

REVIEW ARTICLE

PENAL MEDIATION AS ALTERNATIVE DISPUTE RESOLUTION: A CRIMINAL LAW REFORM IN INDONESIA

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ABSTRACT

In the minor crime, the solving of cases process through formal process in the court is the process that is taking much cost and long time is not suitable with detriments of the crime impact, these all are contrary with the principal fast, simple and un-expensive judicature. Writing this thesis aims to know the legal certainty of implementing Penal Mediation as an Alternative Dispute Resolution and prospects of applying Alternative Dispute Resolution in the Indonesian Criminal Justice System. The approach used in this research is a qualitative research approach that produces descriptive data in the form of people's written or oral words and observable behavior. The type of research that will be used in this research is doctrinal research. Penal mediation is an alternative form of resolving disputes outside the court (commonly known as ADR or "Alternative Dispute Resolution" and some call it "Appropriate Dispute Resolution"). Penal mediation for the first time is known in positive legal terminology in Indonesia since the issuance of KAPOLRI No. Pol: B / 3022 / XII / 2009 / SDEOPS dated December 14, 2009 concerning Handling Cases through Alternative Dispute Resolution (ADR), even though they are partial. In essence, the principles of mediation of the penalties referred to in this KAPOLRI letter emphasize that the settlement of criminal cases using ADR, must be agreed by the parties that litigate, but if there is no new agreement resolved in accordance with applicable legal procedures in a professional and proportional manner.

Keyword: *Penal Mediation, Restorative Justice, Alternative Dispute Resolution*

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INTRODUCTION

When we talk about law, we will talk about human relations. Talking about human relationships, we talk about justice. Thus every discussion about the law, whether clearly or vaguely, is always talk about justice too. As Prof. said Satjipto Rahardjo that we cannot talk about the law only to its form as a formal building, but we also need to see it as an expression of the ideals of justice for the people (Abdullah, 2015).

In the last few years in the world of Indonesian justice, there has often been a process of case resolution which is considered not to fulfill the sense of justice that lives in the community. Like the case of Grandmother Minah in Banyumas who was 55 years old was accused of taking 3 pieces of cocoa beans on a plantation owned by PT Rumpun Sari Antan then was proven legally and convincingly violated Article 362 of the Criminal Code concerning theft so that Grandma Minah was sentenced to 1 month 15 days with a trial period during 3 months. In Batang there is also a case of Manisih who took 12 thousand kapok fruit charged with Article 363 paragraph 1 of the Criminal Code and sentenced to 24 days in prison. There were also cases of Basar and Kholil in Kediri who were accused of stealing watermelons sentenced to 15 days with a 1-month trial for being proven to meet the elements stipulated in Article 363 of the Criminal Code.

The penal system in the Criminal Code still focuses on the prosecution of perpetrators of crime, explicitly illustrated by the types of crimes regulated in Article 10 of the Criminal Code, namely in the form of principal and additional crimes. The penal system contained in Article 10 of the Criminal Code in essence still adheres to the retributive paradigm, which is to provide a reward for the crimes committed by the perpetrators. Retributive paradigm the aims to provide a deterrent effect so that the perpetrators do not repeat their crimes again and prevent or prevent the community from committing crimes. The use of the retributive paradigm has not been able to recover the loss and suffering suffered by the victim. Although the perpetrator has been found guilty and received a sentence, the condition of the victim cannot return to normal.

Often the process of resolving cases through litigation channels like the example above is considered not to reflect a sense of justice that is in accordance with the community because such formal settlement processes only focus on imposing penalties for the offender. Though the process that is passed also requires time and costs that are not proportional to the value of the losses incurred. In addition, victims' rights are often ignored because they are considered represented by the state through public prosecutors. The current Penal Code only does not or does not pay enough attention to victims. The protection of victims in terms of providing compensation is often ignored (Andrew, 2001).

Such formal settlement of cases seems to be less effective in resolving cases of minor categories of criminal acts considering that conventional processes of this kind require a rather long and long time and sometimes are not complicated compared to the value of the goods in question. In addition, the formal settlement only focuses on punishing perpetrators while the rights of victims are often ignored. Because the place of victims and the community in the system are considered to be represented by the state through the public prosecutor.

For this reason, an alternative case settlement is needed, namely by using the mediation of penalties which is an embodiment of the concept of Restorative Justice. Justice in Restorative Justice requires that efforts be made to recover or recover losses or consequences resulting from criminal acts and the perpetrators, in this case, are given the opportunity to be involved in the recovery effort. All of that in order to maintain public order and maintain fair peace. So in mediating the victim's and perpetrator's penalties, dialogue can find out what the victim's wishes are and the perpetrator wants to be responsible for fulfilling the wishes of the victim so that a fair and balanced agreement is reached.

This paper examines and analyzes two main point, *first*, concerning legal certainty of implementing Penal Mediation as an Alternative Dispute Resolution, and *second*, the prospects of applying Alternative Dispute Resolution in the Indonesian Criminal Justice System.

METHOD

The approach used in this research is a qualitative research approach that produces descriptive data in the form of people's written or oral words and observable behavior. The type of research that will be used in this research is doctrinal research. Normative legal doctrinal research examines law in its position as the norm (*das sollen*). Data collection techniques used are literature studies conducted by inventorying and quoting legal science literature books, statutory provisions, as well as scientific essays and lecture notes that are related to writing with the problem to be discussed. The data analysis technique used in this research is the interactive model of analysis.

LEGAL CERTAINTY APPLICATION OF ALTERNATIVE DISPUTE RESOLUTION

The criminal justice system is tasked with enforcing the law, aimed at tackling, preventing or allowing and reducing crime or criminal law violations. According to Bassiouni, quoted by Barda Nawawi Arif and quoted again by Faal that the objectives to be achieved by the criminal law or criminal justice system generally manifested in social interests, namely: (M. Faal, 1991)

1. Maintenance of an orderly society
2. Protection of citizens from crime, loss or unjustified harm done by others.
3. Re-socialize (resosialisasi) lawbreakers.
4. Maintain or maintain the integrity of certain basic laws regarding social justice, human dignity and individual justice.

In the Indonesian criminal justice system, formal procedures in the settlement of criminal cases have been regulated. However, the existing methods do not seem to be effective in reducing the level of crime, even convicts can still commit crimes from behind the prison. Here it is impressed that prison has become a school of crime and is very vulnerable, especially for perpetrators of minor crimes who can learn more serious crimes. In addition, the formal settlement only focuses on punishing perpetrators while the rights of victims are often ignored. Because the place of victims and the community in the system was taken over by the institution through the public prosecutor.

Considering Indonesia as a state of law, the principle of legal certainty is important. Every act that violates the rules must be processed according to the applicable formal law. However, in practice, this principle of legal certainty often clashes with the principle of legal justice (Mohammad, Azman, & Anderstone, 2019). When an act is declared wrong by existing regulations and requires a formal problem-solving process it often does not reflect a sense of justice in accordance with the community. Not to mention when the position of the victim and the victim's family who were considered to have been represented by the state through the public prosecutor were not included in the case settlement process and even tended to be forgotten. This condition has implications for two fundamental things, namely the lack of legal protection for victims and the absence of judges' decisions that fulfill a sense of justice for victims, perpetrators and the wider community (Efa Rosdiah Nur, 2016).

Actually, there is a paradigm in the punishment of restorative justice in the settlement of criminal cases with a mild category. Some legal experts put forward the notion of restorative justice with different definitions but in principle contain the same meaning, a concept of thought related to the criminal system which not only focuses on the need and sentence imposed on the offender but also pays attention to and involves the victim and his community (community). set aside with the working mechanism of the criminal justice system currently in force (Marlina, 2009: 180).

For that reason, the concept of restorative justice is often presented as an alternative solution to cases that are more human in nature by removing sanctions from the judicial process. In the view of Restorative Justice, the interests of victims are highly considered. Where the victim and the perpetrator must dialogue to find out what the wishes of the victim and the perpetrators want to be responsible for fulfilling the wishes of the victim so that a fair and balanced agreement is reached. Principles of Restorative Justice:(Choi, Bazemore, & Gilbert, 2012)

1. Justice must be able to recover those who have been injured;
2. Every party affected by crime (victim) has the opportunity to participate fully in law enforcement;
3. The role of the government is only to maintain public order. Whereas the role of the community is to build and maintain peace;

In addition to the principle, there are also some Characteristics of the Restorative Justice concept, as follows:

1. Meeting
Opportunities for victims, perpetrators and community leaders to discuss the consequences of a crime and the solution;
2. Compensation
It is expected that the offender can correct the consequences;
3. Reintegration
It is hoped that the relationship between the perpetrators, victims and social life can be restored;
4. Participation
Provide opportunities for people who are asking to do, encourage and participate to participate in discussions and provide remedial solutions for the consequences;

One form of case resolution with the restorative justice paradigm is the mediation of penalties. Victim mediation is a process that is assisted by a neutral and impartial third party so that victims and perpetrators communicate with one another in hopes of reaching an agreement (Matsumoto, 2011). Mediation can occur directly where victims and perpetrators are present together or indirectly where victims and perpetrators do not meet with each other facilitated by the mediator. In PERMA Number 1 of 2016 concerning Mediation Procedures in the Court, it is explained that mediation is a way of resolving disputes through a negotiation process to obtain the agreement of the Parties with the assistance of the Mediator.

According to Barda Nawawi Arief, the reason for using mediation of penalties in the settlement of criminal cases is because the idea of mediation of penalties relates to the issue of criminal law reform (Penal Reform), also related to the problem of pragmatism, another reason is the idea of victim protection, the idea of harmonization, the idea of restorative justice , the idea of overcoming stiffness (formality) and the negative effects of the criminal justice system and the prevailing criminal system, as well as efforts to find alternative criminal measures (other than prison) (Barda Nawawi Arief, 2002: 169-171).

Penal mediation is an alternative form of resolving disputes outside the court (commonly known as ADR or "Alternative Dispute Resolution" and some call it "Appropriate Dispute Resolution"). In general, dispute resolution outside the court only

exists in civil disputes, but in practice often criminal cases are resolved outside the court through various law enforcement officials' discretion or through consensus / peace mechanisms or institutions of conscience that exist in the community (family deliberations; village deliberations customary deliberations, etc.) (Barda Nawawi Arief, 2012: 2-3).

Legally in the criminal law enforcement system in Indonesia, the actual law enforcers have been given certain authority by law to override criminal cases or settle criminal cases without forwarding them to the court (non-litigation means) (Mbanzoulou, Cario, & Bouchard, 2019). Like the police, as regulated in Article 18 of Law Number 2 of 2002 concerning the Indonesian National Police, has given the police (investigators) the power to discretion, namely the right not to proceed with law against criminal acts as long as it is in the public or moral interest, because discretion is essentially between law and morals.

Penal mediation for the first time was known in positive legal terminology in Indonesia since the issuance of KAPOLRI No. Pol: B / 3022 / XII / 2009 / SDEOPS dated December 14, 2009 concerning Handling of Cases through Alternative Dispute Resolution (ADR), although it was partial. In essence, the principles of mediation of the penalties referred to in this KAPOLRI letter emphasize that the settlement of criminal cases using ADR, must be agreed by the parties that litigate, but if there is no new agreement resolved in accordance with applicable legal procedures in a professional and proportional manner. This means that this KAPOLRI letter applies to both parties (both perpetrators and victims) if they agree to be mediated on the condition that the crime committed is a minor crime.

In the Police Chief's Letter No. Pol: B / 3022 / XII / 2009 / SDEOPS dated December 14, 2009, several steps for handling cases through ADR are determined, namely: (Lilik Mulyadi, 2013: 8)

- a. Seek to handle criminal cases that have small material losses, the solution can be directed through the concept of ADR;
- b. The settlement of a criminal case using ADR must be agreed by the parties to the litigation, but if there is no new agreement, it will be settled in accordance with legal procedures that apply professionally and proportionally;
- c. The settlement of criminal cases using ADR must be based on consensus and must be known by the surrounding community by including the local RT / RW;
- d. Resolving criminal cases using ADR must respect social / customary norms and meet the principles of justice;
- e. Empowering members of the Community Policing and playing the role of FKPM in their respective regions to be able to identify criminal cases that have minor material losses and allow them to be resolved through the ADR concept;

For cases that have been resolved through the ADR concept so that they are no longer touched by other legal actions that are counterproductive with the aim of Community Policing The National Police determined that the application of the Alternative Dispute Resolution concept (a pattern of solving social problems through more effective alternative channels in the form of efforts to neutralize problems other than through legal processes or litigation), for example through peace efforts (Dekker & Breakey, 2016).

At the prosecution level, the principle of opportunity is regulated in Article 35 letter c of Act Number 16 of 2004 concerning the Attorney General's Office of the Republic of Indonesia with the following formula: (Menkel-Meadow, 2015) The Attorney General has the duty and authority to set aside cases in the public interest, known as seponering. In the process of mediation, a court of law mediation is possible to be carried out with the consideration that the parties are truly aware of the importance of resolving conflicts through deliberation with an awareness of the benefits of peace and mutual forgiveness. For this matter, a judge can actually refer to SEMA Number 1 of 2002 concerning the Empowerment of the First Level Court to apply the Peace Institution which basically recommends that all Judges (the Tribunal) who hear the case seriously seek peace by applying Article 130 HIR / 154RBg., not just formalities advocating peace. Although the Supreme Court Circular is understood as a suggestion for the resolution of civil disputes. However, this authority does not seem to be sufficient to implement the settlement of cases outside the court, so there is a need for a law that clearly regulates the mediation of the law (Fan & Li, 2013).

PROSPECTS OF APPLYING ALTERNATIVE DISPUTE RESOLUTION IN THE INDONESIAN CRIMINAL JUSTICE SYSTEM

The use of criminal mediation as an alternative to criminal justice, especially in light theft, is not new and is not a necessity to be carried out, and even then depends on the attitude of law enforcement officers. But along with the times and the needs of victims, mediation of the law which is a breakthrough law has many benefits for both parties who litigate and provide benefits to the perpetrators and victims. In mediating the penalties the victims are directly met with the perpetrators of the crime and can express their demands so that the peace of the parties is produced (Spurr, 2000)

In Indonesia, the practice of settling cases of petty theft out of court (non litigation) through mediation of penalties has been carried out in the following sample cases:

The case of the theft of four microphones in Al-Maghfiroh Mosque Simorejo Village, Kanor District. The perpetrators had the initials AF 43-year-old citizen of Semanding Sub-District of Tuban found carrying carrying four microphones belonging to Musholla al-Maghfiroh. The police who received the report immediately acted by securing the perpetrators along with evidence in the form of four microphones, a pliers and a screwdriver. The case was not proceeded to trial but was resolved through mediation and kinship. Kanor police chief, AKP Imam Khanafi said the settlement of the case was carried out by mediation because it was classified as a minor crime. That in PERMA Number 2 of 2012 concerning Adjustment of Limits of Minor Crimes and the Amount of Fines in the Criminal Code does not need to exaggerate minor criminal cases.

Another petty theft case that was resolved by mediation occurred in Bojonegoro. Sugihwaras Sector Police on June 12 2017 conducted mediation to solve

the problem of petty theft by applying the concept of Alternative Dispute Resolution (ADR). The mediated parties were the perpetrators of the initials 40-year-old UB resident of the village of Sugihwaras with a victim named Zaki, the owner of a shop in front of Sugihwaras Market. At that time the perpetrators were caught in the act of theft with evidence of 1 bottle of pantene shampoo for 22 thousand, 1 bottle of marina handbody for 11 thousand and 1 bottle of vitalist perfume for 22 thousand. The total amount of material losses was 55 thousand and subsequently the shop owner reported to the Sugihwaras police station. Given the relatively small amount of losses suffered by the victims, Sugihwaras police tried to take the mediation route.

The penal mediation process creates a win-win agreement for the parties. In the mediation process the parties will be creative in seeking win-win solutions to resolve conflicts. Philosophically, mediating penalties ultimately aim to achieve a "win-win" situation and not end in a "lose-lose" or "win-lose" situation as you want to achieve by the judiciary with the achievement of formal justice through a litigative legal process (law enforcement process). (Ward & Langlands, 2008) Through the mediation process of punishment, the highest justice is obtained because of the agreement of the parties involved in the criminal case, namely between the perpetrator and the victim. The victims and perpetrators are expected to find and reach the best solutions and alternatives to resolve the case. The implication of this achievement is that the perpetrators and victims can submit compensation offered, agreed upon and negotiated between them together so that the solution achieved is "win-win" (Fathurokhman, 2013).

Judging from the sociological perspective, this aspect is oriented towards Indonesian society when the cultural roots of the community are oriented to the values of family culture, emphasizing the principle of consensus to resolve a dispute in a social system. Strictly speaking, these aspects and dimensions are resolved through the local wisdom dimension of customary law. Through the history of law, it can be seen that the first law applicable and is a reflection of the legal awareness of the people of Indonesia is the local wisdom of customary law.

There is communication between the perpetrator and the victim in order to eliminate conflicts arising from the existence of crime. That conflict is directed by the mediation process which in its working principle is referred to as. Conflict Handling / Conflictbearbeitung. In the mediation process there is a stage of gathering points of view (gathering point of view). Judging from the sociological perspective, this aspect is oriented towards Indonesian society whose society is oriented towards family values, prioritizing the principle of consensus agreement to resolve a dispute in a social system (Knudsen & Balina, 2014).

The creation of work efficiency for institutions that have authority in the process of handling criminal cases. Because it would be very ineffective if the court both from the first level to the final level, the police and prosecutors were filled and preoccupied with minor criminal cases that should have been resolved by a win-win solution approach without denying the rights of the parties (Witvliet et al., 2008). Because there should be a higher priority from law enforcement officials to resolve criminal cases with a higher quality case in order to create public order in accordance with the function and purpose of the criminal law itself.

Not only does it have advantages, mediation of penalties also still has shortcomings namely if in the investigation process is carried out mediation of penalties then the legal process can be completed if there is an agreement especially from the victim to withdraw the report in the police and stop the legal process. But it is different from mediating penal at the judicial level. The accuracy arising from the mediation of the penalties will only be a consideration of the judge in providing a ruling that is easy for the offender. But it will not necessarily stop the legal process that is already running (Lee, Yiu, & Cheung, 2016).

Both of these different legal consequences occur because in fact there is not yet a comprehensive legal basis governing the same mediating penal process at all stages of the legal process. Or in other words mediation of penalties can only be done outside the court, in contrast to mediation in civil cases that are recommended in the judicial process as stated in PERMA Number 1 of 2016 concerning mediation procedures in court. Mediation that can be carried out in criminal cases is only carried out on the basis of the discretionary authority possessed by law enforcement officers, especially the police. But even within the police environment, sometimes the settlement of a case of petty theft still promotes a retributive paradigm. This is because indeed in the Criminal Code still requires litigation in the judicial process.

CONCLUSION

Penal mediation is an alternative form of resolving disputes outside the court (commonly known as ADR or "Alternative Dispute Resolution" and some call it "Appropriate Dispute Resolution"). Penal mediation for the first time is known in positive legal terminology in Indonesia since the issuance of KAPOLRI No. Pol: B / 3022 / XII / 2009 / SDEOPS dated December 14, 2009 concerning Handling Cases through Alternative Dispute Resolution (ADR), even though they are partial. In essence, the principles of mediation of the penalties referred to in this KAPOLRI letter emphasize that the settlement of criminal cases using ADR, must be agreed by the parties that litigate, but if there is no new agreement resolved in accordance with applicable legal procedures in a professional and proportional manner.

The use of criminal mediation as an alternative to criminal justice, especially in light theft, is not new and is not a necessity to be carried out, and even then depends on the attitude of law enforcement officers. But along with the times and the needs of victims, mediation of the law which is a breakthrough law has many benefits for both parties who litigate and provide benefits to the perpetrators and victims. In mediating the penalties the victims are directly met with the perpetrators of the crime and can express their demands so that the peace of the parties is produced.

The penal mediation process creates a win-win agreement for the parties. In the mediation process the parties will be creative in seeking win-win solutions to resolve conflicts. The victims and perpetrators are expected to find and reach the best solutions and alternatives to resolve the case. Judging from the sociological perspective, this aspect is oriented towards Indonesian society whose society is

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