

Consolidation judge in criminal law and restorative justice

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ABSTRACT: One of the institutions that have been considered by Islamic rules is consolidation judge which has a large role in reducing the burden on the courts. After Islamic revolution in Iran, the organization has been considered in the sixth clause of public and revolutionary courts code (PRCC). Consolidation judge can be accounted like intermediary institutions in restorative justice approach. Consent of the parties to refer the matter to a person other than the official judge is a common feature of these two entities. Besides these two institutions, entity known as the Arbitration Institute in the Civil Procedure Code has been considered which can reduce the volume of visits to courts. Though in current rules the interest has been shown toward Arbitration Institute, but in Islamic jurisprudence rules consolidation judge has wide discretion. So we can consider arbitration as subset of consolidation judge. The sixth clause of public and revolutionary courts code (PRCC) as the first law that has considered consolidation judge ,has some ambiguities which resolving this ambiguity can determine the power of the entity in judicial system.

Keywords: consolidation judge, mediation, arbitration, restorative justice.

INTRODUCTION

One of the main problems in the judicial system is the high volume of criminal cases. This caused many problems, including high volume of referrals to the courts, financial and psychosocial costs, reduce power of judges and prolong the judging process. So a case may take months or years. However, in many cases, criminal penalties are so low that does not benefit. One way to ease the pressure on the judiciary is increasing the number of judges and courts. Although it appears to reduce the handling time but In fact, it does not reduce the volume of cases in courts. In recent decades, an issue that has preoccupied the minds of lawyers is resolving disputes without going to court. This causes the theory of restorative justice in which the presence of a third party called a mediator with the parties resolves their own disputes. Though restorative justice is a recent theories of law, but for centuries, in Islamic law, consolidation judge has been the responsible of solving problems. Although consolidation judge, mediator and arbiter have differences but their common feature is the voluntary participation of the parties without judicial due process that causes parties solve their problems quickly. In the six clause of PRCC, It has been emphasized that the parties can refer to the consolidation judge. This document has been prepared in two parts. In the first part of the review consolidation judge and its relationship with restorative justice has been investigated. In the second part the sixth clause of PRCC has been investigated.

consolidation judge:

In Islamic law some solutions for quick resolution of disputes have been determined. One of the ways is resolving disputes between the parties without going to court. So a chapter that is called " Peace and reconciliation" has been predicted in Islamic religious books (Najafi,2006). Then, in next step, Islam has shown attention to mediate . If the dispute is not resolved, they can go to consolidation judge.

One of the institutions that have been neglected, despite the attention of Islamic law is the consolidation judge. This institution has an undeniable role in reducing the burden on the courts. Though there are differences between

consolidation judge and mediator-including mediator is not decision maker(Najafi Abrandabadi,2004)-,but they have some similarities-Both sides are satisfied with selected third parties and mutual consent is the main element of both institutions. In this paper we will first examine the lexical meaning of the term Then check the legitimacy and authority of the institution's approach to restorative justice process.

"gazi"(judge) is derived from "gasaya" which means judge. In legal terms, the person is said to be appointed to fix hostilities (Jafari Langerodi, 2010).

"Tahkim" is a gerund which means "to judge. In legal term,the person who judge between parties is called consolidation judge (Jafari Langerodi, 2010).

There are some arguments between Shiite scholars about consolidation judge.First consolidation judge conditions,second the difference in the legitimacy of the institution in the absence of last Shiite Imam,and third the range of consolidation judge options.

Shahid sani(one of Shiite scholars) believes that consolidation judge is one who two sides are satisfied to judge him among themselves.He believes consolidation judge is legal only in presence of Imam(Amini,Ayati,2011).Being priest is a fundamental condition in his belief (Amini and Ayati, 2011). Among contemporary scholars,Ayatollah khoei believes one who is appointed by two sides. He doesn't believe in priest condition of consolidation judge(Koei, 2013). It is the expansion of the total comments that consolidation judge is one who is qualified to judge and is appointed by two sides to solve the problem(Najafi/p123).

There are some arguments about legitimacy of consolidation judge among scholars. Generally, soni scholars believe in legitimacy of consolidation judge.Among soni scholars only Qazali and Faqr Razi don't believe in legitimacy of consolidation judge (Forozesh, 2008).There are some differences between Imamyeh's scholars sect.Some like Saheb Javaher believe in illegitimacy of consolidation judge. Nevertheless, Verse 35 of Sura Maedeh has stated the arbitration between couples and this is a clear reason for legitimacy of consolidation judge (Mohamadzadeasl, 2001).

Another issue is discussed is the range of options of consolidation judge. Judging of consolidation judge pertains to Right of God or it consists of people right? Satisfaction or dissatisfaction with parties is acceptable or not? With a careful examination of jurists, it's clear that the option range of consolidation judge pertains to people right because the existence of consolidation judge depends on mutual consent (Najafi, 2006). About satisfaction or dissatisfaction of consolidation judge it should be mentioned that arbitration samples in Islam as Abu Mosa Ashari arbitration shows that after sentencing judge the parties consensual is not important and judge decree is valid (Langerodi, 1985). In addition ,If the parties consent be a prerequisite for judging, we cannot resolve the disputes between parties.

Besides consolidation judge , there is an entity which is called mediator. Mediator is a person who referred to in disputes and he solves the dispute between parties. In mediation, the victim, offender and mediation is essential and because of voluntary attendance of them, reaching in agreement is more probable (Najafi Abrandabadi, 2004).There are three kinds of mediator: state mediation, mediation of NGOs and Non-cooperative mediation(Najafi Abrandabadi, 2004). Non-governmental mediation runs with the inspiration of custom patterns without judicial intervention (Forozesh, 2006). In State mediation judicial officials are trying to solve the dispute. This type of mediation should accept negligently because it was not relevant to civil society (Forozesh, 2006). We see example of this kind of mediation in the 159th clause of PRCC.According to this article"in matters which may be terminated by mutual consent, the court will do their best to compromise. The appearance of article shows that attempting to compromise is the duty of the trial court (Zera't and Mahajeri, 2008). But because of multitude of court affairs, enforcement of this law has not been possible (Zera't and Mahajeri, 2008). So Lawmakers must provide the implementation of this Act.In Non-cooperative mediation, mediation is done by people under state supervision.The sample of this kind of mediation is seen in "The law of nomads'settlement" approved in 1959.According to the law, disputes of nomads is solved by a committee composed of two judges and a trustee of the tribe under government supervision.

Review of clause 6 of PRCC:

According to clause six of PRCC approved in 1995 "Litigants can resolve the hostility with recourse to the consolidation judge ".This is the only article about consolidation judge .So it should be investigated correctly. Two parts of this article have some ambiguities.We investigate them:

1.Litigants:There are two parties in every litigation. In criminal cases, litigants are called guilty and defendant. Committing a crime causes two kinds of litigation: general litigation for penalty and personal litigation for compensate (Kaleqi, 2011). In general litigation one of the parties is court which is the representative of society. Moreover, sometimes there is a personal litigant in general cases, but in general litigation court has the major role in perusing the guilty. In personal cases the person who is the effect of crime can litigate again the guilty and demand financial damages he had (Kaleqi, 2011).There is a difference between personal and general litigations. In personal litigation, the defendant can give his consent when he wants. In general cases, since the court is the representative of society, pursuing of the guilty is necessary and court cannot consent (Kaleqi, 2011). In the lawsuits, the parties can refer the

dispute to the arbitrator. In restorative justice the litigants can choose a person as a mediator. In consolidation judgment, the parties can refer to consolidation judge (Forozesh, 2006). Important to note that each of these three should not have a public aspect. Because as mentioned, public trial is related to community and affected person can only claim his losses.

2. If agreed: The most important condition for referring to consolidation judge is mutual agreement. In accordance with Article 454 of the Civil Procedure Act, mutual agreement is necessary for referring to arbitrator. In mediation, the parties agreement to mediator is essential. Note that there is a vague What is the purpose of the agreement? And at what stage of the dispute. According to the circular dated 1998 of The Judiciary system, courts were bound to identify confident person and appoint them as consolidation judge. According to the circular, the consolidation judge is a cooperative entity which is selected from non-governmental entities familiar with legal principles and under government supervision settles the disputes. And in this sense is equal to partnership mediation. The downside of this directive is that it has considered consolidation judge and arbitrator as the same. While there are differences between the arbitrator and the judge. Thus, according to the circular, the consolidation judge is elected by judiciary system. Thus it can be argued the phrase "the agreement" in 6 clause of PRCC represents an agreement to refer the dispute to the consolidation judge and selection of judge is out of authorities of parties. In opposition to this view, we can say when the parties can withdraw of their right, So they can resolve the dispute outside the judiciary. Meanwhile, according to the principle of freedom of contract in civil code, there is no obstacle to refer the individual dispute to a third party. In practice most disputes are resolved by third parties outside the judiciary. In reference to a arbitrator consent of parties is necessary but agreement is necessary (Shams, 2012). Another point to be noted is agreement of parties in accepting judge's decree. As mentioned before, no need for mutual consent is preferred..

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