

The penal mediation role in protecting the right to the private life's sanctity in the Islamic jurisprudence and the Algerian legislation

دور الوساطة الجزائية في تعزيز وحماية الحق في حرمة الحياة الخاصة في الفقه الإسلامي والتشريع الجزائري.

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Received: 20/01 /2025

Accepted: 07/09 /2025

Published: : september /2025

الملخص:

تعد الوساطة الجزائية من أهم بدائل فض المنازعات بعيدا عن أروقة المحاكم وضجيجها؛ لما تتميز به من خصائص تحافظ على حقوق المتقاضين وتسرع عملية الفصل في النزاع؛ وتمحو الحقد والضغائن التي قد تنتج عن الخصومة القضائية؛ ومن ثمة تحافظ على العلاقات الأسرية والاجتماعية من التمزق. وقد تبناها المشرع الجزائري في إطار تحديث قطاع العدالة وعدم الاكتفاء بالدعوى العمومية في بعض النزاعات ذات الخطورة البسيطة كجحة الاعتداء على حرمة الحياة الخاصة، وذلك للخصوصية التي يتميز بها هذا الحق الذي يعد محورا لبقية الحقوق والحريات، فالطبيعة العلنية للمحاكمة الجزائية لا تتلاءم وطبيعة هذا الحق الذي يقوم على السرية والابتعاد عن أعين الناس ومسامعهم وهو نفس الأساس الذي تقوم عليه الوساطة الجزائية. تهدف هذه الدراسة إلى إبراز دور الوساطة الجزائية في حماية الحق في الحياة الخاصة وكيفية ذلك، خاصة أنهما تقومان على أساس واحد وهو السرية والبعد عن العلنية، وبناء على ذلك، نقترح: رفع مستوى الوعي بأهمية الوساطة الجزائية ودورها الفعال في هذا المجال، وذلك من خلال عقد ندوات ومنتديات متخصصة. كذلك، نقترح تفعيل دور المحامين في إعلام المتقاضين بهذه الوسائل وأهميتها في حل النزاعات.

الكلمات المفتاحية: الحماية؛ الوساطة الجزائية؛ حرمة، الحياة الخاصة؛ السرية.

Abstract:

Penal mediation is increasingly recognized as a vital alternative for resolving disputes outside the traditional courtroom setting. This approach is prized for its ability to preserve the rights of the parties involved, expedite dispute resolution, and eliminate the animosity and resentment that often stem from judicial proceedings. By maintaining family and social ties, penal mediation helps prevent relationships from disintegrating. In Algeria, penal mediation has been embraced as part of efforts to modernize the justice system and to handle certain less severe conflicts, such as violations of the sanctity of private life, without resorting to public lawsuits. This is

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particularly relevant given the private nature of the right to privacy, which thrives on confidentiality and avoidance of public exposure—principles that are fundamental to penal mediation. This study explores how penal mediation protects the right to private life by focusing on these shared principles of secrecy and discretion. Consequently, we suggest: Raising awareness of its importance and effective role in this field, and this is done through holding specialized seminars and forums, and to activate the role of lawyers in informing litigants about these means and their significance in solving conflicts.

Key Words: protection; penal mediation; sanctity; private life; secrecy.

Introduction:

Modern legislations including the Algerian legislator, have adopted amicable methods to settle quarrels as alternatives to judicial litigation that lasts for a long time due to its lengthy procedures, and the huge number of cases that are presented to the courts, which led to what is called the judicial explosion. Speed in settling cases and preserving friendly relations between the parties are considered among the most significant features of the alternative methods. Hence, if the judicial litigation starts with two opponents and finishes with two opponents, so settling the quarrel by using the alternative methods starts with two opponents and finishes with two reconcilers, both of whom are satisfied with the solution, without forgetting to state that the nature of some disputes does not accept publication and publicity because this affects the parties and their families because of the sensitivity of their topics, as well as overtness may affect the work field of the parties. Therefore, these alternatives are considered as a fertile field to settle such kind of disputes.

There are lot of types of amicable methods to settle quarrels, and mediation of all sorts is considered as one of the most famous of these methods, whether we are talking about a dispute that is regulated by the public law or the private one. Firstly, the Algerian legislator adopted it in labor disputes, then stipulated it in the civil and administrative disputes in 2008 by Law N: 08-09 which is dated on Safar 18, 1429 AH corresponding to February 25, 2008 AD, which includes the code of civil and administrative procedures. Then it was stipulated in penal disputes and it was called penal mediation, and the Algerian legislator has adopted it in the code of penal procedures by the order N: 15-02 which is dated on July 23, 2015 after adopting it in the child protection law field which is created by law N:15-12 that is dated on July 15, 2015, and this indicates the effectiveness of this sort of mediation in settling some quarrels.

Without forgetting to mention that the Algerian legislator when adopting penal mediation has determined a specific scope for it, which is disputes of minor and not grave danger, and this is for the sake of modernizing the justice sector and not limiting itself to public lawsuits as the only mechanism to settle disputes of a penal nature. The offense of invading private life necessitates the application of penal mediation, which serves to protect and enhance this right at both jurisprudential and

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legal levels. This study explores the effectiveness of penal mediation in safeguarding the sanctity of private life, centered on its foundational principle of secrecy. Several questions guide this inquiry:

- What constitutes penal mediation?
- How is the right to private life defined, and what is its relationship with secrecy?
- How did the penal mediation contribute to protecting the right to the sanctity of private life?

The preference for amicable dispute resolution methods, such as penal mediation, stems from their endorsement by Islamic law and their inherent confidentiality, which reduces the crime's negative impact on all parties involved. This research emphasizes penal mediation's critical role in protecting personal rights, particularly the right to private life, advocating for its use to alleviate judicial system burdens.

The methodological approach of this study is descriptive, aimed at elucidating the concepts of penal mediation and the right to private life within Islamic jurisprudence and Algerian law. The relationship between these elements is analyzed and compared, structured around four main sections, starting with the concept of penal mediation.

First: The concept of penal mediation.

Second: Definition of the right to private life and its relationship to secrecy.

Third: How penal mediation contributes to protecting the right to the sanctity of private life.

I- The concept of penal mediation:

Dealing with the concept of penal mediation requires us to know its meaning and talk about secrecy as it is its most significant characteristics and scope as follows:

1.1- Definition of penal mediation in the Islamic jurisprudence:

Penal mediation, deeply ingrained in Islamic teachings, serves as a key dispute resolution tool. This approach, which emphasizes reconciliation and arbitration, is advocated in both the Quran and Hadith. These texts encourage settling disputes amicably to prevent resentment and hostility, making penal mediation a historically rooted practice in both Arab and non-Arab regions. This method has been recognized and implemented by the Algerian legislature, affirming its alignment with traditional Islamic values.

Mediation can be considered as one sort of reconciliation in its general sense, where the latter can happen between the two disputing parties without the intervention of a third one between them, and the conflict between them may rise to the point that they do not give each other an opportunity to even talk and propose the idea of reconciliation, so they resort to a neutral third part who attempts to find a common ground between them in order to reconcile

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them. As is clear, the judicial mediation finds its legitimate foundation in the Islamic jurisprudence, either as one of the reconciliation procedures or in its target that is basically presented in bringing the two parties to an end to the dispute through reconciliation, even if the jurists did not deal with it with the same terminology and did not specify specific and detailed rulings for it in its current concept and in the multiple approaches that it has come to due to the evolution it witnessed through the man made systems.

1.2- Definition of penal mediation in the Algerian criminal legislation:

Introduced in Canada in 1974, penal mediation quickly spread to the United States and Europe, and eventually to Arab nations, including Algeria. The Algerian legal system formalized penal mediation through the Code of Penal Procedure by Order No: 15-02, dated July 23, 2015, and in child protection law. (Law 15-12 which is dated on July 15 July 2015) With this view, the legislator will be convinced of the significant role that this system plays within the legal system. The matter also openly indicates his support for new methods to end conflicts of a penal nature, and his reassurance of their effectiveness in solving some conflicts that do not entail great danger. So, it seemed as if he wanted to relatively get rid of the traditional mechanisms that are used by public lawsuits. (Badr al-Dīn 2016, 90-91)

So, penal mediation can be defined as following: “a means to solve conflicts of a criminal nature, which is composed on the idea of negotiation between the perpetrator and the victim on the effects that are resulted from the crime, and this is through the interference of the public prosecution element or his authorized representative, whether a natural or legal person, and its success entails compensating for the harm inflicted on the victim, reforming the effects that are resulted from the crime, and rehabilitating the offender in a way that there is no requirement to carry on the criminal lawsuit

The Algerian legislator did not deal with defining the mediation in Order No: 15-02 dated on July 23, 2015 because it was previously defined in the child protection law which first adopted the mediation system to solve the penal conflicts for juveniles. Penal mediation is defined as a negotiation process between the offender and the victim, facilitated by a public prosecutor or an authorized representative. This process aims to address the consequences of the crime, compensate the victim, and rehabilitate the offender, thereby potentially obviating the need for further legal action. Specifically, it seeks to conclude agreements that halt prosecutions, remedy the victim's damages, cease the ongoing effects of the crime, and aid in the offender's reintegration into society.” (Badr al-Dīn 2016, 94)

1.3- Secrecy and penal mediation:

Secrecy is fundamental to penal mediation, allowing for open discussions without fear of repercussions. All participants, including mediators, lawyers, translators, and experts, are bound by confidentiality to not disclose any information unless explicitly agreed upon by the parties involved. This commitment to secrecy not only protects the details discussed during the sessions but also extends to the

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mediation agreement itself. Various international and national laws, including German laws, recommendations from the U.S. National Conference of Commissioners on Uniform State Laws, the European Parliament, and the UNCITRAL Model Law, emphasize the importance of maintaining the confidentiality of mediation sessions. These legislations enforce penalties for breaches of secrecy, ensuring the protection of participant rights throughout the mediation process.

1.4- Penal mediation area:

The mediation area is limited to certain offences that are punishable by imprisonment or a fine, as well as it is permissible to mediate in matters of contraventions, and the legislator has determined these offences by limiting them, so, they can be divided into many categories, which are as follows: Crimes that affect the person and his dignity: These are specified in the Article 37 bis 2, which are: Insult crimes (article 297 P.C), defamation (article 296 P.C), misdemeanor of assault on private life (article 303 bis P.C), threats and stipulated actions in the (articles 185, 186, 187 P.C), false talebearing (article 303 P.C), abandonment of the family (article 330 P.C), The crime of willful abstention regarding the provision of alimony amounts (article 331 P.C), failure to hand over a child (article 328 P.C), unwillingly beating and wounding (article 289 P.C), and beating and wounding without premeditation and deliberation (article 264 P.C). (Khalafi 2016, 155), (Shnyn Septembir 2017, 46)

Penal mediation in Algeria is applicable to various monetary misdemeanors such as issuing bad checks, misappropriation of funds, and vandalism, as well as juvenile misdemeanors excluding felonies, according to child protection laws. The scope of penal mediation extends to protecting the privacy of individuals, significantly reducing the breadth of conflict in cases involving private life. (Khalafi 2016, 155), (Shnyn Septembir 2017, 46)

The Algerian legislator has identified the right to private life as a misdemeanor eligible for mediation, offering a novel legal avenue designed to mitigate disputes over personal privacy and reduce the extent of conflict involved. (ibn Haydah 2016-2017, 246)

So, penal mediation in this form is considered among the alternatives that the Algerian legislator has monitored for protecting the right to private life, and thus, granted individuals speedy resolution of conflicts and allowed them to correct hatred and disengagement between them, which decreases the prevalent spread of the issues that affect private life, because the regular judicial procedures with their long procedures in many cases widen the scope of breaching on private life. (ibn Haydah 2016-2017, 249)

2- Definition of right to the sanctity of private life and the secrecy feature:

The right to privacy necessitates an understanding from linguistic,

legislative, and legal viewpoints:

2.1- Definition of right and the sanctity of private life:

a. Definition of right in language:

In linguistic terms, "right" suggests assurance and obligation, as exemplified by the verse in Chapter Yaseen of the Quran: "Already the word has come into effect upon most of them, so they do not believe." (Chapter of Yaseen, verse: 07) which means it is confirmed and obliged, His saying: «To firmly establish the truth and wipe out falsehood, even to the dismay of the wicked.» (Chapter of El Anfel, verse :08) that is, it is established and appears, and His saying also in the (Chapter of El Baqara, verse : 241), which means it is a duty to them. It has other senses, like: justice, and destiny, right is against wrong, and right is also singular for "rights." (al-Rāzī 1999, 77)

b. Definition of the sanctity of private life in language:

The right to the sanctity of life in several names, including privacy, is returned, and it is in the language of the Arabs that means a state of privacy. It is said that it is specific to the thing, especially and the privacy and its specialization in something that is specialized in it, and private is against the public. It is said a person specializes in the matter and specialized in it, that is, it is unique with it, he singled out others and specialized in his righteousness, and it is said a person who is singled out for another person, meaning that he is his own and has a specific thing from his side. (al-Rāzī 1999, 91), (Ibn manzūr 1414h, 7/24)

Privacy from the linguistic point of view is approaching the concept of the secret, but it is not synonymous with it, because secrecy assumes concealment and hiding, while privacy, although it assumes a degree of concealment and hiding, but it may have them despite the lack of secrecy. (‘. Hijāzī 2008, 18-19)

Besides to the right privacy, we can extract the perception ratio, so the meaning of this addition is linguistically: it is the person's right to be unique in matters for himself, or his own, provided that these things do not take the characteristic of the public. (al-Hamīm 2004, 87)

Some contemporaries have defined "right" in terminology as: it is an interest that is legally deserved, which means that it brings the right holder a financial or literary benefit. (‘. Hijāzī 2008, 21)

Right was also defined by the Islamic jurisprudence as it is a word used to indicate many senses meanings that differ depending on the interests which these rights determine, because the interests may be general ones of the society, they may be private ones of individuals, or common between both sides. (al-Hamīm 2004, 88) So, jurists have divided rights according to their owners into four sorts, which are: Allah's pure rights, servants' pure rights, common rights that are shared between Allah and the servant, and Allah's right in them predominates, and common rights that are shared between Allah and the servant, and the right of the servant predominates.

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However, the fact that jurisprudence does not use this composition does not mean that it does not recognize this sort of right, but on the contrary, Islamic legislation recognized it since the dawn of its emergence and had witnessed many applications for it, but it had fallen under the concept of right in general in this jurisprudence. (al-Hamīm 2004, 89)

Houssni El Djoundi attempted to define the right to private life in the contemporary Islamic jurisprudence as:

“Protecting the person’s personal and family life away from others’ knowledge or surprise without his approval... or it is a person’s security for himself and covering his and his family’s faults and sanctities, which he is keen to keep them away from all kinds and forms of interference by others, whether they are close relatives or others who have no connection to him at all, inside or outside his house. And ensuring a period of time in which he is alone with himself, during which he and his household act freely to the point that he can fend off the attack on this sanctity without the slightest responsibility, and assigning others to take this into account, otherwise they will be exposed to the legal punishment.” (al-Jundī 1413h-1993m, 46)

c. Definition of the right to the sanctity of private life from a legal perspective:

The right to privacy remains an evolving concept with undefined boundaries across jurisprudence, the judiciary, or legislative bodies. This ambiguity stems from the diverse perspectives through which this right is analyzed. Despite this, numerous interpretations have been proposed to broaden its understanding. For example, Ja'far Mahmud defines it as the entitlement to live one’s life freely without unsolicited interference, encapsulating the individual's right to demand solitude and non-disturbance in their personal affairs.” (Ja‘far Maḥmūd 2010, 36-37) Others, like M.-J. Ḥijāzī, extend this definition to include the right to disengage socially, whether physically or mentally, on a voluntary and temporary basis (M.-J. Ḥijāzī 2000, 56-57).

There are those who gave the right to the sanctity of private life a narrow definition where they evaluate it on three fundamental elements, which are: “secrecy, serenity, and familiarity” (Ja‘far Maḥmūd 2010, 37), there are those who defined it negatively, where they based on the fact that private life is against the public one, and there are those who defined this right by enumerating its manifestations. These definitions have varied, and the inability to reach a specific definition of private life or privacy indicates that the content of private life varies from one society to another, according to the beliefs, customs and morals prevailing in a given society.

The jurisprudence and judiciary are left to tailor this definition to fit societal norms under two primary principles:

- **Individual Autonomy:** The right to select one's lifestyle without external intrusion, bounded only by public order.
- **Secrecy of Personal Information:** The right to keep personal information confidential, safeguarding the essence of one's private life. This secrecy is fundamental, ensuring respect for personal identity and promoting peace and security away from external disturbances. (Ja'far Maḥmūd 2010, 37)

2.2- Secrecy, staying away from publicity, and the right to the sanctity of private life:

Secrecy is considered a fundamental cornerstone of privacy and a significant and distinctive characteristic of the right to private life. So, everything that theone tends to hide from others or only reveals to those he trusts is considered a secret.

And some have defined the secret as: "an incident or characteristic that the scope of knowledge is limited to a specific number of people, on the condition that it remains limited to that scope." (Kāmil al-Ahwānī 1978, 45)

Concerning determining the relationship between private and secret life, jurisprudence is divided into two essential tendencies:

First tendency:

It emphasized the requirement of separating secrecy from the right to private life, as it is not allowed to confuse them because the latter is considered as an intermediate stage between secrecy and publicity. So, if the legislator protects the right to private life, it protects the right to secrecy in the first position, which could be private. Therefore, a secret is everything that its owner or custodian knows. However, the private matter, is what is not published, which means in other words what is not considered public and exposed to everyone, even if its hiding does not reach the secrecy degree. Thus, privacy of life means that one's life should not be made public, or that it should not be exposed to public speaking. (Kāmil al-Ahwānī 1978, 48).

Second tendency:

The right to privacy inherently includes the right to secrecy, making them complementary. This integration means that protecting one's private life also involves safeguarding various confidential aspects such as defense, professional, and economic secrets. So, a person has the right to let him live a calm life far from overtness, publication, and spotlight. Whereas the right to correspondence secrecy for instance and which is considered one of the almost significant rights that falls into the scope of personal freedoms is considered at the same time a manifestation of the right to private life, that has raised in significance at the present time, and that obligation not to disclose secrets is only a means to guarantee the protection of private life against interference by others. And accordingly, it seems that protecting the sanctity area of private life can only be achieved through protecting the secrecy

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that surrounds every incident that is related to the sanctity of private life. So, secret is closely linked to private life and represents one aspect of the personal freedom, and everyone has the right to preserve his secrets in his conscience, and if he wants he may disclose all of it or some of it to the other person who has to keep it undercover. (ibn Sa'īd 2014-2015, 72-73).

Some jurists also go to relate secrecy with some aspects of the private life, like: intelligence and communications secrets, and professional secrets. And each one has the right to secrecy so that the secrets of his private life remain concealed from publicity, kept far from interference and reconnaissance. So, it is forbidden for others to reveal the person's secrets without his permission or agreement, particularly if his knowledge of these secrets is because of his job or profession, only in cases that are allowed by law, without forgetting to state that law has ensured the secrecy protection through the criminal punishment. (ibn Sa'īd 2014-2015, 73).

Through the process of extrapolating the two trends mentioned previously, we find that secrecy is the distinctive character of the sanctity of private life, and without it a man cannot ensure his freedom to practise this life. So, if we deprive the private life of its secrecy, there will be no privacy, and in this case, the right to private life will be deprived of its most significant characteristics, so there is no benefit in sanctifying the private life unless it is decided to keep it undercover. Privacy is not just about personal solitude but extends to protect broader confidential matters (ibn Sa'īd 2014-2015, 73).

3- How the penal mediation contributes to protecting the right to the sanctity of private life:

In order to clearly highlight how penal mediation contributes to protecting the right to the sanctity of private life, it is necessary to briefly address the characteristics of penal mediation, and then link them together to establish the relationship between them, emphasizing its role in protecting this right.

3.1- characteristics of penal mediation :

- Confidentiality.
- Voluntariness.
- Felexibility.
- Neutrality.
- Focus on Restorative solutions.
- Focus on Restoring the Relationship.
- Speed and Efficiency.
- No binding Legal Punishments.

3.2- Enhancing the Right to Privacy through Penal Mediation :

Algerian law, specifically through Article 37 bis 2 of Order No: 15-02,

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outlines penal mediation for misdemeanors like slander, invasion of privacy, and fraud. This process is confidential, accessible only to the involved parties and their legal representatives, contrasting with the public nature of court trials. Penal mediation thus preserves the sanctity of private life by keeping the proceedings secret and focused on reconciliation and compensation without public exposure. (ibn Haydah 2016-2017, 292).

Penal mediation offers a confidential avenue for addressing misdemeanors affecting private life, allowing only the involved parties, their representatives, and, upon request, their legal counsel to participate. This method is particularly favorable for handling private life assaults due to its confidential proceedings, which protect against the further public exposure often encountered in standard trials. By facilitating a resolution that potentially includes restitution and compensation without the widespread dissemination of the dispute's details, penal mediation serves as a crucial legal mechanism. It not only resolves conflicts discreetly but also enhances the stability of societal relations by providing alternative resolutions and reparations. (Order No:15-12 which is dated on 23 July 2015).

Penal mediation is considered one form of the legal protection for the right to the sanctity of private life through explicitly stipulating that it may be applied in misdemeanors of assault on private life in the article 37 bis 2 of order No:15-02 which includes the Algerian code of penal procedures.

Where it is considered convenient for treating crimes of assault on private life because of the secrecy which it enjoys in its procedures, other than the ordinary trial which is public and this leads to further infringement of this right which by its nature conflicts with and distances itself from publicity.

This mediation is beneficial for handling private matters discreetly, protecting individuals from the publicity of court proceedings. It supports legal and relational stability by offering confidential resolutions and ensuring the privacy and dignity of all parties involved (two articles 37 bis and 37 bis 1 of order No: 15_02 which dated on July 23, 2015)

Conclusion:

To conclude, we have reached the significant role that the penal mediation plays in protecting the right to private life, and this is through the feature of secrecy that helps keep individuals' lives far from people's eyes and curiosity, which makes the individual feel comfortable, calm and reassured. This protection strategy was deliberately incorporated into the Algerian penal procedures through Article 37 bis 2 of the 2015 code, which directs misdemeanor assaults on private life to penal mediation.

Among the most important results reached in the light of this study :

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- The process of penal mediation itself is structured to address and mitigate assaults on private life effectively. Its confidential environment not only preserves but also strengthens the right to privacy, minimizing the adverse impacts of public court proceedings on personal lives.
- Despite the evident benefits and crucial role of penal mediation in protecting privacy rights, there remains some reluctance among disputants to engage in this process.

As for the recommendations under this study, they are as follows:

- Raising awareness of its importance and effective role in this field, and this is done through holding specialized seminars and forums.
- As well as we suggest activating the role of lawyers in informing litigants about these means and their significant in solving conflicts.

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