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The role of penal mediation In achieving restorative justice

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Abstract:

Despite all the efforts made by the state as it has the right to impose punishment and fight crime, the phenomenon of crime is constantly increasing, in addition to the increase and accumulation of cases related to it before the penal judicial authorities, which has led to the emergence of a stifling crisis known as "the criminal justice crisis" due to excessive asylum to criminalization and focus on punitive policy, which called for searching for alternatives to public action as a means of rationalizing criminal policy and moving towards a new concept of justice from punitive deterrent justice to consensual restorative justice to resolve disputes.

Perhaps penal mediation is the alternative that responds to these requirements, as it is considered one of the new mechanisms for resolving penal disputes, which was approved by the Algerian legislator under Ordinance 15-02 amending and supplementing the Code of Penal Procedure as a legal system in response to the need to adopt a contemporary criminal policy based on reconciliation between members of society and promoting social peace.

Accordingly, the problem posed in this research is as follows: How did the legislator organize the mediation system in penal matters? How effective is this mechanism in achieving restorative justice?

Keywords: Penal mediation, public action, punitive justice, restorative justice, social peace.

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INTRODUCTION

Crime is an ancient social phenomenon that has evolved and taken various forms. Given the seriousness of this phenomenon and its impact on the behavior of society, various countries have confronted it, adopting a criminal policy based on criminalization and punishment. However, this policy has produced an unlimited number of deviant behaviors that have become the subject of Criminalization by legal texts.

However, the practical reality has proven that the excessive use of punitive weapons has led to the emergence of what is called "punitive inflation," which has had a negative impact on the effectiveness of criminal justice, and has created great pressure on the corridors of the courts in a way that has made them unable to take stock of the various accumulated cases presented before them, and Able to achieve effective and quick justice, all of this as a result of the slow pace of litigation procedures and the significant increase in the number of cases, most of which are simple and low-risk.

In the face of this situation, many countries hastened to reconsider their criminal policy and the method of combating crime and sought to find means and solutions to alleviate the criminal justice crisis, by developing legal mechanisms that are more flexible and more rapid to resolve minor disputes at the lowest cost and in the shortest time. These legal mechanisms adopts a policy of reducing criminalization and punishment, it's first priority is to facilitate penal procedures and an alternative to traditional penal prosecution.

Perhaps penal mediation is the alternative that responds to these requirements, as it is considered one of the most prominent applications of restorative consensual justice, which adopted the restorative method as a way to resolve penal disputes after the failure of traditional penal justice mechanisms to contain the criminal phenomenon and put an end to it.

All of this led the Algerian legislator to adopt this mechanism, believing in its effectiveness in reducing the burden

on the penal judiciary on the one hand, and ensuring fair rulings for litigants on the other hand, in order to enhance social peace.

Hence, the problem posed in this research paper is as follows:

How did the Algerian legislator organize the mediation system in penal matters? How effective is this mechanism in achieving restorative justice?

To address this problem, we decided to divide this research paper into two axes

The first axis: the penal mediation system as an alternative to public action.

The second axis: The procedural framework for penal mediation.

The first axis: the penal mediation system as an alternative to public action

Penal mediation is an amicable settlement system and an alternative to a public action. It is based on mutual consent and aims to spare the suspect from the penal trial records. It is a means of ending the public action at the lowest costs and in the quickest time. How did the legislation define it and what are its characteristics and scope?

First: its definition

Penal mediation is a special reason for the termination of a public action. It was introduced in Algerian legislation in the year 2015 by Child Protection Law No. 15-12[1] of June 15, 2015, then the law issued by Ordinance No. 15-02[2] of July 23, 2015 amending and supplementing the Code of Penal Procedure.

If the latter did not know about mediation, the Child Protection Law has defined it in Article 2 of it as a legal mechanism aimed at concluding an agreement between the child who committed the misdemeanor and his legal representative on the one hand and the victim or his rights holders on the other hand. It aims to end prosecutions, make amends for the harm suffered by the victim, put an end to the effects of the crime, and contribute to the integration of the child.

Therefore, mediation is an alternative method approved by the law for public action by not submitting the matter to the competent judicial authority, so the mediation party, represented by the Public Prosecutor, on his own initiative or at the request of one of the two parties to the case, conducts mediation between them within the framework of what the law decides without submitting it to the competent court in mitigation on the penal justice system[3].

Penal mediation, according to legal terminology, is the procedural means prescribed for resolving disputes of a penal nature on the basis of negotiation between the perpetrator and the victim about the effects resulting from the occurrence of the crime under the supervision of the Public Prosecution or its delegate. Its success entails compensating the damage, repairing the effects of the crime, and rehabilitating the perpetrator in such a way that there is no need to continue the action[4].

Second: Conditions for resorting to penal mediation

The Algerian legislator specified the penal mediation system with a set of conditions, which are as follows:

1- Objective conditions for conducting mediation

A- The parties acceptance of penal mediation:

Before resorting to mediation, the Public Prosecution must obtain the approval of the parties to the dispute as it is a fundamental condition for proceeding with the process. In the event that one of the parties refuses mediation and chooses to resort to the judiciary to resolve the dispute, it is impossible to carry out the mediation process and continue, as it is a procedure that only takes place with the approval of the parties[5], and this is confirmed by Article 37 bis 01, paragraph 01 of the Code of Penal Procedure.

B- Mediation must take place before penal prosecution

The Algerian legislator stipulated that mediation be conducted before penal prosecution. If the Public Prosecution has initiated penal prosecution, it is prohibited from referring the case to mediation. Accordingly, the Public Prosecutor may, before any penal prosecution, decide, on his own initiative or at

the request of the victim or the complained of, to conduct mediation when it would put an end to the breach resulting from the crime or compensate for the damage resulting from it.

The same applies to mediation for minors, as the first paragraph of Article 110 of Law No. 15-12 relating to child protection stipulates that mediation may be conducted at any time from the date the child commits the violation or misdemeanor and before filing a public action.

Accordingly, mediation as a procedure must take place in the period between the commission of the crime and the completion of preliminary research into it, but always before initiating a public action, and therefore it is not possible to resort to mediation or initiate a public action by the investigating judge or juvenile judge[6].

C. Applying mediation to certain crimes

The Algerian legislator explicitly specified the crimes subject to penal mediation and singled out some of the misdemeanors included as an exclusive, in accordance with Article 37 bis 02 of the Code of Penal Procedure and all offenses without discrimination.

Mediation can also be applied in misdemeanor cases to crimes of insult, slander, assault on private life, threats, false slander, leaving the family, intentionally refraining from providing alimony, not handing over a child, and fraudulently seizing inheritance funds before dividing them, or common objects or company funds, and issuing a check. Without a balance, sabotage or intentional destruction of other people's property, misdemeanors of battery, unintentional and intentional wounds committed without premeditation or the use of weapons, crimes of trespassing on real property and agricultural crops, grazing on the property of others, consuming food or drinks, or benefiting from other services by deception. It may also be possible to Mediation is applied in violations[7].

As for Law No. 15-12 related to child protection, the legislator did not limit the crimes subject to mediation, but rather extended it to include all misdemeanors committed by the juvenile without exception.

Hence, we find that the legislator has excluded felonies from the scope of mediation in both the Code of Penal Procedure and Law No. 15-12 related to child protection, as it restricted the scope of mediation to include only minor crimes that do not affect public Order[8].

D- The suitability of the Public Prosecution to conduct mediation:

The Public Prosecution is considered to have the jurisdiction to file a lawsuit, this is within the framework of the appropriate authority granted to it by law, so that the Public Prosecutor may, under Article 37 bis of the Code of Penal Procedure, proceed with the mediation process between the victim and the complained of if it appears to him that this will lead to achieving the purposes for which it was initiated. Accordingly, the matter is permissible for the public prosecutor and not obligatory, as it is considered the only body to which the legislator has granted the authority to accept or refuse to resort to mediation. Therefore, the parties may not resort to mediation without the approval of the public prosecutor, and the parties may not force the prosecution to accept mediation[9].

As for mediation related to juvenile offenders, we find that the legislator has also made resorting to it the jurisdiction of the Public Prosecutor in accordance with the text of Article 110 of the Child Protection Law. Accordingly, the Public Prosecutor has absolute authority to decide to resort to mediation, through his appreciation of the possibility of resolving the penal dispute amicably through Mediation[10].

2- Formal conditions for conducting mediation.

A- Validity of consent:

Penal mediation is based on the principle of freedom of will, meaning that individuals have the right to resort to this mechanism, since penal mediation is a system based on consent,

as the consent of the complained of and the victim to mediation is not imposed by the Public Prosecution, but rather comes from the will of the parties in their desire to resolve the conflict away from Complexities of judicial procedures.

Rather, there must be free and frank consent, free from anything that would impair its validity, such as coercion or error. The Public Prosecution must also not exert pressure on the victim to accept mediation in order to free himself from the task and burden of the investigation[11].

B- Procedural capacity:

It is legally established that for mediation to be valid, the disputing parties must have the necessary procedural capacity to resolve the dispute.

- It is the authority of each party to the conflict to initiate penal procedures in general and agree to mediation.

Procedural capacity in the Algerian penal law is determined according to whom the person is. The person is considered to have full capacity if he is 18 years old. It is necessary, when resorting to the mediation procedure, that the complained of be of legal age and possess mental health that enables him to use his right to defend himself.

C- Writing:

It is intended to express the mediation agreement in a specific form, and this is based on the text of Article 37 bis, paragraph 02, which emphasized the necessity of mediation to be carried out by a written agreement, not an oral one, between the victim and the complained of, provided that this agreement is recorded in a report that includes the identity of the parties and the address of the parties, and also includes reparation for the damages resulting from the act. The criminal investigation required it to be signed by the Public Prosecutor, the Court Clerk, and the parties, and this is what was stipulated in Article 37 bis 03 of the Code of Penal Procedure[12].

Third: Distinguishing penal mediation from some similar concepts

The penal mediation system is similar to some legal systems that rely on consent between its parties. We will mention some of them:

1- Penal mediation and penal reconciliation:

Penal mediation and penal reconciliation are two aspects of consensual penal justice, given the great similarity between them. They are considered alternative methods for resolving penal disputes arising from crimes of moderate severity, while repairing the damage resulting from the crime and imposing measures on the complained of to rehabilitate him[13]. However, they differ in that reconciliation may be concluded at whatever stage the public action is, while the law requires the validity of the penal mediation procedure to take place at the stage preceding the initiation of the penal lawsuit in accordance with the text of Article 37 bis of the Algerian Code of Penal Procedure.

Penal mediation is also characterized by the fact that it is carried out through a third person called the mediator, while penal reconciliation takes place directly between the offender and the victim.

Penal mediation also differs from reconciliation in terms of their application conditions. Mediation requires the complained of commitment to compensate the victim for the harm he suffered, in addition to its contribution to rehabilitating the complained of and reintegrating him into society, with the necessity of implementing this agreement and achieving the desired goal, while penal reconciliation did not benefit the legislator. Under any condition, it is sufficient to submit to the Public Prosecution or the court evidence of the agreement of the offender and the victim, and it is not required to implement it in order for it to produce its effects[14].

2- Penal mediation and conciliation:

Penal mediation is compatible with conciliation in that they are alternatives to public litigation and the reasons for both

are the principle of consent, which requires the parties to agree to it. However, they differ in that mediation is resorted to before any follow-up by the Public Prosecution. Unlike conciliation, which takes place at whatever stage the case is as long as no judgment has been issued.

Conciliation also takes place. There is a bilateral relationship between the administration and the violator, while penal mediation has a tripartite relationship. They also differ in terms of compensation, as conciliation involves paying a legally specified amount of money (a conciliation fine), while mediation obligates the complained of to provide compensation to the victim or perform work for the public interest. In addition, conciliation is at the initiative of the violator and the administration has the right to reject or accept that, while mediation takes place at the initiative of the Public Prosecution, the complained of, or the victim[15].

3- Penal mediation and penal order:

A penal order is one of the follow-up procedures taken by the prosecution in accordance with its procedural suitability when notifying the court of the case. It is an ordinance imposing a fine. It is a procedural system intended to issue a judicial decision imposing a simple penalty whenever this is linked to a simple crime of little importance without oral pleading and following brief procedures in order to alleviate the burden on the entire judiciary, unlike penal mediation, which is an alternative to public action.

They are similar in that they are two measures aimed at simplifying procedures to reduce the burden on the judiciary[16].

4- Penal mediation and arbitration:

Mediation is similar to arbitration in that they are two methods approved by the legislator to resolve disputes between adversarial parties and are considered alternative methods. Both mediation and arbitration are based on a binding agreement for both parties.

While arbitration differs from mediation in the appointment of the third party, in arbitration one or more arbitrators are appointed by the parties, whether the dispute is existing or likely to occur. In mediation, the parties are free to accept mediation only, and the role of the mediator is played by the representative of the Public Prosecution.

In addition, the mediator's authority does not go beyond bringing the points of view between the parties, while the arbitrator issues a ruling that is binding on the parties, in addition, the mediation minutes is considered an enforceable title and is not subject to any type of appeal, while the arbitral award can be challenged by appeal and cassation[17].

The second axis: The procedural framework for penal mediation

Delving into mediation procedures requires research into the stages of penal mediation and the effects of penal mediation on the public lawsuit.

First: Penal mediation procedures

The introduction of the penal mediation system requires respect for certain procedures.

I- Stages of penal mediation

Penal mediation goes through several stages, starting with contacting the parties until executing the penal mediation agreement.

A- The preliminary stage of penal mediation or what is called the mediation proposal stage:

At this stage, penal mediation is proposed, and the Public Prosecutor is responsible for it, as he is the party with the opinion to refer the case to mediation, whether on his own initiative or at the request of one of the parties or their lawyer, provided that he carries out this procedure before any penal follow-up, based on the text of Article 37 bis, paragraph 3 of the penal procedures law.

It is noted that resorting to penal mediation has been made permissible by the legislator, and this is what is understood from the phrase “the public prosecutor may” in the sense that it is not

an obligatory procedure, but rather subject to the suitability enjoyed by the public prosecutor[18].

B: The stage of contacting both parties to the conflict

Here the mediator must, If the initiative comes from the public prosecution, contact the parties to inform them of the penal mediation procedure, or notifying the other party if the initiative is from one of the parties of the penal dispute and obtaining their acceptance to conduct it. For reference, the legislator has overlooked the method of summoning the parties to offer them mediation, which may be by mail or by judicial bailiff. Also, the period specified for the Public Prosecutor to contact the two parties to the dispute, in addition to the period given to the parties to express their acceptance or rejection of the mediation[19]. After the Public Prosecutor issues the decision to conduct mediation, he summons the victim and the complained of to his office, where he reminds them of the facts and legal texts applicable to them. Then he proposes to them to conduct mediation in order to reach a solution to the dispute and informs them of their right to seek the assistance of a lawyer. If they accept, an agreement is drawn up stating their acceptance to conduct mediation in written form[20]; this is what was stipulated in Article 37 bis, paragraph 02.

C- The negotiation phase:

After the agreement to accept the mediation procedure is drawn up, the mediator summons the two parties for a date he specifies, so that the negotiation stage begins, and he attempts to bring the points of view between the two disputing parties closer together to reach an amicable solution between them. The negotiations end either by reaching an agreement that is presented for implementation within a specific period, or with failure, knowing that the legislator did not restrict the negotiation sessions to a specific period, and therefore the discretion rests with the Public Prosecutor, depending on the circumstances of the dispute. A settlement of the dispute may be reached in one session, and the matter may take several sessions[21].

D- Agreement and execution phase:

In the event that the victim and the complained of reach an amicable resolution of the dispute under the auspices and supervision of the Public Prosecution, the Public Prosecutor must record the mediation agreement in a minutes that includes the identity and address of the parties, a brief presentation of the actions and the place of their occurrence, the content of the mediation agreement and the deadlines for its execution[22] and this is in accordance with what is stipulated in Article 37 bis. 03 paragraph 01.

After the Public Prosecutor reads the minutes of the agreement to the parties and they do not object, it shall be signed by the Public Prosecutor, the Court Clerk, and the parties, and a copy thereof shall be delivered to each party.

The mediation agreement also includes restoring the situation to what it was, meaning that the complained of, for example, in the crime of not surrendering the child, handing it over to the person who has custody. The complained of may also return the property of the land or common property that he fraudulently seized, or pay the amount of the cheque to the victim in the misdemeanor of issuing a non sufficient funds cheque.

As well as financial or in-kind compensation, this means that the complained of, for example, in a misdemeanor of destruction or intentional sabotage of someone else's property, has the choice of paying this victim an agreed-upon sum of money in exchange for the vandalized property, or providing compensation in kind by repairing the damage to the victim's property[23].

Second: The effects of penal mediation

The effects of the penal mediation vary depending on the outcome, success or failure of the mediation.

1- Legal implications of the mediation agreement

A mediation agreement as an alternative to a public action results in a set of legal effects that can be summarized as follows:

A- Executive force for mediation:

The minutes of the mediation agreement are an enforceable title according to the text of Article 37 bis 06 of the Code of Penal Procedure, just like the enforceable titles of the Code of Civil and Administrative Procedure.

B- It is not permissible to appeal the mediation agreement:

- It is not permissible to appeal the minutes of the mediation agreement by any means of appeal, as it is an administrative act, not a judicial act, and this is confirmed by Article 37 bis 05 of the Algerian Code of Penal Procedure.

C- Suspending the statute of limitations for the public action:

The minutes of the mediation agreement stop the statute of limitations on the Public Prosecution's right to file a public action, within the deadlines specified for implementing the mediation agreement. When the parties resort to mediation to resolve the penal litigation, whether at the initiative of the Public Prosecution or at the request of the parties, this has a direct effect, which is stopping the statute of limitations on the public action. The statute of limitations for a public action means that it has expired over a period of time without any action being taken in its regard.

As for stopping the statute of limitations, it means the occurrence of an impediment that prevents it from running, so it depends on the running of the statute of limitations until this impediment is removed and it is restored.

- Article 110 also stipulates in its last paragraph of the Child Protection Law that resorting to mediation suspends the statute of limitations for public action starting from the date the Public Prosecutor issues the decision to conduct mediation[24].

- So, from what was mentioned above, we conclude that the time period specified for implementing what was agreed upon by the two parties and specified in the mediation agreement stops the statute of limitations for public action, and this applies to crimes committed by adults.

- As for crimes committed by delinquent children, the legislator expanded the time frame for the statute of limitations on public action by making all mediation procedures, starting from the Public Prosecutor's issuance of the decision to conduct the mediation, a statute of limitations for public action[25].

2- Implications of none-execution of the mediation agreement:

The failure of mediation by not reaching an agreement that satisfies both parties to the penal litigation or by the perpetrator of the criminal act not implementing the obligations imposed on him under the mediation agreement entails initiating a public action against the perpetrator of the criminal act.

A- Institution of public proceeding:

If the parties do not accept the principle of mediation in the first place, or do not reach an agreement, the Public Prosecution regains its authority to carry out its function and dispose of the public action. Likewise, in the case of deliberate refusal to implement the mediation agreement, it results in deciding the case through traditional penal procedures, through the Public Prosecutor filing the public proceedings against the accused according to what it deems appropriate in accordance with the text of Article 37 bis 8 of the Code of Penal Procedure.

B- Penal responsibility

The non execution of the mediation agreement does not only result in filing a public action, but also creates penal responsibility for the person who intentionally refrains from implementing the agreement within the deadlines specified for that, and this is what is deduced from the text of Article 37 bis 09 of the Code of Penal Procedure.

- What must be noted is that the legislator used the phrase "deliberately," which means that in the case where he does not implement the agreement for reasons beyond his control, penal responsibility does not arise.

In general, when it is confirmed that there is a case of willful abstention from implementing the penal mediation agreement, penal responsibility arises, and the violating[26] person

is exposed to the penalties stipulated in Article 147, Paragraph 02 of the Penal Code, which stipulates that instantaneous acts expose their perpetrator to the penalties stipulated in Paragraphs 01 and 03 of Article 144. Actions and sayings whose purpose is to belittle the importance of judicial judgement and whose nature is to undermine the authority or independence of the judiciary.

Third: The advantages of penal mediation and the problems of its application

1- Advantages:

The reality has proven that mediation has contributed to the good administration of penal justice, as it has reduced the number of files at the court level and helped simplify and facilitate procedures. It is a new mechanism for addressing the penal justice crisis in accordance with a new vision of contemporary penal policy aiming to involve opponents in managing the case in the field of simple crimes that lack importance. One of the forms of consensual justice based on reform and compensation is reforming the offender and repairing the damage resulting from the crime, and thus it is an alternative to the idea of applying punishment, one of the most effective forms of quick justice.

It gives the complained of an opportunity to correct his mistake in an educational manner without there being any consequences.

It contributes greatly to consolidating relations in society, as it is a promising, more humane and fairer justice, as it seeks to achieve three basic goals: the first is social reintegration of the offender, the second is reparation and repair of the victim's damages, and the third is establishing and strengthening social peace through preventive programs against the phenomenon of crime.

As well as the human dimension that it achieves, so that even after the end of the penal litigation, dialogue can continue between the victim and the perpetrator in an effort to alleviate the suffering resulting from the criminal act. The best example is

the case of the Chenu couple in France, where their dialogue with the killer of their son continued, which resulted in the killer revealing that he had abandoned the neo-Nazi organization that he had been a member and this made them feel comfortable, as if he had given them their son back[27].

2- Problems of penal mediation:

Every new action produces positive and negative aspects.

A- Problems related to the mediator:

The legislator placed the responsibility of the Public Prosecutor with the task of conducting mediation, and this raises a real problem represented by the confidence of the complained of in mediation supervised and facilitated by the person demanding that punishment be imposed on him. Therefore, it is advisable to assign this task to other persons appointed for this purpose.

B- Problem specific to the mediation object:

The Algerian legislator has specified the misdemeanors that can be submitted to mediation, in contrast to the comparative legislation that left the field open to the public prosecutor. Is the Algerian legislator actually convinced that only the misdemeanors specified in Article 37, Code 02, only, are permissible for mediation, or is the matter an issue of time since the mediation is a modern mechanism that requires more time and on a large scale[28].

CONCLUSION:

Finally, it can be said that the Algerian legislator was late in embodying the idea of consensual and restorative justice, even though it is not strange to Algerian society, which knows it through the provisions of Islamic law that encourage reconciliation, and also knows it through the prevailing customs in some regions as a method, to resolve some disputes through what is called "DJEMAA".

However, we say that the legislator did well by introducing penal mediation as a means to put an end to penal prosecutions, by creating a compromise between the victim and the complained of that satisfies both parties.

Penal mediation is an effective legal mechanism to confront the large number of simple and non-serious cases and contribute to reducing the burden on the judiciary, which contributes to improving the image of penal justice, in addition to keeping pace with the development witnessed by penal policy from the punitive concept to consensual restorative justice.

It also works to develop the spirit of reconciliation between the parties, by ensuring on one hand, that the victim receives appropriate compensation to erase the traces of the crime, and on the other hand, it rehabilitates the complained of and reintegrates him into society away from the spirit of revenge and hatred.

Its most important characteristic remains the rapid resolution of cases and the lowest costs, in addition to maintaining friendly social relations between the disputing parties in order to enhance the stability of social peace and reduce grudges between individuals.

Given the importance of penal mediation as an alternative to resolving penal litigations, we present some suggestions to enrich this system:

1- The necessity of assigning the task of mediator to someone other than the Public Prosecutor and benefiting from the French experience that it assigned it to people not affiliated with the justice system, especially since Algerian law allows the Public Prosecutor, in the event that mediation is not successful, to filing a public action.

- Here, the task of mediation is assigned to persons not affiliated with the judiciary. The conditions and methods for their selection are determined, provided that each chosen mediator is subject to an administrative investigation conducted by the Public Prosecutor, as is the case for judicial assistants.

2- The mediator also undergoes training in specialized centers to ensure the success of the mediation process.

3- Sensitizing public opinion about the importance of alternative means of resolving penal litigations and the importance of restorative justice in achieving social peace.

4- Working to expand the scope of application of restorative justice to include a greater number of misdemeanors as is the case with violations.

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