

# Analysis of the Possibility and Limitation of Criminal Mediation in Rural Areas in China

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**Abstract.** With the development in the theory and practice in the area of criminal law in China, a lot of creative views have been put into legal practice. Criminal mediation, which is cropping up in both practice and theory becomes a hot subject under discussion in the field of legislation. The newly modified criminal law formally prescribes the criminal mediation, which has been recognized in the level of law-making. It has become a basic policy in the procedure of law suit. This thesis emphasizes the possibility of criminal mediation in rural areas in China, discussing the disadvantages of the current criminal justice mode, the advantages of criminal mediation and the tradition in rural areas in China. Additionally, it attempts to set up the limitation of criminal mediation, based on the principle of law, principle of equality, principle of utility and principle of justice.

**Keywords.** criminal mediation; rural areas; possibility; limitation

## 1 Introduction

Recently, as the progress of legal reform advances, various new theories have been introduced to the practice of justice. Criminal mediation is one of the most typical issues, which draw attentions from the legal academics and practitioners. Criminal mediation stems from the theory of modesty in criminal law, the theory of restorative justice [1], as well as the criminal policy of combining punishment with leniency. Criminal mediation allows the offender and the victim reaching a consensus based on negotiation, confession and compensation with equality, which will lead to a mitigated treatment to the offender.

The spirit of criminal mediation is to pursue the recovery of the relationship between the offender and the victim for the development and harmony of the whole society. The formal recognition of criminal mediation was regulated in §277, §278 and §279 in the newly modified criminal procedure law.

Due to the special reality in the rural areas of China, criminal mediation may provide the judicial activities there a new choice except the penalty. I would like to analyze the possibility of criminal mediation in the following paragraphs.

## 2 The possibility of criminal mediation in rural areas of China

Although criminal mediation is not an indigenous concept of China, it also has a broad prospect in application in the criminal cases in rural China. Because rural China still remains in the acquaintance society, the connection among people is much closer than that in the urban areas. Therefore, the

demand in fixing the violated relationship between the offender and the victim highlights the significance of criminal mediation.

## **2.1 The defects of the existing criminal justice system**

In the traditional criminal justice system focuses mainly on dealing with the offender, while the victims are almost overlooked by the authority concerned. The defects, which the existing system contains, are rather obvious.

Firstly, the system only pursues the punishment to the offender rather than meet the demand of the victim, which is not helpful to compensate the victim. Furthermore, the compensation is strictly limited in the range of visible damage caused by crimes, excluding the mental damage, which may be far more severe than the visible damage. It is hardly possible to offer a sufficient relief to the victim under such circumstance.

Secondly, the system overrates the effect of correction brought by punishment, while neglect the cross infection among prisoners. Criminals can easily share their experience about crimes with the others, especially in an over-crowded prison, which may invalidate the effect of correction in punishment. As Martinson claimed in his well-known report, “nothing works”. [2]

Thirdly, the cost in tackling crimes is rather expensive, which is a burden the society as a whole. The criminal procedure law nowadays has very strict regulation in the process of dealing with crimes, while the theory of constitution of crimes is getting more and more sophisticated. Under such circumstance, to prove a crime is rather tough and time consuming.

## **2.2 The modification of criminal mediation to the existing system**

Criminal mediation emphasizes that “under the auspices of a trusted third party, criminal offender and the victim may distribute their rights and obligations through mutual understanding, mutual consultation and mutual respect”. From the perspective of the perpetrators, this is “generally an over-commitment of civil liability, and an additional reduction in criminal liability”[3]. The main advantages of criminal mediation system can be embodied as follows:

1. The timely and sufficient compensation from the offender will help restore the losses of the victims. In many minor cases, what the victim need is an adequate funding support for restoring the trauma in physics and property etc. For example, in the case of serious injury caused by negligence, the victims or their families prefer to get timely compensation for the defendant to support the treatment and rehabilitation of the victims, rather than merely penalties. Merely imposing punishment against the defendants’ evils does not make much sense for the recovery of the victim's loss. In practice, many defendants hope to increase compensation for victims in order to lighten the sentences. In this sense, to boost recovery of damages suffered by the victims via transformation of the defendant's criminal and civil liability is also a viable option.

2. Mediation between the victim and offender can exclude some minor criminal cases from the trial, which is conducive to pretrial diversion of the cases [4] and saving judicial resources. The new Code of Criminal Procedure states that, for the case that is suitable for a settlement agreement, the public security organ may recommend leniency to the procuratorate. The procuratorate may recommend leniency to the court; and for a minor offense, where no sentence is required, a non-prosecution decision may be made. The court may make lenient punishment on the defendant according to laws. Criminal mediation system can end some minor cases in the prosecution phase and it only needs the inspection authority to make a non-prosecution decision. Therefore, there is no need to bring the case into a trial, which reduces the workload of the trial institution.

## **2.3 Adapting to the cultural tradition in rural areas**

In Chinese rural areas, farming is the very basis in tradition. For the rural life, “it is geographically constrained. Regional contact is rare and the life circle is isolated.” “The interpersonal relationship is

therefore of distinctive feature. Each child grows up under the witness of others; and the people around is also familiar to the child. This is a familiar society and a society where there is no stranger.” [5] This cultural tradition and lifestyle determines that the interpersonal circle of the rural residents is usually limited between the villagers, neighbors and relatives. And it is a typical acquaintance society and interpersonal circle. In this living circle, the strength of an individual alone cannot fully meet the requirements of daily production and life and interpersonal collaboration is needed. Therefore, the objective living conditions create a close relationship between people. Even if there is a contradiction between people, with respect to the combination of the whole community, this contradiction is not insurmountable. Community members will try to resolve these issues without the need for outside help.

If the law refers to the rules safeguarded by national powers, China's rural society is a “society without laws”. But this does not affect the order of the society because rural society is ruled by rites. [6] People there are more dependent on rites which are previous experiences. Here, rites, rather than laws, are treated as the criteria to resolve interpersonal disputes. In traditional Chinese society, “no litigation” is pursued, where the maintenance of public order does not rely on laws but rely merely on rites. And this kind of culture is still very popular in contemporary rural society. Law, criminal law in particular is with a strong national mandatory color. If blindly muscling into minor criminal cases in rural areas, this not only can not eliminate the contradiction between the victim and offender, but also lead to much more tense relationship on both sides. Even if one party won victory in the legal sense, but he may therefore be considered by other members of the community as “unreasonable” and therefore is “exiled” and excluded by groups. [7] The laws, which are originally designed to protect the victim’s rights and interests, only cause an embarrassing lose-lose result between the victim and offender. Consultative mechanism of the criminal mediation system complies with the “no litigation” preference of the rural traditional culture. It is designed to repair the relationship between the parties.

### **3 The limitation of criminal mediation**

Criminal mediation has advantages, which are accepted and recognized by the society. But it is also questioned mainly because it leaves an impression of “relieving penalty via money” to the public. It seems that if more money is spent, fewer penalties will be exerted. Thus it is considered subversive to people’s simple concept of justice, and violates the principle of legality and the principle that everyone is equal before the criminal law. Moreover, it seems that private power expels public power. Therefore, what kind of criminal mediation is legitimate, in other words, the limits of criminal mediation will be the focus of this article.

Criminal mediation system completes and improves the traditional criminal justice system. Therefore, if we discuss its limits, we cannot deviate from the basic principles of traditional criminal justice, such as the principle of law and principle of equality. In addition, in effect, it must equal the effect of the traditional penalty modes. This is also one of the factors affecting the limits of criminal mediation.

#### **3.1 Principle of equality**

Some extremes occurred in the justice practice make people worry about the criminal mediation. For example, in similar cases, some criminal defendants are able enough to pay for the victims and thus be forgiven; but other defendants fail to pay for the victims and thus be sentenced. Still other criminal victims blackmail the defendants and the defendants therefore suffered heavy losses. These extremes have exerted adverse impacts on the public. People began to worry that criminal mediation tend to be reduced to “reliving penalties via money”, and that “the more the money is paid, the lighter the sentence will be and vice versa.” Criminal mediation system involves in the consultation between the criminal defendant and victim and it is therefore somewhat arbitrary. Accordingly, whether the criminal mediation can be successful or not depends on whether the defendants are able to afford adequate compensation. Observing from the other perspective, we will conclude that criminal

mediation system is able to make exchanges between civil liability and criminal liability. Accordingly, the effects of criminal mediation will vary in accordance with the economic status of the defendants. This indeed violates the principle of equality that “similar cases will be handled in the same way”. But it is hardly impossible for the criminal mediation system itself to overcome such unequal factors.

Influenced by the simple concepts of equality, the principle of “same crime, same penalty” is what can be widely accepted. Otherwise, it will cause fierce responses from the public opinion. The author deems that proceeding from system construction, establishing supporting systems for the criminal mediation, the national compensation system for criminal defendants in particular, is the only feasible way. This system is used to ensure the criminal victims to get some funding supports from the State when they cannot obtain adequate compensation from the defendants so that the victims can get needy help. If such a system can be established, when mediation is conducted between the defendants and the victims, the attention will not focus too much on how much money the defendants can provide, and their attitudes towards and understanding of their crimes will also matter. To some extent, unequal phenomenon will be prevented.

### **3.2 Principle of utility**

Generally, the penalty should contain the following functions: First, in terms of corrective function, via an equivalent punishment, penalty exerts a pain equivalent to the degree of harm caused by the criminal behaviors, [8] in order to reverse the offenders’ interests (at least there are benefits from the viewpoint of the perpetrators). Second, in terms of utility, penalties are exerted on the criminals and a series of approaches are adopted to make the criminals correct their behaviors. Therefore, special effects of prevention can be achieved. Meanwhile, the State declares and conducts penalty. This shows to the public that crimes will definitely cause the pains of penalty, posing threatening to the potential criminals. Thus, in general, preventive effect can be achieved. The penalty declaration and implementation is a relief to the victims and their relatives, which is also conducive to healing the gaps of the damaged social relationship. In terms of the very purposes of the penalty, we may mainly check whether the criminal mediation of the defendants can equal the results of normal penalty. Specifically speaking, we shall examine whether the economic losses of defendants will remedy the defendants’ wrong-doings as effectively as the penalty. If it is so, criminal mediation between defendants and victims will be encouraged; if it is not so, deliberate consideration will be made.

Meanwhile, we should consider whether the effects of the criminal mediation shall be equal to the effects of penalty. Moreover, we should also consider that whether the tense relation caused by the criminal behaviors shall be compensated. If there are evidences of threats, luring, cheat and other major defective factors, we should not support the mediation of the case. If the case has caused serious consequences and aroused strong resentment among the public, criminal mediation shall not be considered.

### **3.3 Principle of justice**

The principle of justice refers to that in the process of criminal mediation; the judiciary should hold a just and impartial attitude and examine the possibilities and extent of criminal mediation to a specific case, proceeding from social justice and the legal justice of the legal community. If penalty occurs on the basis of the simple justice concept, the newly emerged criminal mediation system occurs out of the purpose of utility.

Similarly, to some of laws and institutions, regardless of how efficient and orderly they are, as long as they are not just, they must be adapted or repealed. [9] In practice, we must try to avoid mediation for mediation’s sake. We cannot force mediation merely out of the blind pursue of the convenience of the procedures or improvement of the cases clearance rate and force a criminal settlement. Although justice and utilitarian are mutually reinforcing in most cases, but sometimes there are conflicts between them two. For example, extreme utilitarianism is considered unjust. In terms of justice and utility, if there must be a choice, the author favors the idea of justice. This is

because “justice is the first virtue of social institutions, just as truth is the primary virtue of the ideology system. No matter how fine it is, as long as it is not true, it must be rejected or amended; judicial staffs should proceed from their own sense of justice of law, consult the general conception of justice, community as a reference, and then make comprehensive assessment on whether a particular case should adopt mediation. If it is convinced that the case meets the justice concept of legal person and the mass majority toward mediation, mediation process may be conducted; otherwise, it shall not be conducted.

## References

1. Xiaoming Chen. Research on Restorative Justice[J]. Chinese Journal of Law, 2006, 01: 52 (Ch).
2. Doris Layton MacKenzie. Criminal Justice and Crime Prevention, Preventing Crime: What Works, What Doesn't, What's Promising, <https://www.ncjrs.gov/works/chapter9.htm>.
3. Hui Xie. On Criminal Settlement and Folk Norms[J]. Modern Law Science, 2011,33(02): 4-5.
4. Yinghui Song. Empirical Research on Criminal Mediation [M]. Beijing: Peking University Press, 2010. 22.
5. Xiaotong Fei. The Foundations of Chinese Society, Reproduction System[M]. Beijing: Peking University Press, 1998. 9.
6. Xiaotong Fei. The Foundations of Chinese Society, Reproduction System[M]. Beijing: Peking University Press, 1998. 49.
7. Suli. The rule of law and local resources [M]. Beijing: China University of Political Science Press, 1996:33 .
8. Kechang Ma. History of Theory of Western Criminal Law in Modern Times [M]. Beijing: People's Public Security of China Press, 2008. 150.
9. Rawls. A Theory of Justice [M]. He Huaihong, He baogang, Liao Shenbai, Beijing: China Social Sciences Publishing House, 2009