

EXECUTION OF CRIMINAL MEDIATION IN IRAN: PRECONDITIONS AND CRITERIA

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Abstract: Today with respect to increasing cases proposed in Iranian courts, the criminal circumventions based on removal of adjudication and reducing responsibility for proceeding of cases in the courts have been officially recognized in laws of countries gradually out of which criminal mediation institution is deemed as one of them. This institution has been anticipated in Iranian and French criminal laws as substitute for prosecution and it has been highly addressed in order to decrease input of cases in courts. Country such as France has been pioneer to Iran in prediction of this substantial traditional method but with a modern title. For this reason, currently Iranian legal system is at initial phases for execution of criminal mediation where with respect to this issue, it is crucially important to interpret the needed executive practical points for better enforcement of this institution. Moreover, approval of new mediation procedure in criminal affairs along with execution points is helpful but ambiguous in some cases while background of execution with reference to law in French criminal law as a country as inspiring for this institution not only can contribute to remove ambiguities but also one can take step at least toward localization of enforcement of this institution with respect to this legal system.

Keywords: Criminal mediation, Execution model, Execution phases and process, Criminal procedure, Mediation procedure in criminal affairs

1 Introduction

The criminal mediation is a process that enables victim, offenders and other persons in society duly that have been impacted by crime to resolve actively and willingly the crimes through mutual talks and with assistance and presence of neutral third party (mediator). Criminal mediation which has been experienced officially for the first time at early days of 70s of twentieth century in Canada and USA now has been highly developed in various countries such as UK and France.¹ This process is trilateral or triple that starts regardless common formalities in criminal process based on prior agreement among plaintiff (delinquency victim) and culprit (delinquent) with the presence of a third party called mediator in order to settle various disputes and differences caused by perpetration of crime. The mediator is a member of a civil society (natural person or a non-governmental organization) that tries to communicate among offender-victim and pay the way for visiting and dialogue and talks and proposing of mutual claims and requests of both of parties and expresses their attitudes and problems for disambiguation and clarification of them in another language and thereby to help them to express their own cordial requests and to be reassured spiritually.² The theoretical basis of criminal mediation forms it modernly as new approaches of recognition of offenders-victim and attitudes based on restorative justice. Through these intellectual bases, criminal mediation follows several objectives versus cornerstones of criminal justice i.e. victim and offenders and members of community and system of criminal justice and it relies on general principles such as option, impartiality, independence, and privacy of mediation process versus each of these cornerstones and it approaches attitudes and interests of delinquency victim and delinquent and social institutes and their requirements together within a creative and efficient process.³ Criminal mediation process includes four

steps in its most common form. These phases comprise of step for taking and reference of a case, stage of preparation for mediation, phase of mediation dialogues, and step of post-mediation measures each of which includes specific rules and principles. Comparing to other methods for dispute settlement, one of the advantages of criminal mediation is in that it possesses more flexibility with faster resolving of differences. Above all, it provides friendly resolving of disputes with mutual agreement and consents by both of parties so that to continue relations between them.⁴ With respect to the unique principles and features⁵, criminal mediation follows some objectives which some of these goals belong to both of mediation parties (i.e. victim and offenders) and some of the other ones are related to human community relevant goals and motives and some to criminal justice system.⁶

With respect to above-said considerations and in this regard, given French Laws, execution of mediation will be analyzed within types of institutional executive models and then through their phases and finally with implication of executive constraints of criminal mediation where in this law-centered analysis some of practical experiences in aforesaid countries will be considered. This paper is also intended to smoothen typically the way better for execution of this institution in Iranian criminal proceeding system by interpretation of theoretical bases.

2 Background for acceptance of mediation at prosecution step

Since the middle of 70s at twentieth century, mediation plans have impacted criminal justice system. This process was manifested by initiative of one of the probation officers in Canada for the first time in 1977 and it was conveyed to other cities in Canada and USA.⁷ The aforesaid probation officer suggested to a judge in one of cities in Ontario State to expose two young men who have been convicted to demolition to the delinquency- victims and after agreement of judge, issuance of probation verdict was subject to remove the damage and acquiring consent of delinquency- victims. After this experience, mediation was financially sponsored by the government and support intellectually by church and at the end 70s, it was conveyed from Canada to USA and then to Europe. Mediation that stems from paradigm of removal of adjudication through referral of differences caused by criminal phenomenon to mediation and acceptance of a type of arbitration in resolving of conflicts has possessed importance and position and played undeniable role in drawing participator policy of criminal justice.⁸

Fairness Houses in Iran entered into territory of criminal policy of Iran with approval of act for establishment of fairness houses in 1965.⁹ Based on Article 1 of the given act, the goal of this institution was introduced as '... addressing and settlement of disputes between rural inhabitants...' According to Article 10 of the aforesaid law, fairness houses were tasked to settle differences and actions among rural inhabitants by compromise and reconciliation.... Thus, the given institution should create compromise between each of rural people and parties of criminal cases listed in Articles 12 and 14 using the existing restorative

mechanism for settlement of conflicts, Monthly of proceeding, vol. 101, December 2013 and January 2014

⁴ Darvishi, Hoveida; Yousef, op. cit. p 92

⁵ In order to achieve goals of its executives, mediation executes mediatory process based on the given rules and bases. Some of these principles include independence of mediation process, voluntary presence of delinquency- victim and delinquent in mediation process, observance of impartiality principle by the executives of this process, privacy and closed door talks between conflicting parties and principle of guarantee of execution of agreement between parties

⁶ Abbasi, Mostafa, Criminal mediation, Daneshvar, 1st Ed., 2003, p 92

⁷ For more study, see also history of this institution in France. See also Kooshki, Gholam Hassan, Alternatives for prosecution of general case in Iranian and French criminal proceeding systems, Quarterly of research in public law, vol. 29, summer 2010, pp. 327-350

⁸ Samavati Pirooz, Amir, Restorative justice, gradual modification of criminal justice or change of it, Negahbineh Pub, 1st Ed., 2006: 123-125

⁹ Zarkalam, Sattar, Advantages and disadvantages of mediation- arbitration similar to method of substitution of arbitration, Journal of bar association, new series, vol. 2, 2000, p 37

¹ Ashuri, Mohammad, Incarceration alternatives or interstitial punishments, Gerayesh Publication, 2nd Ed., 2011, p 287

² Najafi Abrandabadi, Ali Hossein, Implications of criminology lesson, by Mohsen Borhani and Amir Hamzeh Zeinali, 2003-4, p 15

³ For more study regarding the relevant theoretical and legal frameworks to criminal mediation see also Najafi Abrandabadi, Ali Hossein, Mediation an effect of restorative justice, introduction written by Mostafa Abbasi, Modern horizons of restorative justice in criminal mediation, Daneshvar Pub 2003; Babaei, Mohammad Ali, Theoretical challenges of restorative justice and its effects in criminal procedure act, in Najafi Abrandabadi, Ali Hossein (supervised) (criminal news) (collection of essays), second book, Mizan Pub, 1st Ed. 2014, Hosseini, Seyed Mohammad, Mediating role in settlement of actions and response to norms, Journal of faculty of laws and human sciences University of Tehran, vol. 45, 1999; Darvishi, Hoveida, Yousef, A study on mediation as a friendly method for settlement of difference, Quarterly of law, Journal of faculty of law and political sciences of University of Tehran, series 41, vol. 1390, 41; Sadeghi, Mohammad Hadi, Mediation in criminal cases, Judicial and legal Journal of Justice Administration, vol. 12, 1994; Tale Zari, Ali, Criminal mediation as old

potential and capacities.¹⁰ In 1966, following to approval of arbitration council act and its Article 13, criminal policymakers have officially recognized this institution so that in light of this process they could settle some of the given criminal cases in cities by taking restorative approach.¹¹ Based on Article 16 of amended act, reference to arbitration councils regarding criminal cases depended on attitude of plaintiff- delinquency victim. As a result, plaintiff could submit his/ her plea about occurrence of misdemeanors in written and or orally and directly to arbitration council.... After taking plea by plaintiff- delinquency victim typically as these councils discerned they addressed the criminal case and issued award with respect to contents of legal case without impact of culprit's comment about rate of response.¹² In fact, arbitration councils determined fate of criminal case as a restorative institute and for mediation and compromise only based on contents of case and by vertical approach.

Finally, criminal mediation has been explicitly anticipated in Article 82 of Criminal Procedure Code (2013. According to this article, *'Regarding discretionary crimes (degrees 6, 7, and 8) as suspendible crimes, judicial author may give maximally two months deadline to the culprit to acquire forgiveness or compensation for the loss caused by crime according to request of accused party and agreement of delinquency victim or private claimant and by taking appropriate security. Likewise, judicial authority may refer the disputing case to arbitration council or other person or institute for mediation in order to acquire compromise between both of disputed parties. Period of mediation will not exceed from three months. The aforesaid deadlines in this article will be extensible once if expired and with same interval. If plaintiff forgives the culprit and if subject is a forgivable crime, prosecution will stop. In other cases, if plaintiff forgives or his/ her loss is compensated and or they agree over payment of compensation while the culprit lacks effective criminal conviction before, the judicial author may require the culprit to execute some of orders as subject of this article with observance of provisions of Article 81 of this act as requires. Similarly, in the case of non-fulfillment of agreed obligations by the culprit without plausible excuse, prosecution suspension relief will be cancelled and prosecution continues based on request of plaintiff or private claimant.'*¹³ *'Provision: Interrogator may demand judicial authority for suspension of prosecution or reference to mediation.'*

Criminal mediation is a method by deviation from criminal process that may be employed at any phase of litigation steps.¹⁴ It is identified through review on different and various mediation plans that a single method is not used for reference of cases in different legal systems. Proportional to different proceeding systems and at various phases and authorities and exclusive references of criminal justice systems and strategies taken by them about restorative justice, the process of reference of case to mediation may vary.¹⁵

Overall, it seems that criminal case can be referred to mediation from the beginning of discovery of crime by police officials or it can be also referred to mediation at prosecution or investigation phase and or at litigation step and issuance of award and or at process of enforcement of order and even after execution of award so each of different systems have accepted a specific techniques and certain step for referring a case to mediation. Anyway, the crime cases can be referred to mediation at different phases depending on their type and governing

circumstances and positions and rule over criminal proceeding system. While as usual regarding more important crimes and files, the cases will be referred to mediation the time after litigation and even times after enforcement of punishment and or some part of it. For example, in some countries e.g. Canada, right of mediation is given to conflicting parties even regarding hostile and important crimes such as sexual harassments, inchoate to murder, after incarceration of delinquent and passing some part of it.

Today one of the main and major orientations off criminal procedure has been dramatically transformed and several strategies have been created for extension and developing restorative techniques through criminal process.¹⁶ In this sense, French criminal law executes the following measures by virtue of the first part of Article 41-1 of Criminal Procedure directly by city prosecutor or by officer of judicial police or prosecutor delegate¹⁷ or mediator.¹⁸ On the strength of the headline of French criminal procedure, city prosecutor may decide using mediation¹⁹ before starting prosecution to general case in order to compensate for the loss incurred by victim and to terminate disruption created by crime and also for probation of offender. Therefore, prosecutor is competent to initiate for making decision to mediation.

3 Execution of mediation within types of institutional executive models

From perspective of criminal policy and type of execution of mediation in various countries, criminal mediation can be generally separated into three types.

3.1 civil criminal mediation: In fact, this type of criminal mediation is executed by initiative of civil society and through inspiring from usual models in norm and local and national public culture and norm for resolving consequences due to perpetration of crimes with no intervention and comments of judicial authorities. The first practical mediation experiences were created by inspiring from common arbitration among these tribes to settle differences.

Also our country as a land with ancient civilization has exercised several quasi-judicial public customs prevalent among the given various tribes.²⁰ These plans along with formal system of criminal justice are also employed for resolving problems and differences caused by perpetration of light offences and even serious crimes today in some places that may strike a type mediatory paradigm and method in minds. Today due to deficiencies of formal system of criminal justice it seems people tends increasingly to civil judicial procedures such as civil mediation. This technique is also growingly increased in French criminal law. This type executive model has been converted into a citizenship task and it is followed endogenously and of course organized and in full civil form. However the reason for welcoming to this method may slightly vary in two countries. In Iranian law, probably presence of traditional methods and also reduced efficiency of justice administration system has been led to this process and this may be also followed by lack of trust in justice system while in French law this traditional background may be downplayed for mediation technique, impression of mediators also typically contributes to justice system and not to non-confidence. Accordingly, it can be found through this model that our national law acts toward implementation of civil method with the given traditional background and it assumed as an informal method. This implementation is also accompanied to lack of knowledge of formal criminal system about these crimes for which this method is utilized among tribes in various parts of Iran such as Khuzestan to some extent. However in French law,

¹⁰ Rahgosha, Amir Hossein, A glance at arbitration councils, Daneshvar Pub, 1st Ed. 2003, p 23

¹¹ Gholami, Hossein, Restorative justice, Criminal sciences (A collection of essays in memorial of Prof. Dr. Mohammad Ashuri), SAMT Pub, 1st Ed. 2004, p 209

¹² Jamshidi, Abbas, Analysis on legal position of arbitration councils as subject of Article 189 of third development plan act, MA Thesis, faculty of law, Shahid Beheshti University, 2004, p 60

¹³ Following to Article 83 of this act, it holds in this way: 'Result of mediation will be signed by mediator and both of parties in detail and by implication of the related causes within the minutes and it will be sent to the relevant judicial authority for review and verification and taking subsequent measures as it requires. In the case of mutual agreement, it necessitates implying obligations for both of parties and how to fulfill them in the minutes.'

¹⁴ Najafi Abrandabadi, Ali Hossein & Hashem Beigi, Hamid, op. cit., p 218

¹⁵ Abbasi, Mostafa, op. cit., p 125

¹⁶ François Altmois, Arbitration of criminal law: a myth or reality?, translated by Reza Farajollahi, Legal journal of justice administration, 2006, 165. In this regard see also Najafi Abrandabadi, 2003, p 3, Ibid, 2003, Shiri, 2006, ibid, 2007, p 17

¹⁷ Délégué du procureur

¹⁸ Le médiateur Rappel à la loi

¹⁹ La médiation

²⁰ Atashneh, Mansur, Arbitration rule between Khuzestan Nomads, MA thesis in penal law and criminology, University of Tehran, 1991, p 52

it is seen in civil form with encompassing supervision by judicial system by entirely by initiatives of persons and civil institutions.²¹

3.2 Civil criminal mediation under supervision of judicial authorities: This type of mediation became initially prevalent in form of arbitration in civil law but during recent years it has been also entered into criminal law under some circumstances. Judicial actor attends in this model in two times. Primarily, he enters upon appointment of mediator to start mediation process and then at the end of this process to analyze results of mediation which have been signed by delinquency victim, delinquent, and verification of mediator within an agreement.²² This type of mediation seems to be applicable in all steps of criminal proceeding namely prosecution phase at official court, court substantial proceeding step, and phase of execution of criminal punishment such as punishment for freedom confinement and if both of parties agree over this process, proportionally process of legal case will exit from criminal proceeding system and archived so that to issue award up to conviction with mitigation and some modifications and facilities will be created in favor of convicted party at phase of enforcement of given sentence such as imprisonment. Criminal mediation has been anticipated as an alternative for prosecution of culprit at phase of criminal prosecution in French criminal law in which if prosecutor discerns that the culprit possesses some qualifications such as compensation of loss by delinquent for the victim and removal of local concern due to perpetration of crime and punishment of delinquent and this fact that the culprit has been social probated, mediation is accepted only at prosecution phase based on contents of criminal procedure (2013) of this type and by virtue of Article 82 regarding acceptance of civil process supervised by judicial authority. Accordingly, the prosecution phase is relatively similar in both criminal systems within the mediation phase as well. It has been stipulated in Article 35 of Mediation Procedure for Criminal Affairs that 'The relevant judicial authority is necessarily responsible for monitoring mediation process as the given criminal file is referred to him.' Such supervision has even become more prominent since Article 37 of this procedure holds that 'In the case of absence of parties in mediation sessions and mediator's report about lack of potential for holding of mediation sessions, the referent judicial authority to mediation will cancel this measure and continue litigation.'

3.3 Judicial- police mediation: This type of criminal mediation is inter-system or judicial- police mediation and it does not belong to civil society. Based on practical conduct, and by virtue of law, mediator who is one of official authorities initially focuses his effort in creation of compromise and reconciliation among victim and delinquent.²³ Also one can assume task expressed for the court in Article 192 of criminal procedure (2013) as examples of this type of mediation. Similarly, compromise and reconciliation units are established in justice administration centers which are responsible for referring the case to the court in order to encourage and invite both of parties to compromise and also the counseling districts and social-working units stationed in some of police offices which exclusively try to create peace and compromise among victim and delinquents in forgivable crimes that can be assumed as some examples in this type of mediation. Similarly, reference the case to arbitration council mentioned in Article 82 since it can be deemed as a type of judicial institution unlike philosophy of existence (*raison d'être*) for this unit, arbitration council is a type of judicial institute. This measure in police- phase is mainly applicable among common law legal systems e.g. in UK. Of course, this question may be raised here that if one can refer a legal file to police for peace and compromise resulting from mediation or not; it seems there is no legal bar in this regard but it necessitates assertion and determination of framework to make executive process more accurate. In Article 2 of mediation

procedure in criminal affairs, it has been confirmed typically in judicial mediation and held: The mediation related affairs may be organized under supervision of general prosecutor of revolutionary public court or head of judicial district in site. Prosecutor or head of judicial district may assign this task to one of his deputies. Then by considering Article 3 that denotes that legislator has officially recognized a type of modern model of mediation within administrative mediation for which it has been mentioned in this article that it is not legally banned to refer to mediation in some cases when public departments and systems are as plaintiff based on observance of rules and regulations.²⁴

4 Execution of mediation within certain deadline and time its effectiveness

In Article 82, legislator asserts explicitly that 'mediation deadline may not be longer than 3 months and if expired and the stipulated period may be extended for once.' Also in other countries, enforcement of this constraint is seen in other countries e.g. Canada where they have given 60days deadline but this period can be extended by written agreement of both of parties and in the case of non- consent in one of parties criminal mediation will be deemed as failed at the end of this mediation period and proceeding will be continued formally and according legal criteria. Thus, delinquent may ask forgiveness from victim and pay compensation of loss for the victim of delinquency and or acquire his/ her consent to give further deadline unless formal litigation will be continued.²⁵

Concerning to time of enforcement of criminal mediation, it necessitates implying two other points: one is that in which interval any mediation session should be held; secondly, how much time these session should last. Primarily it should be implied that no relevant point has been mentioned in this regard in Article 82 but according to Article 15 of act for referring affairs to mediation 'the mediator shall start mediatory tasks as soon as possible after referring the subject on behalf of judicial authority and hold mediation session or sessions not later than stipulated time by judicial authority²⁶ and prepare the minutes from report of his activity and comments of parties and the result of session.' It seems that judicial authority is responsible for determination of deadline to holding mediation session but probably this deadline is three months stipulated in Article 82. Nonetheless, it seems this session should be held within deadline specified by the judicial authority (that is certainly obvious) but it seems the mediator is responsible for determining number of sessions and period of holding any session.

5 Conditions for execution of criminal mediation

There should be some qualifications for execution of mediation of course. Primarily, it should be mentioned it is possible to issue mediation order for all crimes in terms of domain of execution of mediation and with respect to goals listed in headline of Article 41-1 although mediation is practically executed for disputes between families and neighbors and related persons to each other.

5.1 Necessity for consent and agreement of parties: It is surely necessary to take consent and mutual agreement among disputed parties in order to refer parties toward resolving the present

²⁴ In other cases of this procedure for referring affairs to mediation other aspects of judicial mediation can be observed:

Article 8- Judicial authority may refer criminal subject to an institute for mediation. Thus, the head of given institute will be accountable to the judge for mediation.

Article 9- A list of qualified persons who are competent for mediation will be prepared in any judicial district by heads of judicial district. Preparation of this list is solely for determination of priority and it does not bar mediation to others.

Article 10- The addressing judicial authority will be responsible for ascertainment of competency in mediator after mutual agreement.

²⁵ financial services commission of Ontario; online: www.fscs.gov.on.ca/en/drs/pages/meclaton.aspx#ten

²⁶ Article 30 of act regarding referring of affairs to mediation: implausible negligence and delay of mediator in holding mediatory sessions and about holders of mediation licenses will be subject to written warning and written reprimand and annulment of mediator's permission (license). Regarding persons without license, omission in doing of assigned tasks will lead to excluding him/ her from the given list based on discerning of the reference by the related judicial authority and it will be acted concerning councils according to the related regulations.

²¹ Ibid

²² Najafi Abrandabadi, Ali Hossein, Mediation, An effect of restorative justice, op. cit. p 16

²³ Najafi Abrandabadi, Ali Hossein, Criminal mediation: modern effect of restorative justice, op. cit. p 18

difference among them. Therefore, mediation will fail if either of disputed parties is not satisfied. Also it has been emphasized on requisite for achieving mutual agreement among parties in Article 82 and this condition has been inspired from French criminal law since by virtue of Clause 5 of Article 41-1 in criminal procedure mediation is employed among crime perpetrator and delinquency- victim in mutual agreement was achieved among between two parties. In the case of achievement in mediation, city prosecutor or mediator prepares minutes from this session that will be signed by him and disputed parties and a copy of minutes is given to them. If crime- perpetrator has been pledged for compensation of damage exerted to delinquency victim with respect to the minutes, the given victim can request for payment of compensation following to award of court and based on rules of civil procedure. In any case, mediation is deemed as a civil litigation under control by judicial rules.²⁷ In other words, although both of disputed parties make decision and agree mutually on the platform of unofficial formalities but in the case of failure, formal measures in criminal procedures will govern. Importance of mutual agreement among parties is also implied in Article 6 of act regarding reference of cases to mediation: 'Mutual agreement between disputed parties to refer mediation for which judicial authority prepared minutes will be signed by them.' Even such importance also emphasizes in this point that 'if both of disputed parties mutually agree to introduce a mediator and the given mutually agreed mediator accepts to mediate between them, the mediator will be responsible for this process after confirmation of judicial authority. The judicial authority may independently take measure if two parties do not appoint a mediator.'

5.2 Taking security: Surely, taking criminal security has different effects on its trend before reference of mediation and making mediation method dependent on criminal justice system. This constraint may cause the delinquent to imagine constantly this point on the one hand that through reference of mediation s/he will be still within the range of criminal justice and not to exit it since as it obvious this type of file reference will not entirely cause separation and isolation of informal proceeding from formal litigation in justice system. For this reason, the delinquent may not duly cooperate with them as it deserves to mediation method since s/he may see any type of cooperation for proving crime against oneself and s/he will avoid this method to escape from legal consequences of acceptance and confession to the given delinquency. In addition, some benefits can be implied for taking security before referring of file to mediation including this fact that it may encourage delinquent to cooperation and acceleration in achieving amnesty and agreement of victim since if s/he does not make the best efforts for agreement with the victim s/he will be exposed to criminal justice system. On the other hand, whereas delinquent should attend for making final decision before official authority of litigation, issuance of relief for taking security will prevent from his/ her escape and/ or hiding.

If mediation system and model is based on judicial type, it is natural to determine constant supervision by judicial authority over various parts of this process. While is it necessary to issue criminal security relief before referring of case to mediation? The answer can be perceived easily in Article 82 of new criminal procedure. Legislator expresses two method of exit from formal proceeding in two initial parts of this article regarding the same crimes under identical conditions. The first part of this article explains about possibility for giving deadline to culprit to acquire consent of victim or compensation for his/ her loss and damage and it has assumed the same crimes under the same conditions as referable to mediation at second part of article. Therefore, judicial authority can refer it to ... in discretionary crimes (degrees 6, 7, and 8) where their punishments are suspendible by *taking appropriate security* and through mutual agreement over subject between two parties. On the other hand it

is also characterized at the end of article that whatever the mediation results in, the competent legal authority will make final decision. Thus, we will need to presence of culprit since in the case of successful mediation at the end of file and if committed crime is forgivable, judicial authority will issue decision not proceeding of the case (*nolle prosequi*) so that according to specific legal formalities, this relief should be notified and if the committed crime is not forgivable, prosecution of culprit will be suspended by ascertainment of other conditions.²⁸

6 Execution of mediation within phases and mediation execution process

By virtue of Clause C of Procedure of Mediation in Criminal Affairs, mediation process²⁹ is defined as follows: 'it includes a group of measures by which through administration of mediation with the presence of victim and culprit and other effective persons in acquisition of compromise in f necessary such as family members, friends, or their colleagues and also duly members of local community, the competent official and public institutions and or NGOs discuss and exchange their views to resolve differences and if they achieve agreement, they draw up agreement and it is sent to judicial authority.' This process starts if the needed qualification exist to begin execution of mediation where it varies in terms of type of process and the related phases depending on type the accepted model and whereas presence of victim, delinquent, and mediator is necessary at least for execution of mediation plan often execution of mediation consists of four steps we will examine them each of them separately and briefly in the followings:

6.1 Phase of receiving or reference of case: Based on way of performance of mediator, this step is taken in both of active or voluntary and/ or passive and involuntary forms. In *active or voluntary* method for referring of cases, mediator personally selects files and asks the judge or related prosecutor for referring it to this purpose. This method is executed with respect to various criteria including when the crime is not serious and basically crimes were committed against properties and delinquency- victim is identified and his/ her request and requirements are also determined and s/he agreed mediation while delinquent has assumed it as his/ her responsibility and or asked for mediation, personal and familial conditions of delinquent may indicate possible success in mediation at high level and... each of these conditions may essentially impact on way of reference.³⁰ In passive method of file reference, executives and officials of mediation plans (mediators) are not involved in process of file reference and this process should be independently controlled by the relevant judicial authority. Although this method also includes specific criteria in reference of cases and usually expertise and experience of mediator and conditions of victim and delinquent are also addressed, this method is not basically successful and few cases are referred to this technique in this way as well. Article 82 and the related procedure have also confirmed this method.

Given criminal mediation is at the prosecution phase in Iranian criminal law and prosecutor is also responsible authority for

²⁷ In this regard see also: Sharifzadeh, Ali, Analysis on concept of role and position of local society in mediatory processes and arbitration councils, Quarterly of studies on prevention from crimes, Police periodical of prevention (IRI Police), 2nd year, vol. 2, 2007; p 101

²⁸ It is observed that in any case culprit should be accessible whether *nolle prosequi* relief is issued and served or in order to issue *nolle prosequi* for suspension since because it necessitates agreement of delinquent for issuance of *nolle prosequi* relief as legislator implies and this relief may not be issued if s/he is not present. On the other hand, as it mentioned, legislator relies on taking proceeding by formal techniques and has not shown inclination to litigation by informal method. This case also verifies the requisite for issuance of security relief before referring of file to mediation. Thus according to new criminal procedure, culprit should be kept under control of justice system but the case should be resolved by a technique rather than what it common for his/ her crime and the related subject.

²⁹ The interesting point that can be added relating to body of Article 17 of procedure is that 'During mediation process, it is assumed there is dialogue between parties and they attempt for exchange of view and acquire agreement. Mediator is responsible for managing and facilitating this process. Mediator should do his/ her task impartially and within limits of legal powers and mediator should not threat or compel either of parties in order to achieve agreement and signing it and should act in such a way in managing sessions among plaintiff and culprit that the victim not to be again subject to delinquency and two parties should talk to each other respectfully and without resorting to threat and hostility.'

³⁰ Gholami, Hossein, op. cit. p 126

prosecution accordingly power for reference of case to mediation have been allocated to prosecutor's power. In addition to presence of the article relating to subject of mediation in part of tasks and powers of prosecutor, concerning demand for reference to mediation by interrogator from prosecutor in provision of Article 82 denotes this point that the interrogator is not entitled to refer the case and he can maximally put his evidences for referring it to mediation at disposal of prosecutor and ask him for this case.³¹ It is a matter fact that if the court is responsible for preliminary investigations³², then it is obvious the court will be the referent authority of these files. Therefore, according to new code of criminal procedure in our proceeding system, it is possible to refer the case to mediation and other reconciliatory and compromising units only at the phase of prosecution and primary investigations. In French criminal law, prosecutor makes decision for mediation to realize aforesaid goals in Article 41-1.

6.2 Phase of preparation for mediation: This phase includes preparation of initial bases for mediation and creating arrangement and acquiring readiness for starting mediation consists of two parts.

Firstly, communication unit: Mediator communicates with delinquent and then victim in this part and does the needed coordination and arrangements. In this regard, in fact mediator talks about mediation plan and time of execution of plan with parties and asks them for comment in order to acquire their agreement and or disagreement about participation in mediation and way of their consent as well as their experiences of occurrence of crime and to find their requests and requirements. Emphasis in condition for acquiring agreement in Iranian and French laws is for this purpose.

Secondly, it is unit of *preparation of arrangements for mediation meeting*. After mediator acquired the needed information through communication with victim and delinquent and if they agreed to participate in mediation plan the mediator will tend to prepare mediation arrangements and take measures such as notifying time of holding session, place of session and the execution arrangements for execution of plan. It has not been mentioned about quality of sessions and their place in criminal procedure and the related code to mediation while quality and location of holding session may also essentially impact on better execution and efficient outcomes of mediation more than ever.

6.3 Mediation meeting phase: Doubtlessly, the foremost part in mediation trend is the meeting phase since at this step mediation plan is executed and delinquent and victim are exposed to each other and they propose their requests and needs; both of parties talk to each other and hear statements of other party and express their questions. This plan is managed by mediator and although according to attitude of some experts and presence of at least two mediators is preferred³³, this point has not been implied in law and although it seems apparently presence of one mediator is adequate, it does not seem there is any bar for use of more than two mediators. Additionally, this procedure exceeded from this point in a case when it is possible to invite some persons who are not necessarily mediators but their presence may be useful for outcome of mediation. Accordingly, by virtue of Article 19 of procedure, 'If necessary, mediator may invite family members, friends, colleagues, neighbors, and other persons including local community for presence as mediator discerns or if based on demand of either of parties their presence is helpful in mediation session.'

Mediator or mediators will impartially listen to requests and statements of disputed parties and managed session favorably. Similarly, it necessitates for mediator to possess adequate experience and skill to manage trend of dialogue and stream of mediation in order to achieve favorable outcome. Likewise, mediator can propose a suitable solution to them if s/he has needed power and in the case of failure in achieving a mutually agreed solution.³⁴

Language and literature of mediator should be appropriate to conditions of participant party³⁵ so that communication is peacefully established among victim and delinquent and they should find mediator as one who can resolve their dispute. In order to determine sanction for impartiality, it has been stipulated in Article 21 of procedure that 'receiving or promise for receiving of any property, fund, benefit or advantage from both of disputed parties by mediator will be forbidden except what it stipulated in this procedure and in addition to addressing legal liabilities, it is led to divesting of his/ her competency for mediation.' However no point has been implied about necessity for having experience and also way of interaction with disputed parties and it has been solely emphasized in attestation of mediation and only trainings were deemed as adequate.

Following to realization of these conditions where this phase aims at arranging mutual dialogue and expression of circumstances and conditions of criminal environment as well as the related effects and consequences on life of victim and delinquent and their families and proposing questions and finding appropriate answers directly from victim and delinquent, expression of feelings, spiritual and mental discharge this goal is fulfilled by restoration of damages and losses within a bilateral contract³⁶ because mediator does not only attribute the fault but he enables them favorably to find roots of differences and then they can achieve agreement by discussion and exchange of views which are in the course of regulation of future behavior and also resolving their problems in the past.³⁷

6.4 Phase of follow-up the results: At this step, we examine the agreements and contract among delinquent and victim and the problems and barriers are resolved for achieving the favorable outcomes and the way is smoothly paved toward mediation point. In other words, following to execution of given agreements at this step, quality of progress in this plan is observed and if some problems are created in execution or interpretation of contract through contact to parties for settlement and as a result achievement and fruitful mediation is guaranteed.

Depending on method of execution and implementation of former steps, this phase requires several measures for which mediation session may be still necessary for removal of some problems but whereas criteria may be provided for a friendly visit and dialogue and conversation at this step so it can be effective on more successful trend of execution of agreements and it will be followed by more viable positive effects on victim and delinquent. The goal of holding session should be explicitly expressed in this visit so that both of parties not to start committing the crime again out of this process by discussion and dialogue. It is unlikely at this step that parties do not agree to attend in the second session. Thus, mediator shall arrange another session for their presence and or if it is possible mediator should contact both of parties by phone call to achieve secondary executable agreements.

At the end, it should implied that execution and enforcement of mediation is not restricted this this method and the mediation may be arranged and organized even without observance of

³¹ Provision- Interrogator may ask the prosecutor for suspension of prosecution or referring to mediation.

³² Article 340- Discretionary crimes (degrees 7 and eight) will be directly proposed in the court.

Article 306- Crimes such as fornication, sodomy, and other crimes against indecency will be addressed directly in competent court.

N. B.1 of Article 285- The primary investigations will be directly for all of crimes committed by persons under age fifteen at juvenile court and the given court will do all tasks for which bailiffs in justice administration and prosecutor's office are responsible according to law.

³³ Ibid, p 137

³⁴ Kristen Woods, Fundamental elements of mediation: Kristen Woods- fundamental elements of mediation [http://www.riverdalemediation.com/pdfs/learn/adr/Kristen Woods.pdf](http://www.riverdalemediation.com/pdfs/learn/adr/Kristen%20Woods.pdf).

³⁵ Gholami, Hossein, op. cit. p 128

³⁶ Abbasi, Mostafa, op. cit., p 189

³⁷ Najafi Abrandabadi, Ali Hossein, Hashem Beigi Hamid, Encyclopedia of criminology, Ganj-E-Danesh Publication, 1996, p 219

given conditions and only within a few hours dialogue.³⁸ It is because there are very numerous techniques and experiences in this regard. In any case, the procedure has addressed only subject of drawing up the minutes³⁹ and it has not been anticipated task of follow-up the results for mediators and this may impact on useful execution of this institution.

7 Conclusion and suggestions

Today due to deficiencies of official criminal justice system, public tendency is growingly toward civil judicial procedures such as civil mediation. This method is also going to increase in French criminal law. This type of executive model has been turned into a citizenship task and it is followed endogenously and of course in organized and totally civil form.⁴⁰ However the reason for welcoming this method may slightly vary in two countries. Perhaps presence of traditional techniques and also reduced effectiveness of justice administration system has been led to this process in Iranian law and this may be also followed by lack of trust in justice system as well while this background is downplayed for traditional methods in French law per se and mediators' paradigm is typically contributive to justice system and not to non-confidence.

Occasionally, one can also imply non-confidence of legislator in execution of mediation by looking at body of law and approach of legislator. For example, although there are numerous punishments in law that can be referred to mediation and several crimes can be found for which punishments are classified in this group, anyway the enforced constraint is not too small in this regard. The crimes with this rate of punishment are not clearly too important and they may not also create disruption in public order. These conditions characterize legislator's approach toward a lot of mistrust in informal method and their high reliance on formal method in criminal justice system.

One can consider legislator's mistrust in respective of limitation of criminal mediation anticipation and or great role of discerning by prosecutor's position at the beginning of process for the execution, ambiguity in prediction, and arrangements for execution as the barriers against proper execution of this institution. No point has been mentioned about quality of mediation and their sessions and location in criminal procedure code the related procedure to mediation while quality and location for holding session may essentially impact on better enforcement and efficient outcomes of mediation more than better per se. Execution and enforcement of mediation is not limited to any certain method and mediation may be arranged and organized even without observance of the given conditions and only within a few hours of dialogue for mediation since there are a lot of various techniques and experiences in this regard. Anyway, this procedure has only addressed subject of drawing up the minutes and it has not anticipated the task for follow-up the results for mediators and that is something influences in useful execution of this institution.

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³⁸ Abbasi, Mostafa, op. cit., p 169

³⁹ Article 25- Mediator shall draw up terms of mediation minutes and briefly reflect them and put them for signing by parties. In the case of refusal by either of parties, the subject will be listed in minutes by the mediator.

N. B.1- General status of victim and mental, physical and financial effects of crimes against him/ her as well as repentance or excuse of culprit and also his/ her attempt or lack of efforts to compensate for effects of crime and reassurance of the victim should be mentioned in report of mediator.

N. B.2- Mediator shall draw up details of agreement between parties by implication of all their details, obligations, and rights in written without ambiguity and after arraigning to parties who sign it.

⁴⁰ For more study see also lecture by Ali Hossein Najafi Abrandabadi, meeting in University of Tehran, under title of criminal mediation, 2016

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