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## Studying the Capacities of Restorative Justice in Formal Laws

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### ABSTRACT

*Restorative justice is a fresh model in criminal policy highlighting the restoration of victims' rights and resolving the issues stemming from the happening of crime and reparation of damages - especially, the harm to the victim with the free and active participation of the victim and the offender and the local community, through negotiation and dialogue in the form of means including mediation and family meetings, and achieving tranquility and reconciliation. This study aimed to explore the capacity of restorative justice in formal laws. The research method is descriptive-analytical and library resources were used. Studies have revealed that because of the extent of the ruling authority in suspending the execution of sentences, the application of alternatives to imprisonment, parole, semi-liberty, and delay of sentencing are good bases for the rehabilitation of criminals to deliver at least indirect prerequisites for repairing the damages to the victim. Repentance, viewed as one of the factors for the abolition of punishment, is not fulfilled in the case of crimes that are in some way related to the violation of the rights of others, except by reimbursing the material or moral damages imposed on the victim. And this can be a suitable way for criminals to try to make up to the victim.*

**Keywords:** restorative justice, punishments, alternatives to imprisonment, parole

### INTRODUCTION

In the classic criminal justice model, punishment has a moral dimension, and the moral falsehood of the offender is penalized. Traditional criminal justice in neither of its two forms has been able to achieve the expected objectives. Failure of the offender's penalty to stop the crime, failure to rehabilitate the perpetrators, overcrowding of the prison, length of the trial<sup>1</sup>, the hostility of the trial<sup>2</sup>, being expensive, Ignoring those who have been directly or indirectly offended and who have been harmed by the crime, and their needs and desires, and considering society and the state as victims are among the criticisms that have been made about the traditional model of criminal justice, that is, repressive and rehabilitative. Various solutions have been offered even to the point of repealing the penal system. One of the solutions to this situation is to design and follow a model for the victim to be involved in the investigation process. In this respect, a new model called "restorative justice" was introduced in criminal policy. This type of criminal justice has turned its attention from the offender to the offended and has concentrated on compensating all kinds of harms inflicted on them<sup>3</sup>. In this context, we view justice as a system that guarantees the superiority of a more respectable interest in judging between two

<sup>1</sup> Gholami, H. (2006). Restorative Justice. Tehran: Samat Publications, p.64

<sup>2</sup> Ibid., P.65

<sup>3</sup> Zahar, H. (2004). The Small Book of Restorative Justice, translated by Hossein Gholami, Tehran: Majd Publications, p. 32

conflicting interests. This view believes that the offense primarily affects the victim, and what is most essential is to pay attention to the victim and recompense for the material, spiritual, spiritual, psychological, and emotional damage inflicted on them and prevent their re-victimization<sup>4</sup>.

It appears very evident that the execution of sentences such as postponing sentencing, release from prison, and replacements to imprisonment can reduce expenses and criminal inflation, reconcile criminals with society, and secure the victim's interests. Furthermore, the Code of Criminal Procedure of 1392 hosts innovations and capacities for implementing restorative justice, the most tangible of which is the specification of mediation. Including items can be seen as manifestations of restorative justice in the new Code of Criminal Procedure, such as parole, suspension of sentence, adjournment of the sentence, the extension of exoneration by the plaintiff, and inclusion of amnesty and prediction of issues such as reconciliation and mediation between litigants. Accordingly, this study aimed to research the capacity of restorative justice in formal laws.

### **1. Terms of criminal mediation in the Criminal Procedure Code**

The most significant advantage and goal of mediation are to lower the volume of cases in the judiciary. Initiating a criminal process costs the community. For the government to ensure an honest trial, it will have to employ a free lawyer and translator. But if the litigation is directed to mediation, there is no requirement for these expenses. The criminal process has adverse effects on the accused, will cause them to be stigmatized, and will put them in the spotlight of the accusation for a long period. Implementing restorative processes will contain these issues.

One of the regulations and foundations of the restorative justice process is the acceptance and confession of the accused of the crime and their readiness to reimburse for the damages and injuries done to the victim. With the offender stepping up, the restorative justice process starts, and other partakers in criminal justice are encouraged to collaborate and help rebuild the affected individual and social environment. In this way, the legislator first takes a privilege from the accused (confession and admission of his unlawful act) and then supplies the basis for cooperation with him.

The consent of the victim is demanded to direct the case to mediation. Because the process of criminal mediation, influenced by the teachings of restorative justice or the victim-centered approach, is spreading and evolving. This consent of the victim can be reached in any way: an apology from the accused, a favorable promise to compensate the damages, etc.

### **2. The stages of mediation in the proceedings**

The steps of the trial include the pre-trial stage (proof of guilt), mid-trial (in the court) and post-trial (execution of sentences).

The pre-trial phase is the stage of prosecution and investigation. Mediation is suitable at this stage for two reasons: 1- Resorting to mediation is not restricted to criminal proceedings and the guarantee of executions, 2- Mediation is in contact with the criminal justice system as much as possible, and there is some judicial supervision over it; This gives the parties a chance to resolve the conflict arising from the offense and removes the need to go to the next stage of criminal proceedings to save time and money in the criminal justice system. Although Mediation at this

<sup>4</sup> Gholami, H. (2003). Criminal Sciences, Collection of Articles in Honor of Professor Dr. Mohammad Ashouri. Tehran: Samat Publications, p.731



stage is superior to the "mid-trial" one, it is not without its flaws the most critical of which in the investigation phase is that the circumstantial evidence of innocence is in conflict.

In the criminal procedure, parallel to the ability to mediate according to Article 82 in the prosecution stage by the prosecutor and the investigator and Article 192 in the investigation stage and before the trial by the investigator, it can be seen from Note 5 of Article 81 regarding the possibility of suspending offenses that go directly to court, and the end of Article 82 that mediation is possible in 7th, 8th and 6th degree offenses.

### **3. Terms for agreeing to the outcome of mediation and seizure or suspension of prosecution**

The cases of administering a moratorium on prosecution are limited to Article 13 of the new Code of Criminal Procedure. In the second paragraph of the article, amnesty by the plaintiff or private plaintiff in forgivable crimes, is subject to the new law in this section. Nevertheless, obtaining amnesty by the plaintiff and the private plaintiff is foreseen in this article under restorative measures, which distinguishes the "process-oriented" nature of amnesty from other "result-oriented" pardons.

### **4. Securing the rights of society in the mediation process**

Ensuring the rights and interests of the society directly in litigation with a restorative approach in comparison with criminal proceedings is a punishable offense. In other words, through the execution of restorative justice programs, particularly criminal mediation, the public rights of the community are better guaranteed and implemented. Because crimes damage the public order, and their public aspect is more investigated than the private ones, society takes it upon itself to prosecute until the order is restored. In the meantime, honorably, by using the capacity of social institutions and non-governmental organizations by participating in dispute resolution, a firm and useful step will be taken for the judiciary in order to save time and money in this regard, and at the same time restore the violated status of the rights of society and individuals.

With the referral of mediation proceedings and the removal of criminal cases from the judicial system, there will be the necessary time for a qualitative review of the most important cases and better criminal cases, so that a more favorable result can be achieved in the criminal justice process. On the other hand, by setting a deadline of 3 months for the mediator and the parties, they are directed to expedite the investigation and use the opportunity, especially for the accused. The extension of this quarter is decided by the representative of the community.

### **Mediation in sharia and governmental punishments**

Examining cases such as repentance and amnesty in cases that are merely a divine right (punishment for adultery, sodomy, moharebeh, etc.), and amnesty by the plaintiff in cases such as qazf (false accusation of adultery) and theft, may lead to the annulment of punishment under certain conditions. These cases cannot be said to be a complete and indisputable illustration of restorative justice, but they can provide the basis for the implementation of restorative justice programs.

In Iranian law, because there is no proper division of crimes in terms of severity, there is no border between severe, ordinary, and minor crimes, opposite to the law of other countries. Crimes fall into limits, retribution, blood money, punishments and deterrent sentences, and forgivable and unforgivable crimes.

The realm of mediation in penal offenses includes grades 8, 7, and 6. That is, depending on the severity of the grade, it includes the three mild degrees of offenses. In total, the offenses include up to two years of criminal imprisonment. In the case of criminal penalties for forgivable and



unforgivable crimes, by separating these two, forgivable ones can generally be referred to mediation at any grade, provided they are private. For instance, premeditated murder, which according to the history of mediation, is among the cases in which disputes are always settled through peace and reconciliation, and with pardon by the plaintiff, the punishment is reduced to a ransom. As a principle, the amnesty of crimes is subject to the stipulation of the legislature, some of which are stated in Article 104 of the Penal Code.

Article 347 of the Islamic Penal Code indicates the expansive powers of the holder of the right to retaliation. With this approach, the legislature has opened the space for the implementation of restorative justice programs at all stages of the proceedings, with special importance and care for the victims. Following articles on the rights of guardians of the deceased (heirs or secondary victims) to retaliation may include many individuals. In this case, different restorative methods such as meetings, circles, and local community restoration circles or boards can be used.

In Iranian legal practice, one of the most important uses of mediation in crimes is subject to retaliation, especially retaliation, as we have seen in the traditional rituals of the chapter, "Khon Bas" and "Peter" - either spontaneously or by referral to the judiciary. The support of social groups for the capacity and potential of this restorative institution has been and will be of great benefit to Iranian society.

#### **Other restorative institutions in the Criminal Procedure Code approved in 2013**

1. Authorities of the judicial authority to rehabilitate criminals in the Criminal Procedure Code  
One of the innovations of the new Code of Judicial Procedure to accomplish the terms of restorative justice is the issuance of a suspension sentence for the prosecution of the accused by the judicial authorities. However, this deal was already not banned by law, according to the law amending some of the justice laws approved in 1977. However, in Article 81 of the new Code of Judicial Procedure, in line with the principle of the possibility or appropriateness of prosecution, an alternative to criminal prosecution, provides the prosecutor as a prosecuting authority so that if he considers the consequences of the criminal process and the conviction of the accused, such as the stigma of guilt, familiarity with the prison environment and the ways of committing the crime, to be more than its benefits for the society, he will suspend the public lawsuit for a while so that if the accused does not commit a crime during this period, he will not be prosecuted for that crime.

One of the embodiments of restorative justice is the issuance of a revocation order, stated in Article 79 of the Criminal Procedure Code (2013). Although the issuance of the order to cancel the prosecution was also predicted in the note of Article 177 of the Code of Civil Procedure of the General and Revolutionary Courts in 1999, it had ambiguities and problems resolved in this newer law, including the fact that the issuance of the order to cancel the prosecution is prescribed only for forgivable crimes. The time limit for issuing a revocation order is a maximum before the issuance of the indictment. The time for the issuance of the order to cancel the prosecution is the maximum before the issuance of the indictment. The issuance of the order to cancel the prosecution is one of the special duties and powers of the prosecutor and the investigator does not have the right to issue a restraining order and must propose it to the prosecutor.



Amnesty by the plaintiff or private plaintiff, as the case may be, leads to the repeal of prosecution or the abolition of the sentence. Thus, the victim can cancel the prosecution before or after the indictment is issued by announcing an amnesty.

The demands of the victim are distinct in each crime, and the temporary cancellation of the prosecution at specific stages without announcing the cancellation helps to reimburse for the damage and prevent the problem from escalating in their personal and social environment.

The challenge of amending the modification of the law is that by issuing a restraining order and following the last part of Article 251 of the Criminal Procedure Code, with the termination in any way, which is to cancel the prosecution is one of the same cases, the prosecutor is obliged to cancel the security and supervision order. It is judicial. If within one year, the accused does not wake up and the plaintiff requests further proceedings, access to the accused will face problems that the legislature will need to take measures in this regard.

About the suspension of the investigation, it should be said that one of the issues that the judiciary is facing is the high volume of criminal cases. In most cases, this takes a lot of time and causes costs due to the lack of identification of the perpetrator. Thus, the legislature has provided for this provision in Article 104 of the new Criminal Procedure Code. Of course, not in all crimes it is possible to stop the investigation after a while just because the perpetrator is not known. It is permissible only in some relatively minor offenses under this article to consider them "fourth, fifth, sixth, seventh, and eighth-degree criminal offenses."

Another embodiment of restorative justice envisioned by the legislature other than criminal security arrangements is judicial oversight deals, which is an innovation that has not been addressed before. It should be noted that this order is meant to punish or individualize punishments, and Article 247 of the Criminal Procedure Code notes that these cases are a kind of supplement to complement the effect of security contracts and prevent recidivism. Judicial supervision orders can be integrated not only with security contracts but also with each other and can be numerous. And all judicial supervision orders can be objected to. If these orders are issued by the investigator, the court competent to hear the objection will be the court stated in Article 271, and if they are issued by the court, the reviewing authority will be the provincial court of appeal.

## **2. Supportive policies to protect the victim and rehabilitate the criminal within the framework of the Criminal Procedure Code of 2013**

Reimbursement to the victim by the offender, sometimes to repair tangible damage, and sometimes the symbolic aspect for the victim is regarded as an essential matter. When the offender tries to recompense for the damage caused by the crime, even if it is partially compensated, he is in fact taking a step showing that he takes responsibility and feels guilt. He, therefore, undertakes reparation to the victim to reimburse the damage caused by his crime.

Criminal procedure is the actualization of the rights of individuals entangled in a criminal case. From the start, the rights and freedoms of individuals must be regarded. For the victim, after the commencement of the victim, support should begin and continue until the end of this process. In the new law, in various ways, parallel to the preliminary protections immediately after the crime, the victim is furthermore protected during the prosecution and investigation of the accused.

The victims are not decision-makers regarding their passive participation in the criminal proceedings, but they can affect decisions. Receiving and providing information to criminal



authorities is included in this category. In forming an appropriate policy and decision-making, counseling is obtained from the victim, but the outcome does not necessarily follow their wishes. The affinity between the victim and the criminal justice system can take the form of providing and receiving information. Criminal authorities embark to receive information from the victim, and in return, the victim undertakes to supply their information. For instance, in settling the punishment, the opinion of the victim and their will must be minded, and the determination of punishment is otherwise unfair and unjust.

In the criminal proceedings, it takes a lengthy process to fulfil the rights of the accused, and this is only a possibility, even after industrious pursuit. But the first condition in the mediation process is the confession and initiative of the accused to reimburse the material and moral damages of the victim. In this way, the victim is mentally rehabilitated and achieves their rights in a fair process without enduring the hardship of proving the act committed against them.

The most significant matter regarding the observance of fair procedures in mediation is the objectivity and independence of the mediator. That is why, in France, judges, lawyers, and legal advisers, bureaucrats, and forensic experts are barred from mediation, and this is largely left to the people.

### **3. The principle of speeding up the investigation to support the victim**

#### **a. Oral indictment**

An oral indictment is a queue-free mechanism for dealing with cases that, for reasons (such as damaging public sentiment), need a public reaction to a crime. Essentially, on the same day that the case is referred to the branch, the defendant is charged and convicted. However, although Article 86 of the Criminal Procedure Code notes that the prosecutor files a criminal lawsuit "without an oral indictment," it does mean that the lawsuit is filed "without a written indictment," not that there is no indictment at all. Because of the verbal claim of the prosecutor or his representative in court (paragraph "a" of Article 359), the indictment is oral. So the indictment is not completely "oral and unwritten," and the trial proposal and the indictment are written down to be recorded in the case file. Finally, it is done without writing in the special indictment form.

#### **B: Proceedings without an indictment**

In some cases, the court is mandated to attend (whether written or oral) without an indictment. In these cases, sometimes the investigation is not done in the prosecutor's office at all, and the court performs an investigation and (a), whereas sometimes, after a preliminary study in the prosecutor's office, the case is transmitted to the court without an indictment (b).

The investigation without investigation in the prosecutor's office includes the cases studied while discussing the preliminary study in the first volume of the present book, under the title "Cases of non-investigation in the prosecutor's office." These cases, assuming the existence of a prosecutor in the jurisdiction, are crimes of individuals under the age of fifteen (Note 1 of Article 285), crimes against chastity (Article 306), and seven and eight-degree crimes (Article 340), known as cases of direct filing of a court case. Considering that there is no prosecutor's office in that place, these cases are the event of a crime in the jurisdiction of the district (Article 336).

### **4. Participation of non-governmental organizations in the criminal proceedings**

following victim-centered thinking, the Iranian legislature in 1992 passed Article 66 of the Criminal Procedure Code. This article defines:



"NGOs whose statutes are based on protecting children and adolescents, women, the sick and physically or mentally disabled, the environment, natural resources, cultural heritage, public health, and the protection of civil rights can plead guilty to the offenses committed in the above areas and participate in all phases of the proceedings."

Before the enactment of the new Code of Criminal Procedure (adopted in 1992), the possibility of declaring a crime by law enforcement agencies was dubious. On the other hand, Article 66 of the Code of Judicial Procedure of General and Revolutionary Courts in Criminal Matters, enacted in 1978, by declaring the necessity of observing a crime on the part of the declarant, specifically considered natural individuals. On the other hand, if Article 67 of the same law was associated with the opposite meaning, the reports and letters whose identities of the reporters and their authors are known could be used as a basis for initiating prosecution. It seems that according to the second part of paragraph d of Article 3 of the Law on the Establishment of Public and Revolutionary Courts, which considered the declaration of a crime to the investigator as a legal reason to start an investigation without any conditions, the mere declaration of a crime by a non-governmental organization, in unforgivable crimes, could be considered sufficient to initiate prosecution.

### **Conclusion**

Considering that a lot of human and financial resources are spent on imprisoning people and also the conditions prevailing in the prison have made the process of rehabilitation and reform of prisoners difficult and as a result compensating the victims,

Given the scope of the authorities in suspending punishment, applying alternatives to imprisonment, parole, semi-liberty and deferral of sentencing, there are good grounds for rehabilitating offenders to provide at least indirect conditions for reparation. Repentance, which is known as one of the factors that eliminate punishment, is not achieved in the case of crimes that are in some way related to the violation of the rights of others, except by compensating the material or moral damages inflicted on the victim. And this can be a good way for criminals to try to compensate the victim.

In the case of modification and lessening of punishment, the victim has an active and emphasized role because amnesty is a condition for implementing this deal, and the legislator has considered the terms and interests of the victim. To the extent that Article 38 of the Islamic Penal Code considers the defendant's endeavor to mitigate the consequences of the crime to mitigate or change the punishment. Based on this, traces of the principles and programs of restorative justice can be observed in this section. Because with the active and energetic presence of a facilitator and the implementation of a restorative process such as criminal mediation between the victim and the offender or family group meetings, etc., it is possible to restore the harm done to the victim on the one hand and hold the offender accountable on the other hand and acquire the victim's consent.

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