

THE ROLE OF MEDIATION IN RESOLVING CRIMINAL DISPUTES

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ABSTRACT: *Relying on alternative means for resolving conflicts has become an urgent necessity in our time to keep pace with the social, economic, political, cultural and technological changes that the contemporary world knows. As the judiciary, as the competent authority to adjudicate conflicts and disputes, is no longer able to address the huge number of issues before it. Hence the idea of alternative means to resolve disputes, which received special attention from various legislations, as public policy was becoming tend towards consensual solutions or restorative justice in many issues and areas as a reliable strategic option in resolving disputes. And criminal mediation is one of the newly developed methods resulted by contemporary criminal policy to contribute to treating the massive and continuous increase in the number of cases before criminal courts, and a reliable strategic option in resolving disputes of a simple nature that do not pose a threat to public order.*

KEYWORDS: mediation, resolving disputes, legislations, criminal policy, crime.

INTRODUCTION

To understand the idea of criminal mediation well, it is necessary to provide an overview of its applications in some of the leading and distinguished legal experiences, which differ according to the prevailing legal culture. As mediation origins traced back to the laws of Anglo-Saxon countries, especially the United States of America, England and Canada, this important mechanism for settling criminal disputes found a considerable resonance at the level of European legislation at the end of the last century. Therefore, the research problem arises about the role of criminal mediation in addressing the criminal justice crisis, and what is the legislative model that can be relied upon in legalizing criminal mediation. On this basis, we will try to identify the importance of criminal mediation in some comparative laws by evaluating them, in order to determine its effectiveness and the advantages that it came to achieve them.

Legal Experience Forms for Criminal Mediation

The comparative legal experiences of criminal mediation are numerous and the models are many, varying from the Anglo-Saxon to the Latin systems, so we cannot deal with all the experiences but only the leading and important ones. Thus, we will discuss the Anglo-Saxon experience of criminal mediation (first paragraph), as well as the Latin experience (second paragraph).

The Anglo-Saxon Experience of Criminal Mediation

Certainly, the emergence of contemporary criminal mediation was in the Anglo-Saxon laws¹, it began in Canada in 1974, in the context of the raising voices demanding the rights of victims in 1970², As for the United States of America, some consider that its first experiences date back to the late sixties in Ohio state, therefore we will try, through this paragraph, to address in detail the Canadian experience, and the American experience in particular, as models for the application of criminal mediation in the Anglo-Saxon system as follows:

- Criminal mediation in Canada

Canada ranks first among the countries that moved towards applying the non-traditional criminal systems in resolving disputes, but it is considered one of the first countries that moved towards implementing the new criminal policy that adopt the trend of caring the rights of the victim and ensure protecting them³, by creating new means for managing criminal disputes capable of re-establishing the social relationship, based on the offender's compensating for the damages inflicted the victim as a result of the committed crime, and rehabilitating the offender and integrating him into the fabric of the social entity as a tool to create a new social relationship that helps in achieving social cohesion⁴.

In 1975, one of the cities of "Ontario" in Canada witnessed the first experience of the criminal mediation system based on negotiation and agreement between the offender and the victim through a central committee consisted of representatives of the Department of Probation and Pardon, based on a proposal from one of probation officers (the police). This mediation experience based on the idea that disputes are an inseparable part of life.

Thus, it cannot be avoided as long as life exists, therefore, mediation efforts should lead to bringing together the offender and the victim in order to reconcile them along with referring the matter to its origin, with the knowledge of a third party who has an experience, an impartiality and an independence that enables him to manage negotiation successfully to find a solution satisfies the conflict parties and resolves the dispute away from the traditional methods of going to courts⁵. The criterion on which it is based in determining the scope of crimes to be dealt with through criminal mediation is concentrated in three elements⁶:

¹ Ashraf Ramadan Abdel Hamid: Mediation and its Role in Ending the Public Prosecution, first edition, Dar Abu Al-Majd for printing, Al-Haram, 2004, p. 110.

² Sherif Sayed Kamel, The Right to Speed of Criminal Procedures, A Comparative Study, Dar Al-Nahda Al-Arabiya, Cairo, 2005, p. 158.

³ Ashraf Ramadan Abdel Hamid, *ibid*, p 112.

⁴ BONAFA.SCHmitt, (j.p), Op.Cit, p 20.

⁵ Muhammad Nabil Al-Siddiq: "Reconciliation through mediation and alternative punishments are a pillar of human rights", Journal of the Judiciary and Legislation, Tunis, No. 1, 2010.

⁶ For more details about the subject, see: Studies submitted to the Fifth United Nations Conference on Crime Prevention on Agenda Topics, which was held in Geneva in September 1975, The Arab Journal of Social Defense, No. 6, 1977, p. 68 and thereafter, referred to it Ashraf Ramadan Abdel Hamid, previous reference, p. 113.

1. The crime should not reach a degree of seriousness that would push the members of society to demand the necessity of prosecuting the perpetrator.
 2. That the alternative means (mediation) be so effective that it helps prevent further deviations.
 3. The existence of a relationship between the offender and the victim and to agree to settle the dispute amicably and through dialogue and exchange of views.
- It remains to point out that most of the cases referred to criminal mediation in Canada are confined to minor crimes such as thefts of minor importance, intentional damage, infringement or forgery⁷.

- Criminal mediation in USA

The United States of America has adopted the system of settling criminal disputes through peaceful means away from traditional procedures⁸, where criminal mediation comes in two forms:

The first form: They are educational programs at the local level, with the support of local governments, carried out by help crime victims' associations, in order to restore the rights of the victim that were violated by the crime, and to help him get out of the crisis that befell him as a result of it. This form takes an informal dimension if no legislation is issued to regulate it, and mediation procedures take place before referring the case to the court in order to stop the procedures before the stage of accusation and conviction, and the scope of disputes that are resolved in this way is determined by special cases in which the victim's status is mixed with that of the perpetrator, and the most important of these cases are cases of abuse in the family environment, such as the husband's assault on his wife and the crimes of fraud and forgery⁹.

The experience of San Francisco is the most prominent example of informal criminal mediation, as it is carried out by the local project committee, which is composed of a group of all-volunteer members, which seeks to resolve the dispute amicably away from the normal procedures for resolving criminal disputes¹⁰, as for the second form, it is the official mediation form established by law, in which the conciliation judge (the investigative judge) plays the role of mediator when the case is considered for the first time.

The justice of the peace in the American criminal system practices dual jurisdiction, as he is an investigative judge in serious felonies and misdemeanors, and he is a judge who decides on minor crimes. After the police complete the preliminary investigations, they refer the case's documents to the Public Prosecution, which in turn refers them to the judge of the peace, whatever the type of crime (misdemeanors, felonies, infractions), it must pass this preliminary stage, at this stage,

⁷ Muhammad Hakim Hussein al-Hakim, *The General Theory of Conciliation and its Applications in Criminal Matters, a comparative study*, Dar al-Nahda al-Arabiya, Cairo, 2006, p. 153.

⁸ The mediation committees succeeded in solving 52 out of 54 cases referred to them from 1975 to 1976. The Association of Prisoners and the Committees together evaluated a complete guide to criminal mediation with 32 programs, and these programs' number became 47 in 1986, and 86 programs in 1989.

⁹ Osama Hassanein Obeid: *Conciliation in the Criminal Procedures Law: What it is and the associated systems*, Dar Al-Nahda Al-Arabiya, Cairo, 2005, p. 179.

¹⁰ Ashraf Ramadan Abdel Hamid, *ibid*, p 108.

the judge of the peace may in minor crimes (misdemeanors, infractions) that do not affect public order, such as crimes of simple theft and mutual violence between neighbors..., Before proceeding with the normal procedures for adjudication, he plays the role of mediator between the offender and the victim. In this case, the judge of the peace can, after the offender acknowledge his responsibility for the act and pledge to repair the damage caused by his crime to the victim, ends the dispute by reconciliation and has the power to rule on the offender despite his pledge to compensate of the victim or referring the matter to its origin, by imposing a penalty depriving freedom, or the imposition of a precautionary measure against the offender¹¹.

The criminal mediation system in the United States of America achieves many benefits, which can be performed as follows¹²:

1. It helps in expediting the settlement of disputes, and allows the judge to identify the secrets of difficult cases in which the element of incrimination and conviction is different.
2. It helps the judge to identify the dimensions of the conflict and the personality of the perpetrator by listening to the parties, exchanging opinions with them, discussing and negotiating about presumed solutions.
3. It contributes to the offender repairing the damage he has inflicted on him by avoiding the length and complexity of the procedures, the loss of time and money, and all the disadvantages arising from reviewing the normal methods of resolving criminal disputes.

The Latin Experience of Criminal Mediation

After the emergence and the spreading of criminal mediation in the Anglo-Saxon countries, it then moved to the European continent, where France, Belgium, Italy, Portugal and others adopt it.

Given the large number of Latin experiences of criminal mediation, we will content ourselves with addressing the most important of them, which are the French and Belgian model.

- French experience in criminal mediation

We will discuss the French experience in criminal mediation in general and briefly, focusing on the main stages that this important experiment went through.

- The stage of pre-legalization of criminal mediation.

Criminal mediation in the French experience appeared on the level of practice before it appeared obviously and clearly at the level of the legal text, where the Public Prosecution Office in France played a major role in the emergence of criminal mediation in the mid-eighteenth decade of the nineteenth century, when the Public Prosecution Service called for the establishment of an association that seeks to address the criminal mediation process, which is the Association for Victims Assistance and Judicial Oversight, which was followed by a group of other associations, such as the Association for Assisting Victims with Information, the Association for Assisting Victims of Crime and other associations¹³.

¹¹ Ibid, p. 110.

¹² Muhammad Hakim Hussein al-Hakim, The General Theory of Peace and its Applications in Criminal Matters, op. reference, 169.

¹³ Ibrahim Al-Asri, Restorative justice, justifications for its emergence and prospects in Morocco, criminal mediation as a model, Al-Quds Moroccan Journal, for Legal and Judicial Studies, No. 2, 2015, p. 23.

Indeed, associations in France had an important role in the emergence and spread of criminal mediation, the most important of which are: the associations of victim assistance and judicial oversight¹⁴, the Association “Aggressive Conflict”¹⁵, in Paris, and the Association “Conciliation”¹⁶, in Strasbourg¹⁷.

The year 1985 has seen in the city of “Valence”, the first programs of criminal mediation in France, which was called at that time the criminal conciliation¹⁸.

In addition, the French Ministry of Justice played an important role in criminal mediation through many instructions and periodicals that were introducing it and determining its controls, in addition to calling for resorting to mediation, for example, the instructions issued in 1982 which called “Judicial controls for social culture”¹⁹. Rather, it organized a symposium on “victims’ right” to “compensation of the conciliation” in Strasbourg on May 31 and June 1, 1985, which discussed the legality of criminal mediation and its legal basis from the point of view of victims’ rights²⁰. Although the Public Prosecution Office in France did not rely on an explicit text for applying the criminal mediation, it was based on Article 41 of the Criminal Procedure Law, which empowers the Public Prosecutor with the so-called “authority to assess the appropriateness of taking criminal procedures”²¹.

Thus, we conclude from the above, that the Public Prosecution and the associations had an important role in the emergence of criminal mediation at the level of practice, and this indicates the role of the judiciary and its boldness in developing justice, in addition to the contribution of civil society associations in achieving this.

This confirms, from our humble point of view, that the development of criminal justice does not depend on waiting for a legal text to be issued by the legislator, but that law enforcers on a practical level can achieve this through diligence and boldness in applying the law.

- The stage of legalization the criminal mediation

After the important results achieved by criminal mediation in France at the level of practice, the French legislator intervened by legalizing it with an express text in Article 41. By the law issued on January 4, 1993, and it was amended by the law of January 32, 1999, which transferred the mediation procedure to Article 411 Q, M, G, F, as it was amended by the law of March 9, 2004, as well as the law of July 9, 2010.

¹⁴ Association D’aides Aux Victime et Contrôle Judicaire.

¹⁵ Aggression Conflits.

¹⁶ Accord.

¹⁷ Asmaa Amouloud, Resorting to Alternative Dispute Resolution, An Essential Introduction to Judicial Efficiency, Moroccan Journal of Mediation and Arbitration, No. 2, 2012, p. 33.

¹⁸ Ibid.

¹⁹ Anwar Muhammad Sidqi, Al-Mosaed Bashir Saad Zaghoul, Mediation in Ending Criminal Litigation, Comparative Analytical Study, Journal of Sharia and Law, No. 20, p. 349.

²⁰ Ibid.

²¹ (-)Jean – Pierre Bonafé, Schmitt, Op.Cit, p 109.

It remains to point out that the applied method of mediation in France is either delegated mediation, according to which the Public Prosecution sends the case file to a person or an association engaged in mediation, or retained mediation, which is a method that only the French legislator was adopted and under which mediation departments that are directly integrated into the judicial body as the offices of Justice and Law (MJD) and Justice Channels (AJ) are tasked with mediating criminal dispute resolution between the two parties²².

The Belgian experience in criminal mediation

It can be said that criminal mediation in Belgium also took place in two stages:

- The stage of pre-legalization of criminal mediation.

Some researchers have referred to a set of practical practices for criminal mediation in Belgium before the legalization of 1994, which are three types²³.

Compensation mediation: in which the police play an important role through the police chief's selection of files and transferring them to a mediator for compensation, based on controls set by the Public Prosecution.

Neighborhood mediation: which is carried out with compensation from the king's agent to free mediators belonging to the neighborhood in which the crime subject of mediation was committed. Its first project was in 1983 in the Belgian city of "HUY".

Mediation of conciliation: which takes place in the period between the summons and the appearance before the court, where the king's attorney proposes mediation between the offender and the victim.

The stage of legalization the criminal mediation

The Belgian legislator legalized criminal mediation through Article 216 bis, 3 of the Belgian Criminal Investigations Act pursuant to the law issued on February 10, 1994²⁴.

The legislator empowered the Public Prosecution to resort to criminal mediation, except if the case was transferred to an investigative judge or court²⁵, and therefore it turns out that the time range of criminal mediation in Belgium is determined at a stage prior to initiating a public case.

As for the objective scope of criminal mediation in Belgium, it does not concern offenses and misdemeanors, but also includes felonies punishable by hard labor for a period not exceeding twenty years if it becomes clear to the Public Prosecution that the felony presented to it must be punished by imprisonment for a period of some years or more in certain cases such as the activation of mitigating circumstances²⁶.

²² Adel Youssef Al Shukri, previous reference, p. 210.

²³ Anwar Muhammad Sidqi, Al-Mosaed Bashir Saad Zaghloul, Mediation in Ending Criminal Litigation, previous reference, p. 353.

²⁴ It has been amended by the law issued on May 7, 1999, as well as Law 6, 2005.

²⁵ Omar Salem, *ibid*, p. 124.

²⁶ Sherif Sayed Kamel, previous reference, p. 179.

In general, the Public Prosecution Office can, in the context of criminal mediation (Article 216 bis, 3, CBC), resort to one of the following procedures:

1. Calling the offender to compensate the victim.
2. Calling the parties to perform the mediation on compensation and its modality.
3. Calling the offender to undergo a treatment program if necessary.
4. Calling the offender to perform an act for the public benefit or to pursue a rehabilitation program.
5. Suggest a combination of some of these measures.

It must be noted that there are those who have distinct between criminal mediation in its broad sense, as they included all the procedures stipulated in “Article 216 bis, 3 of the Belgian Criminal Investigations Law”, and mediation in its narrow sense, which was identified in conducting mediation proposal between the parties²⁷. There are those who considered mediation to be only a mediation proposal between the parties, while the rest of the procedures in Article 216 bis 3 are considered just other alternative measures²⁸.

Of course, what concerns us here is a mediation proposal between the parties without the rest of the other procedures stipulated in Article 216 bis 3.Q. T. G. B.

This procedure is generally carried out through the King’s representative, who selects cases and refers them to the mediation authorities, where there is a person called the mediation assistant who is in charge of them, but after issuing the 1999 law related to the courthouses, the majority of mediation interests were incorporated into them and the mediation assistant has also become called the justice assistant.

Thus, the stages of the criminal mediation procedure²⁹, can be divided into three stages³⁰, as follows:

Preliminary stage:

The Public Prosecution selects the cases and sends them to the courthouses where the mediation interests are located. After that, the justice assistant informs the parties to attend in order to meet each party separately to explain to them the importance of mediation and to give them the opportunity to talk about the dispute, but the main objective of it remains to obtain the consent of the parties to conduct mediation and find ways to resolve the dispute.

²⁷ Christophe Mincke: «de l’utopie à l’aveuglement, la médiation Pénale belge face as es idéaux Fondateurs, thèse présentée en vue de l’obtention du garde de docteur en droit, universitaires, Saint. Luis Faculté de droit, a.c 2005 – 2006, p 37.

²⁸ Charlotte Vamneste : « Pratique de la médiation Pénale au parquet de Bruxelles, Collection des travaux de l’école des sciences criminologiques l’éon connil, sous le non de travaille d’intérêt générale et médiation pénal ou Pénalisation de social, 1997, p 112.

²⁹ Christophe Mincke , Op.Cit, p 49 ets.

³⁰ Although some have summarized it in two stages: 1) the preliminary stage, 2) the decision stage, Sherif Sayed Kamel, previous reference, p. 180.

This results in either a meeting between the two parties together in order to discuss channels of dialogue and discussion about the harm that befell the victim, his feelings and pain, as well as the reasons for committing the crime and others, but if the parties do not want to meet, the justice assistant (mediator) mediates between the parties by meeting each one separately. Thus, if the parties reach an agreement, it moves to the so-called mediation session.

Evaluation of comparative legal experiences of criminal mediation

The legal experiences of criminal mediation spread across different countries around the world, and the important rationale behind this was the first experiences that were evaluated, as they revealed the importance of refuting the opinion of those opposed to criminal mediation. As the opponents of criminal mediation were based on this as affecting the presumption of innocence by doubting the consent of the accused, who may accept mediation for fear of accusation and criminal procedures, then also the fear that the mediator will be exposed to the influence of the Public Prosecution in addition to its violation of the equality principle in the treatment of offenders, as the controller of adopting mediation is not identified, and the defense is no longer for this kind of negotiating justice, in addition to that it may have negative aspects on the victim, such as fear of the mediator's lack of impartiality and confronting the perpetrator³¹.

All these criticisms were bypassed due to the success achieved by mediation on a practical level through the statistics and field studies that have been conducted on the subject. Examples of statistics include what was stated by the National Institute for Victim Assistance and Mediation in France³², that there are 75 associations practicing mediation and that they completed 85,000 mediations in 1975, as well as what was stated by the Coordinating Body of Judicial Control Societies³³, that there are 52 associations practicing mediation that completed 10240 mediations in 1995, in addition, the number of cases completed through mediation for the year 2005 reached 31,852, while in 2007 they were 26,692³⁴, as well as the year 2010, they were 11,953³⁵.

This decline in the number of cases completed through mediation since 2005 is due to the Public Prosecution's activation of the various alternatives introduced by the French legislator after a period of legalizing mediation in France, such as directing the offender towards a health, social or vocational institution in addition to reminding the offender of the law and others³⁶, so that the French legislation became witness a great diversity of the public lawsuit alternatives.

³¹ For more on this topic, see:

- Muhammad Hakim Hussein al-Hakim, previous reference, pg. 475.

- Medhat Abdel Halim Ramadan: "The Brief Procedures for Terminating the Criminal Case", previous reference, pp. 39 to 42.

³² Institut National D'aide Aux Victimes et de médiation (INAVEM).

³³ Comité de liaison associa de Contrôle Judicaire (CLCJ).

³⁴ Jean Pierre Bonafé-schmitt : Op.Cit. p 64 et 65.

³⁵ Paul.Mbnzoulou, Op.Cit, p 104.

³⁶ Jean Pierre, Bonafé-schmitt , Op.Cit, p 66

But despite the competition with the other alternatives, criminal mediation still maintains its position, and this is confirmed by the research carried out by the Ministry of Justice in 2007 about the subject of victims' satisfaction with the various criminal solutions in French law, which concluded that 55% of victims stating that criminal mediation achieved them a sense of satisfaction and justice³⁷.

Among the important studies that had a great role in demonstrating the importance of criminal mediation by evaluating it is an American study (first paragraph) and another European study (second paragraph).

The American study

A valuable study was conducted in the United States of America in 1995 for four states aimed at evaluating the criminal institution, and it adopted for that purpose the interview method with a group of victims and judges. This study resulted in a set of results³⁸, which are briefly as follows:

- The parties accepting for the solution resulting from criminal mediation in two thirds of the crimes committed.
- The agreement of the parties in criminal mediation reached more than 30%.
- The parties showed their full satisfaction for the outcomes of their cases' settlement through mediation and the achieved fairness.
- Victims mentioned that their fear of confronting the offender disappeared as soon as the procedures were started, and the quick benefits resulting of that.
- Perpetrators whose cases were resolved through mediation committed a small number of petty crimes.

Thus, this study demonstrates the great value achieved by criminal mediation, which appears on a practical level through the feelings of satisfaction and humane justice expressed by the parties who participated in this study, and the guaranteed and quick benefits, in addition to reducing the percentage of recidivism.

But what caught our attention is the fear of confronting the perpetrators expressed by the victims, which could constitute an obstacle to many of them in resorting to mediation, but the study revealed that it disappears as soon as the mediation procedures begin, and this would therefore encourage the victims to overcome the barrier of hesitation resulting of fear because it is normal and quickly disappears.

The European study

Among the important European studies are those that were conducted in some European countries in 2004 with the aim of evaluating criminal mediation, which concluded with a positive result (), that mediation brings many benefits to victims and perpetrators as well as society, as follows:

- For victims:

³⁷ Paul.Mbnzoulou, Op.Cit, p 11.

³⁸ Anwar Muhammad Sidqi and Bashir Saad Ghalloul, previous reference, pp. 313 and 314.

The benefits that criminal mediation brings to the victim in brief are:

- Psychological calm that criminal mediation achieves for the victim through confronting the offender.
- The victim feels that he has an important role, with achieving quick results.
- It gives the victim the opportunity when confronting the offender to express his feelings and show the effects of the crime on him and his surroundings.
- The victim is given the opportunity to inquire of the offender about the reasons for committing the crime against him, in addition to the fact that the offender's answer to it will mitigate the effects of the crime on him.
- It helps the victim to overcome the crime and its consequences due to the offender's request for forgiveness and remission and the consequent reduction of the victim's anger and fear of the offender's revenge.
- For perpetrators
- Criminal mediation gives the offender a greater sense of justice in contrast to traditional procedures.
- It helps the offender to avoid denying the crime and defending himself for fear of punishment within the framework of traditional procedures.
- It contributes to improving the relationship between the perpetrator and the victim due to conciliation in contrast to traditional procedures.
- Make the offender far from registration of precedents in his criminal record.
- For the society

The benefits that the study revealed of criminal mediation on society are precisely:

- Criminal mediation contributes to protect society from future crimes by organizing offender rooting programs.
- Maintaining peaceful relations between the society members, especially those who are related by kinship.
- The participation of community members in the criminal mediation procedure creates in them a sense of belonging and feeling that they are rendering a service to the community.

The main remark that we can make on this study is that it reveals to us the value of criminal mediation through the benefits it brings to the victim, offender and society, and this indicates from our humble point of view that there is no loser in the criminal mediation system, which we will not find in traditional methods of conflict resolution.

CONCLUSION

The countries that have adopted the criminal mediation system have expressed their fear of it, but after starting it, a continuous evaluation of it was conducted, and it became clear to them that it is a system that achieves many advantages and benefits for the victim, offender and society. Therefore, they have developed it and approved it by legalizing it in their procedural criminal laws, because the criminal mediation has already proven itself in comparative laws on a practical level through statistics and studies that it has evaluated, which contributed greatly to the spread of its legalization in comparative legislation. Therefore, we hope that legal regulations will seek to

develop restorative justice, activate and legalization appropriate legal solutions to help victims, reduce the criminal justice crisis and combat the criminal phenomenon.

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