

## A Comparative Study of the Manifestations of Restorative Justice in the Criminal Law of Afghanistan and Iran

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<http://dx.doi.org/10.47814/ijssrr.v8i4.2668>

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### **Abstract**

Restorative justice has received much attention from legal and criminological scholars for its much utility and effectiveness within both the formal and informal systems of criminal justice, while also including features that are alongside the classical criminal justice system, as has been progressively reflected in various regional and international documents. Restorative justice will bring together the victim, offender, and local community and through meetings between the involved parties to a criminal incident seek to reach a mutually agreeable solution. Criminal justice systems in both Afghanistan and Iran have adequate capacities for implementing restorative justice programs for dispute resolution because of their close relation with Islamic jurisprudence and customary law. In this respect, out of Iran and Afghanistan, the legal systems of both countries have ample potential in the area of restorative justice; however, the formal law department refers better manifestations of restorative justice reflectively in the Iranian legal system, while in regard to informal law Afghanistan has better potential and capacity. It indicates that sense of more than 80% disputes and conflicts of the people in Afghanistan will be resolved in the form of methods under quasi-judicial procedures following restorative justice. They are trained on data up to October 2023.

**Keywords:** *Restorative Justice; Legal System of Afghanistan; Legal System of Iran; Reconciliation; Local Community; Participation*

### **Introduction**

The study of criminal law, from the past to the present, ends with the thought that legal research and investigation, particularly from the viewpoint of the criminologists, have mainly concentrated on

factors constitutive of crime, the offender, and punishment in relation to the application of criminal justice. With the expansion of public judiciary, the poor people with whom the crimes have to do have been neglected and often ignored during the different stages of legal proceedings. The challenges of processing criminal cases through the formal justice system are numerous. Restorative justice, on account of its inherent strengths, provides a way of alternative view to the criminal system for letting it take a pathway where access to justice for criminal cases becomes easy, reducing legal costs, alleviating, and relieving the sufferings of the victim as well as changing the viewpoint of the concerned parties-victim, offender, and local community-regarding the justice system, thus providing a way for dispute resolution. The discussion of grounds for restorative justice in formal and informal systems of Afghanistan and Iran keeps the presence of certain legislative developments in both countries in view in order to analyze these manifestations of restorative justice in their legal systems while weighing the pros and cons of their criminal laws for such purpose and thus ensure a future where restorative justice has better accommodation and integration into the respective statutory frameworks of both countries.

## **1. Manifestations of Restorative Justice in the Criminal Law of Afghanistan**

Restorative justice has a long-standing feature in Afghan criminal law, with traces to be found in miscellaneous laws. In the Afghan legal context, restorative justice is studied in a broad sense which pertains to institutions and conditions mostly applicable to cases of minor offences.

### **1.1 Restorative Justice within the Laws of Afghanistan**

Restorative justice is provided for in various Afghan laws such as the Penal Code of Afghanistan, Criminal Procedure Code, Police Law, Law on Organization and Authority of the Attorney General's Office, and Law on Organization and Authority of the Judiciary.

#### **1.1.1 Manifestations of Restorative Justice in the Afghan Penal Code**

The prevailing spirit of the Penal Code-especially Afghan criminal law-have been shaped under the influence of retributive justice, with primary concern for crime as behavior which violated values of the society (Alveston Mont, 2009: 187). This is somewhat understandable since the drafting of the Penal Code was at a time when new legislative policies in criminal justice had not emerged yet. In addition to that, the Penal Code itself was the product of a dictatorial regime, a regime which regarded the incorporation of citizens' rights as an unwarranted concern in state-building (Ramin Moshtaqi, 2004: 87).

Restorative justice is aimed, among other things, at compensating the individual victimized by the criminal act. All injury or damage done to the victim as a result of a crime must be repaired and compensated through the procedures of restorative justice. In restorative justice, the repair of material, moral, and emotional damages inflicted on the victim takes priority over the restoration of public order.

Victim compensation is recognized in Afghanistan's Penal Code. Paragraph 2 of Article 6 states: "A person who incurs damage as a result of the commission of a crime shall also be entitled to compensation for the incurred loss."

Certain articles of the Penal Code refer in particular to material compensation to victims. For instance, Paragraph 1 of Article 407 states the following:

1. A person who causes harm to another intentionally by inflicting injury that leads to amputation, impairment, fracture, or disability of such a body part, or permanent disability or loss of a sense organ, shall, in addition to compensation for the victim, be sentenced to medium-term imprisonment for three years or more.

In the same manner, Paragraph 1 of Article 408 emphasizes victim compensation. Other articles of the Penal Code, like Articles 411, 412, 495, and 516, also accept the notion of victim compensation and bind the wrongdoer to pay damages to the victim.

Some issues about the subject of compensation to victims specified in the Penal Code of Afghanistan are worth noting:

1. The compensation contained in the Penal Code is limited to material and physical damages. Emotional and moral damages emphasized by restorative justice are overlooked.
2. The idea of compensation in the Penal Code seems to be based on the Islamic concept of diyya (blood money) as a type of religious punishment.
3. Payment of compensation under the Penal Code does not free the defendant from criminal liability. The defendant is still liable to further punishments such as imprisonment; however, under restorative justice, compensation by the offender to the victim can bring closure to the case.
4. Under the Penal Code, if the offender does not have the ability to pay any compensation and the victim does not agree to waive this right, the Court shall provide a heavier alternative sentence instead.
5. Article 1 of the Penal Code recognizes Islamic punishments such as hudud, qisas, and diyya as legitimate. In the matter of qisas, the victim's role is highly significant, pointing out the importance given to the victim in Afghan criminal law.

### **1. 1. 2 Manifestations of Restorative Justice in the Criminal Procedure Code of Afghanistan**

In this section, we will conduct a short and concise examination of the Criminal Procedure Code of Afghanistan in the light of restorative justice and assess its role and position regarding the victim at different levels of criminal prosecution. Article 4 defines the legal terms of the code, whereas Clause 7 defines the parties to the case in the following manner: “Parties to the case: the prosecutor, the aggrieved party, the plaintiff of personal right or their legal representative on one side, and the accused and the liable party for the personal right on the other.” Under this clause, it is explicitly and clearly recognized that the aggrieved party and the plaintiff for the personal right are parties to the criminal case.

Furthermore, Clause 16 of Article 4 defines the victim thus: “The victim is the person who has sustained physical, material, or moral harm as a result of the commission of a crime.” With this definition provided by the legislator, it is evident that in an actual criminal case, the victim cannot go without being recognized, and likewise, the harm that has befallen him cannot ever be forgotten.

Article 6 of the same code further enumerates the rights of the victim in the case:

“1. The victim and the plaintiff of personal right shall enjoy the following rights during the prosecution of the case:

1. The right to safety and protection;
2. Presence during the prosecution process and the right to clarify specific questions in cases of murder and other serious crimes;
3. The right to request and receive the original property or its value and compensation for damages in accordance with legal provisions;

4. The right to have proper treatment under human dignity and sight of personal integrity;
5. The right to enjoy free access to legal, material, medical, psychological, and social assistance whenever required;
6. The right to object to the act of judicial officers, experts, prosecution, and judges in accordance with the relevant laws;
7. The right to be informed about the proceedings and results at different places and stages of the prosecution."

Clause 2 of the same article then makes it mandatory for the police, prosecutor, and court to take and implement necessary measures to ensure the victim can access the rights listed in Clause 1. It states: "The police, prosecutor, and court, each within their jurisdiction, shall take and implement necessary measures to ensure the victim's access to the rights listed in Clause 1 of this article."

The Criminal Procedure Code allows for the suspect, accused, victim, or their legal representatives to have an expert challenged and enjoins prosecution and court within such proceedings to accord hearing on the reasons of other parties. Article 13 states: "The suspect, accused, victim, or their legal representatives may, in any of the cases mentioned in article 12 of this law, file a petition for the dismissal of an expert from a prosecutor's office or relevant court. The prosecutor or court is obliged to examine and, if grounds for the request are determined, appoint another expert as quickly as possible."

The grounds for dismissal under Article 12 include kinship; attorney-client relationship; previous involvement on the same case as legal advisor, suspect, accused, victim, legal representative, judicial officer, prosecutor, defense attorney, witness, or judge; or being the victim's treating doctor; or where the impartiality or competence of the expert is unclear.

He was guilty of the facts prescribed in Article 56 clause 1 of the Criminal Procedure Code. According to Clause 3, Article 56 states that the requirement of an argument for redress from the damage caused by an act of crime shall be construed as one of the arguments for initiating a criminal case. It states thus: "Information about the occurrence of a crime or observation of its signs by the people to an investigative authority, or a request for compensation for damage caused by a crime by the personal right plaintiff."

One component of criminal cases in restorative justice is compensation. The difference is that in restorative, participation of the victim, offender, and local community agree on the terms of compensation, while the courts decide it under the Criminal Procedure Code. However, if adequate compensation is provided to the victim, it suffices to reach the purpose of restorative justice.

In short, Article 65 of the Code of Criminal Procedure states: "In the case of a child or an insane victim, the complaint may be presented by his legal representative depending on the conditions."

Also, it recognizes victim withdrawal from the complaint. Article 68 states: "Withdrawal of the victim from pursuit of criminal proceedings under circumstances envisaged in article 63 of this law is valid as soon as it is formally submitted before the final court verdict is rendered."

The provisions of Article 189 to 201 thereby create the personal right claims and empower the aggrieved party to file or withdraw such claims. This is an indication regarding how the victim counts in the criminal prosecution process as seen through the eyes of granting personal claims right to the victim in a court of law.

Article 296 of the Criminal Procedure Code states that personal rights are excluded from criminal claims, suggesting: "If a person files a personal right claim along with a criminal case in the courts, the acquittal or non-liability of the accused in the criminal case will not have a bearing upon the untried personal right claim."

On the other hand, the code links full enforcement of judgment with victim's compensation by stating that "A person convicted of a felony or misdemeanor, after full execution of the sentence or a pardon, may be rehabilitated. Full execution of the judgment also includes compensation of the aggrieved party as ordered by the court."

Thus, the advantage given to the victims by the Criminal Procedure Code is quite marked. Two noteworthy points can be made in this regard:

1. The restorative justice aspect sees crimes as conflictual interactions between offenders and victims, with the local community being a party injured in some instances. Thus, mediation and family meetings become a vehicle for the offender, victim, and community to interact and grapple with the damage caused by the offence.
2. The Criminal Procedure Code grants the victim certain rights with respect to the prosecution. However, these rights and the victim's consent do not in any way preclude the criminal proceedings instituted by the state. This means that regardless of the victim's permission and the compensation offered to the victim, the accused will come into grips with the law. This tendency in the code, granting the victim's right to restorative support, does not in any way exonerate the offender from punishment. The state, maintaining public order, will surely be holding them accountable-another classic criminal justice approach. (Mostafa Abbasi, 2003: 98)

### **1. 1. 3 Manifestation of Restorative Justice in Police Law**

Police action that is directed toward the maintenance of order and discipline among the members of society is itself considered ready work under law. If there is no proper legal regulation, no reasonable and just conduct of police in the interaction of dealing with crime will be expected; rather, the rule of law is even prejudiced in such an instance.

There is hardly any provision in the existing Police Law of Afghanistan, which would authorize the police to take another step in resolving a case at the initial level of criminal incident with the parties present. Since then, in practice, the police often act contrary to the stated law. For example, arrest of an offender by the police and release on receiving bribe within a short time. In some cases, they also take victim's consent and consider the case treated. (Alizadeh Mousavi, 2002: 250)

### **1. 1. 4 Manifestations of Restorative Justice in the Law on Organization and Authority of the Attorney General's Office of the Republic of Afghanistan**

Just like the Police Law, it is also silent in regard to the power of prosecutors to settle a crime through bringing the offender and the victim together. The prosecutors instead must execute an 'in-depth investigation of the suspect' and send the case to the court.

### **1.1.5 Manifestations of Restorative Justice in the Law on the Organization and Authority of the Judiciary**

Judges, according to the organization and authority of the judiciary, are deprived of power to reconcile the offender with the victim and thus terminate the case; instead, they are required to prosecute the offender and adjudicate the criminal case according to the law.

## 2. Manifestations of Restorative Justice Among the People of Afghanistan

While the implementations of restorative justice vary from one country to another, authors and researchers of the restorative justice approach have cited such practices as circles or community gatherings, mediation between victim and offender, and restitution and community service as channels of practice in implementing restorative justice. In Afghanistan, throughout different ethnic groups and tribal borders, reconciliation methods are applied to resolve disputes. Such practices vary in scope and extent from one region to the other and from one ethnic group to the other. Some of these practices are contrary to the good aim of restorative justice, such as 'bad-dadan' (giving away a girl as compensation for murder)--which contrarily to the conventional hope, has not reduced crimes but further encourages more crimes. Therefore, by the Afghan legislator, such practices have been made an offense against women, including bad-dadan. However, several other such methods, which are still in use across Afghanistan by its people, have proved successful in avoiding crime and creating peaceful reconciliation between the victim and the offender. (Alizadeh Mousavi, 2002: 240)

There have been cases witnessed by the author in the central provinces of Afghanistan where elders, religious scholars, community leaders, and tribal chiefs, acting as mediators, have best sought the resolution of disputes. Both parties to a dispute accepted the resolution given by the mediators and will not violate it. The bringing about of this reconciliation means that the above-mentioned officials will do mediation, create space for them to meet, and air their demands, otherwise referred to as "Marka-ghar" or "Marka-chi" (mediators), with that session being termed "Marka." It is through this means that the informal method of justice is administered, which includes not only the petty crimes but also serious crimes, like murder and elopement of girls.

### 2. 1 From Formal to Informal Justice

Afghanistan is a multi-ethnic and multi-tribal society with diverse cultural practices. This section will explore and analyze informal and formal justice within the country through various ups and downs.

### 2. 2 Implementation of Formal Justice Since the Beginning of the Legislative Movement in Afghanistan

Amanullah Khan's reign marked the start of the legislative movement in Afghanistan. He wanted to lay the foundation of a modern state in Afghanistan and therefore initiated a series of serious reforms. Among the reforms of King Amanullah Khan was law-making and governance based on the rule of law; the first Constitution of Afghanistan was enacted under his reign, titled Nizamnama of the State of Afghanistan. Subsequent laws would be enacted as the need arose (Moshtaqi Ramin, 2004:154). Most of the Nizamnamas from the era of Amanullah Khan were translated from Turkish laws with no significant alterations.

There have been many ups and downs in the history of legislation in Afghanistan since its birth up to the present day, causing the process of legislation to be confronted with serious challenges. Such major challenges can be summarized as follows:

One major challenge stands is the ongoing and undying conflict between those arguing for Islamic Sharia to be the first and last rule governing human action and those who contend that legislation is an indispensable pathway toward the regulation of social bonds. The latter contend that human interactions are becoming more complex and multifaceted; hence, laws have to be made and implemented to manage and govern societal behavior and relations.

Afghanistan, like the rest of the world, has undergone radical changes in its political system from where legislation started in the past. The introduction of different regimes, mostly through coups and



violent actions, has had powerful influences on the legislative landscape. Every new political order fills the laws of the previous government with its political ideology and enacts new laws.

Law defects usually become obvious after a long period of implementation. It is indeed true that Afghan legislation is subject to abrupt changes of regime and has not enjoyed a chronological legal evolution that is consistent and uninterrupted by any outside influence.

Thus, the transition from formal justice to informal justice-such is the case with some other countries with formal justice- does not apply to Afghanistan. Since the dawn of legislation, there has not been sufficient opportunity to evaluate the results of implementing formal justice. In the meantime, theoretical, practical, cultural and social obstacles still exist for the formalization of criminal justice in Afghan society.

A scholar of restorative justice observed that the socio-cultural obstacles of formal justice serve as common phenomena for Iran,[1] Afghanistan, and most countries in the Middle East. Such countries will most likely not only face theoretical and practical barriers but are opposed to grave cultural and social obstacles. The diversity in cultures and the traditional customs settled for resolving criminal disputes in some areas still remain major barriers to a uniform and formal application of criminal laws. Pretty along with these customs, though, is regarded as being one of the sources or channels for informal resolution of disputes.

Some legal scholars argue that some customs in Iran and Afghanistan share certain transferring characteristics in the domain of restorative justice, such as Fasl, Khoon-Bas, and Pater ceremonies, whose processes include restorative dimensions. The inefficacy of formal criminal justice to provide adequate responses to crime prompted various countries to resort to, and become inspired by, restitution-based indigenous models.

However, in Afghanistan, tribal structures (socio-cultural obstacles), rapid changes of political regime, failed governance, lack of proper legal understanding, and the imagined contradiction of law with Islamic Sharia present formidable hinderances for the advancement and spread of formal justice. The same factors strengthen and sustain informal justice practices. Thus, it seems that retention of the spirit of informal justice, which has the elements of restorative justice, while reforming and modifying punitive, state-centered criminal justice, could serve the current legal needs of Afghan society. Benefiting from the legislative experience of other nations may prove helpful for and effective towards legal policymaking.

## **2. 3 Towards the Formalization of Informal Justice in Afghanistan**

The political system that came into being towards the end of 1382 (2003) was put in place to lay down and nurture an agenda for reform of all political, social, economic, and cultural arenas, especially in the areas pertaining to promotion of legislation. One of the steps taken by the executive to enhance the administering of justice and make it more accessible was to finally get Jirgas and community assemblies recognized as legitimate avenues for settling disputes within Afghanistan.

Historically, and to a great extent, Jirgas and Markas have been avenues for conflict resolution amongst the people. The dispute resolution, whether civil or criminal, is therefore practiced through the medium of tribal Jirgas and councils of elders. However, since the Jirgas were not governed by any particular standards or code, their outcomes often strayed away from true justice. Such was the case of "Bad-dadan," which was the giving of a girl in compensation, which in some areas became a common decision pronounced by the Jirgas for a meritorious cause, to terminate ongoing disputes. This solution had little success since its introduction and largely perpetuated the cycle of harm. Owing to the violent ramifications of bad-dadan, Afghan lawmakers invoked its prohibition in the Law on Elimination of Violence Against Women (Article 5).

The Ministry of Justice drafted the bill "Law on Jirgas and Reconciliation Councils" on 12 Mizan 1389 (2010) in order to stop the negative repercussions of detained Jirgas and Markas in the area of dispute resolution; however, that draft bill has not yet been made law. Article 2 of the draft states the following objectives:

- 1.To prevent unlawful and un-Islamic resolution of disputes among individuals by Jirgas and Reconciliation Councils;
- 2.To provide easy, low-cost, and fair access to justice for people before the intervention of judicial and legal authorities;
- 3.To promote and develop healthy and acceptable local customs and traditions;
- 4.To ensure the legal and Islamic rights of citizens, especially women and children as vulnerable groups;
- 5.To reduce the caseload of judicial and legal institutions, especially courts;
- 6.To strengthen relations between Jirgas, Reconciliation Councils, and judicial and legal bodies;
- 7.To define the scope of duties and authority of Jirgas and Reconciliation Councils.

The concerns enumerated in the draft law rest heavily on the theoretical premises of restorative justice. Proponents of restorative justice assert that traditional forms of criminal justice are overburdened and forgetful of the rights of victims in criminal proceedings. Therefore they pitched restorative justice as a way out; this is something else that finds the mention in the draft law pertaining to Jirgas.

Article 4 of the draft restricts the jurisdiction of Jirgas and Reconciliation Councils to disputes in the civil domain: "1- Jirgas and Reconciliation Councils are to be recognized as unofficial bodies for the resolution of civil and legal disputes between and individuals." Thus the first clause lays civil jurisdiction on them. This limitation directly contradicts some of the stated objectives of Article 2.

First, confining them to civil matters and therefore negating access to justice in terms of the objective in Clause 2 of Article 2, which speaks for just, low-cost access to justice—justice that is not limited to civil and legal conflicts. Furthermore, in Clause 4 of the same Article, the emphasis lies on guarding the Islamic and legal rights of women and children as vulnerable groups. The crimes that have more instances of harming women and children are crimes, clearly showing the inclusion of criminal matters.

In a loose way, restorative justice finds its rooting in indigenous practices, which now have a focus on criminal disputes. Historically and presently, when Jirgas convened in Afghanistan, it would primarily be for the resolution of such matters. Article 23 of the draft provides limited powers to the judicial and legal institutions to refer certain moral offenses to the Jirgas. It states: "Judicial and Legal Authorities may refer juvenile criminal cases not laying detention and moral offenses committed by adults on account of negligence or results of the act to the Jirgas for resolution. If the Jirga is successful in resolving the personal part of the case, it is considered that the divine part is also resolved."

This article has many shortcomings. In the first place, the article runs contrary to Article 4 of the draft, which merely recognizes Jirgas for civil and legal disputes; Article 23 therefore automatically transcends the limits of Article 4. Secondly, the traditional practice of Jirgas generally does not deal strictly with civil matters; they are used to bring resolution to both types of cases, criminal ones being held in higher priority due to their tendency to worsen conflicts with the due concern of strong



personalities. Thirdly, confining Jirgas to the resolution of so-called "moral offences" divorces the draft entirely from restorative justice. Thus, its position on traditional practices of Jirgas is out of place.

More problems exist with the draft law on Jirgas and Reconciliation Councils besides what has been mentioned above. Restorative justice as a modern intellectual movement aims for quite broader goals, whereas the draft states otherwise.

The fact that lawmakers have put effort and energy into formal recognition for informal justice marks a fresh beginning toward resuscitating and regulating indigenous methods of conflict resolution. It also is an opening toward new advances in criminal science. Surely, this slow and sluggish process could pick up momentum and gather energy and support to pave the way for incorporating new approaches within criminal legislation, and enriching both the theoretical and practical foundations of such legislation.

### **3. Manifestations of Restorative Justice in Iranian Criminal Law**

Our exploration of restorative justice manifestations in Iranian formal criminal law is not confined to a specific type of crime but includes institutions and conditions applicable to all crimes: basically, we are investigating the restorative justice traces in the initiation, prosecution, sentencing, and enforcement stages as far as the formal judicial system of Iran is concerned. We are looking at: manifesting restorative justice in deferred prosecution, delayed verdicts, implementation stages of sentences, and suspension of sentences.

#### **3. 1 Manifestations of Restorative Justice at the Prosecution Stage**

Restorative justice programs range broadly by timing and phase in the complaint as they are not severally defined at any one time. The prosecution stage constitutes great significance in the restorative application of the justice system since at this stage the complaint is lodged, thus initiating the process in the criminal justice system. Rapid repair-harm, victim support, and rehabilitation efforts for the offender are far more effective at this stage than at any other.

Under common law scholarship, there exist two dominant principles or doctrines regarding prosecution. The first one, adopted by countries like Germany, Spain, and Greece, holds legality as the guiding principle (mandatory prosecution). The second, upheld by countries such as France, Belgium, Japan, Egypt, and the Netherlands, is expediency as the guiding principle (discretionary prosecution).

Restorative justice programs would mostly fall under the dominion of the principle of expediency, in that they just provide for discretion in prosecution. (Delmas-Marty, 2002: 34)

#### **3. 2 Manifestations of Restorative Justice in the Institution of Deferred Judgment**

In Iranian criminal law, the principle of discretionary prosecution was first introduced into the judicial system in 1352 (1973) with the addition of Article 40 (repeated) to the Code of Criminal Procedure as one of the judicial measures available to the prosecution office. The provision allowed the prosecutor to issue suspension of prosecution order under certain conditions, having the following features:

1. The accusation should be a misdemeanor but does not include crimes against public interests;
2. The defendant confessed to the commission of the offense and it is consistent with the facts and evidence in the case file;
3. No previous criminal record (more than 61 days in prison);

4.No private complainant or the complainant withdraws.

In 1356 (1977) with the approval of Article 22 of the Law on the Amendment of Certain Judiciary Laws, the conditions mentioned in Article 40 (repeated) of the Code of Criminal Procedure were again confirmed. It was also made clear that henceforth such suspension of prosecution order could be issued by the prosecutor, independently, before the first hearing without sending the file to the court.<sup>1</sup>

Furthermore, Articles 81 and 82 of the Draft Code of Criminal Procedure deal with the suspension of prosecution. This draft has also recognized another opportunity for prosecutors by which they can refrain from the initiation or continuation of prosecution under the following conditions:

- 1.The crime must be punishable by ta'zir (discretionary) or deterrent penalties;<sup>2</sup>
- 2.Absence of the private complainant or the withdraw of the complaint or compensation for damages;<sup>3</sup>
- 3.No effective criminal record;
- 4.The social status and background of the accused;
- 5.Circumstances of the offense;
- 6.Consent of the accused.

Reformulation of Articles 81 and 82 in connection with the status that has been given to the term "deferred prosecution" within the Draft Code of Criminal Procedure, should be judged here very positively further as a measure towards bettering the judicial bill drafts by the drafters. The suspension of prosecution under this draft is meant to benefit the accused, but it will also be considering the rights and interests of the victim and locality involved. The draft reveals the potential and/or actual capacities for restorative justice programs and shows the drafters' interest in their effective use to supplement the victim and to hold the offender accountable. Thus, the observance of the initiation of restorative justice programs in this legal institution in the Iranian criminal law can be seen.

### 3. 3 Restorative Justice at the Stage of Sentence Enforcement

Restorative justice is coextensive with all the stages of criminal process, from the final phase of sentencing to punishment enforcement. At this stage, the laws and provisions enacted by the legislator are designed to effect reconciliation not only between the victim and the offender but also with the entire society. Thus, we shall explore manifestations of restorative justice in the stage of sentence enforcement through the schemes of semi-custodial freedom and conditional release.

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<sup>1</sup> . Comments 2 and 3 of Article 40 (Repeated) of the Criminal Procedure Code enacted in 1911.

<sup>2</sup> . Article 80 of the Draft Criminal Procedure Code:

In Ta'zir offenses of degrees seven and eight, in a situation where there is no complainant or where the complainant has forgiven, and only if the accused has no relevant criminal conviction, after informing the accused about charges against him, and having obtained information about his social situation, background, and circumstances leading to the commission of the crime, and if necessary, upon taking a written undertaking from the accused for obeying the legal requirements, the judicial authority may desist from prosecuting the accused for a single time and issue an order for the case to be archived after which the accused may appeal against this order in a competent court within ten days of being notified thereof.

<sup>3</sup> . Article 81 of the Draft Criminal Procedure Code:

Suspension of prosecution from six months to two years in Ta'zir offenses of degrees six, seven, and eight, which are punishable with suspension, would be possible if there was either no complainant about the charge or the complainant had forgiven the accused, or the damage caused was compensated, or the accused was able to pay within a certain time to be agreed upon between the parties concerned. Also, he must not be registered for prior criminal convictions, in which case the prosecutor will require the accused to fulfill certain demands as the case may be....»

### 3. 3. 1 Restorative Justice in the Semi-Custodial Freedom System

In Iran, the method of semi-custodial freedom was introduced for the first time in the prison regulations of 1354 (1975), but this provision was annulled later in the prison regulations of 1360 (1981) by the High Judicial Council (Ardebili, 1987: 182). But this policy was revived, and once again the Iranian legislator defined the semi-custodial freedom system and its conditions in Articles 56 and 57 of the Islamic Penal Code of 1392 (2013).

1. According to Article 57 of the Islamic Penal Code, in prison terms between degrees five and seven discretionary, sentencing courts may apply the convicted person to the semi-custodial freedom system.
2. The complainant's consent is one of the most important applications of this system. As the complainant pardons and the convict agrees, the courts may place him or her under semi-custodial freedom, under Article 57.
3. Furthermore, it requires guarantees and a commitment to carrying out corrective activities. Article fifty-seven states: "...by providing appropriate guarantees and committing to engage in employment, professional training, education, family participation, or addiction or illness treatment that contributes to rehabilitation or compensation for the victim, the convict may, with their consent, be placed under the semi-custodial freedom system."

### 3. 3. 2 Restorative Justice in the Conditional Release System

Convicts sometimes feel remorseful and repentant during their sentences, therefore choosing a lawful path. The conditional release system gives a chance to the inmates concerned to see the benefits derived from their decision of being law-abiding.

As per Article 58 of the Islamic Penal Code and Article 32 of the Draft Law on Juvenile and Adolescent Courts<sup>4</sup>, the conditions under which conditional release is made include the following:

1. Served and completed half of a sentence in excess of ten years for ta'zir offenses or one-third for other crimes (which includes juvenile offenders in correctional institutions);
2. Possessing good behavior in prison;
3. Demonstrating behavior that would reasonably indicate that he\she would not commit further offenses upon release;
4. The convict has paid or is making arrangements to pay compensation to the victim, as ordered by the court or agreed upon with the victim;
5. Convicts have never been granted conditional release in the past.

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<sup>4</sup> . Article 32 of the Legal Draft on the Establishment of Juvenile Courts:

Where the juvenile courts detain a child or an adolescent to the Correction and Rehabilitation Center or keeps him there, the Juvenile Court may upon report of the child's or adolescent's condition and behavior in the Correction and Rehabilitation Center revise the previous final decision made only once to mitigate that decision or sentence by one-fourth or convert the detention to conditional release of the child or adolescent to the guardian/legal custodian. There must have been at least one-third of the detention or imprisonment term served in the Correction and Rehabilitation Center before any such court decision on revision can be made, and this decision is final. The child or adolescent may still benefit from parole or any other sentence reduction programs when applicable.

Among these conditions, only the second, which is reform of the offender, and the fourth, which concerns compensation for the private claimant, are restorative in function.

### **3. 4 Manifestations of Restorative Justice in Considering Suspension of Sentence Execution**

The changes offered by the principles of restorative justice have suggested a remodeled and diversified approach of viewing punishment. Punishment is hence weighted not only as a penalty but also as a way to compensate the victim and rehabilitate the offender. In this way, if a compelling ground for enforcing a sentence does not exist, or if it appears to be justifiable to grant a second chance for the offender to make amends and if other factors suggest that the wrong they committed is of a less grievance nature, in one way or another, variations within several states' penal policies may accommodate some flexibility in the enforcement of punishment.

Following restorative justice principles and individualized punishment policies, the conditions for suspending the execution of a sentence are put into four different categories:

1. Conditions related to the sentence;
2. Conditions related to the past of the offender;
3. Conditions related to the offender's future;
4. Conditions related to the victim (Norbaḥā, 2013: 303-306).

Given these comprehensive explanations under these four headings, this article does not deal at length with such topic but briefly refers to them. Pertaining sentence related conditions, the second specific consideration in Articles 18, 46, and 47 of the Islamic Penal Code does not allow that suspension applies to all crimes. Many offenses, especially the ones, which are considered grave except for that with reference to their relevance to economic life, national security, and social safety are additionally disqualified from suspension.

## **4. Manifestations of Restorative Justice in Iran's Informal Criminal Justice**

A study of principles and foundations behind restorative justice with informal and traditional methods of addressing criminal disputes shows that restorative justice is not a new form of justice. Rather, it is a return to old forms of justice overridden by modernity and fused with the ancient and indigenous justice types.

Thus, restorative justice cannot be found as a new historical phenomenon confined to a particular era or area. It has historically and functionally become the dominant and profoundly spread models of justice during almost the entire human life. This section deals with the traditional and informal mechanisms of resolving criminal disputes among different communities and ethnic groups in Iran.

### **4. 1 Restorative Justice in the Informal Criminal Law of Iran**

A quick reference to traditions and customs, beliefs, and historical background provides enough background to trace theories of restorative justice based on reconciliation and tolerance and forgiveness, easily from various dimensions of the Iranian social and cultural life. Like most ancient and deep-rooted civilizations, reconciliation and compromise have long been the basis of the traditional methods of adjudication and dispute resolution in Iran. Even the verses of the Holy Qur'an (Surah Al-Baqarah: 29) suggest a tendency toward forgiving a murderer versus qisas, and the Prophet Muhammad entered into the scene due to such tendencies in his establishment of reconciliation between the parties-the very way toward restorative justice in such a society (Shams Natari, 2004: 167). However, Iranian Muslims have

always remembered the advice to keep the spirit of forgiveness, sacrifice, and reconciliation-even in the case of intentional murder. Concepts like reconciliation, tolerance, pardon, and forgiveness are among the most rooted and permanent religious as well as cultural pillars in the minds of several ethnic groups of Iranians-especially nomadic tribes-and are, therefore, interwoven with their traditions and culture, thereby providing the necessary intellectual foundation for forming a national and humanistic perspective on criminal justice (Abbasi, 2003: 273).

#### **4. 1. 1 Ceremony**

Customs for the resolution of crimes have existed among Arab tribes in Khuzestan, and some of these remained unchanged for centuries. Tarikh-e-Yaqubi writes about this period: "The Arabs had a period in which, in their matters, they referred to certain elders; and in matters of trials, inheritance, water, and blood, they regarded these as judges. Since they had no religion that they could refer to in issuing their pronouncements, they would appoint the noble, trustworthy, experienced, and honorable elders to do so" (Ibn Abi Yaqub, 1983: 337). The concept of *fasl* that was followed in old times still exists among Arab tribes today. It commences with a murder, an assault, or other types of crime that the tribes then value as a crime on the basis of tribal customs (Atasheneh, 1991: 100). Most disputes fall under the provisions of this ritual, especially in murder cases. Evidence has shown that about 95 percent of murders get settled based on *fasl* (Nowzarpour, 1991: 44).

#### **4. 1. 2 Khoon-Bas Ritual**

Similar customs have existed among the Bakhtiari Lurs called *khoon-bas*. This ritual is primarily reserved for intent criminal homicides and is based mainly on veneration for blood by the community. "From a legal perspective, the Bakhtiari tribal legal structure can be considered the broadest system within which disputes and conflicts are resolved through arbitration, judgment, and mediation" (Ali Qoli Khan, 1984: 427).

With the act of intentional killing, there arises excessive emotion against the killer, which strengthens the right of retaliation within the tribe in its earliest moments. The elders, *sayyids*, and other chiefs of the tribe come together at the crime scene for mediation on behalf of the murderer. They visit the victim's family to urge them, in the spirit of nobility and dignity, not to render the murderer and his family homeless. They urge the family of the murdered person to peace and tranquility.

After this initial emotional phase, then the tribal elders and leaders intensify their efforts for obtaining the agreement of the family, who should be told to behave graciously, avoid bloodshed, and forgive the murderer, who, although deserving of *qisas*, is pardoned due to the spirit of putting an end to blood feud.

### **Conclusion**

1. To advocates of restorative justice, crime is a conflict between individuals; it is not about the state against the individuals. The ultimate aim is to restore the offender back into society and provide security for the victim and community through conversations, *jirgas*, mediations, and reparations.
2. This shift in the paradigm of criminal law signifies a new approach that has been advanced primarily as an alternative to criminalization and punishment, which involve decriminalization and mitigation of punitive measures.
3. There are two main models within restorative justice: the purist model, which calls for the exclusion of criminal law in favour of restorative justice practices, and the maximalist model,

which considers restorative justice as an adjunct to ordinary trial justice. The implication of the latter is that restorative methods should use first, with regular justice reserved for cases where restorative justice fails.

4. The traditions and customs of tribes around the world are the roots of restorative thought. Scholars have drawn largely from these ancient cultural practices in developing restorative approaches. The rationale also has religious underpinnings as qisas and reconciliation in Islam are restorative in nature.
5. Because restorative justice is a recent addition to and has hardly made some dent on the discourse of criminal justice in Afghanistan, the country's criminal law simply has not been construed in its light. Not appearing totally blind, however, some faint traces can be seen in some provisions of the law.
6. The various local systems of jirga governing the resolution of criminal matters among several peoples of Afghanistan have existed for a long time. Yet, it is feared that these practices do not guarantee for just resolution in all situations and at times even violate the rights of the victim or inflict secondary victimization.
7. Lawmakers seem to have woken up slowly to revive and revamp the ancient traditions, but the efforts are slow and weak.

### ***Recommendations***

1. The sheer volume of cases faced by Afghanistan's legal and judicial institutions makes the application of restorative methods an effective way to reduce cases and lessen the load on such institutions. Additionally, institutional corruption has further aggravated injustices and violations of citizens' rights; restorative practices could help prevent such violations.
2. The efforts to recognize informal justice in Afghanistan lack strength and remain limited, being discussed almost exclusively in academic circles. It must be raised at national level and considered earnestly by lawmakers.

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