is closed until end of mediation and it will not be able to prevent recidivism.

Conclusion

If there is no balance between punishments of the complainant, right of the accused and society, one cannot accept philosophical-ethical theory because justice is not observed and experimental –scientific theory doesn't cover goals of preventive–corrective punishments. Therefore, although mediation is a private body under public supervision and the parties to suit are included in this process with consent, they will be forced to meet requirements of the criminal system if they are included. As a result, it is compulsory to indirectly enter the mediation process taking into account its loss and profit and the requirements which the perpetrator shall meet will have indirect criminal effect.

The goal of mediation is close relation with type of culture of the people in society. Unlike the definite punishments which pass legislative–judiciary–executive process, this process will occur concurrently for creation of

responsibilities through criminal mediation so that mediator can accept, report and execute views of the parties and their agreement on type of punishment which has not been determined before.

Although one can refer to mediation under judicial supervision and in special crimes and such referral will be legal, referring the case to mediation will be more flexible and far from the strict and demanding process of the judiciary. People are interested in mediation instead of referring to the judiciary and if the involved parties don't hope for administration of justice through the judiciary, they may not be able to gain their real right by moving toward mediation and will do less than what is necessary. Therefore, weakness of the judiciary in facilitating proceeding and elongation of procedure and interest of this system in referring to mediation will lead to loss of criminal function of weak crimes and power of the government and the main goal of mediation is to eliminate hostility and revenge between the parties. Although it can solve the problem formally due to lateral expenses of the judiciary and force of the parties to refer to mediator, it may not remove real hostility so that the involved parties can return to the previous state.

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