



IMPLEMENTATION OF PENAL MEDIATION IN MINOR CRIMES SETTLEMENT

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ABSTRAK

Artikel ini membahas prospek penerapan mediasi penal dalam penyelesaian tindak pidana ringan dengan mengutamakan terwujudnya keadilan restoratif. Hal ini sesuai dengan teori kontemporer tentang tujuan pemidanaan yang bertujuan untuk mencapai keadilan restoratif. Tujuan penelitian ini adalah untuk mengetahui prospek dan perkembangan penerapan mediasi penal dalam penyelesaian tindak pidana ringan. Penelitian ini ingin menjawab tentang proses mediasi penal yang ideal diterapkan dalam penanganan tindak pidana ringan, mengingat selama ini belum ada landasan hukumnya. Hasil penelitian ini adalah bahwa mediasi penal harus dimuat dalam aturan hukum acara pidana, sehingga terdapat keseragaman model penyelesaian perkara tindak pidana ringan dengan mediasi penal, dan aparat penegak hukum perlu mendapatkan pemahaman yang cukup tentang kebutuhan tersebut. menerapkan mediasi penal. Peneliti menyarankan untuk mengintegrasikan mediasi penal dalam Hukum Acara Pidana Indonesia (KUHP) dan memberikan sosialisasi kepada seluruh aparat penegak hukum untuk melaksanakan mediasi penal dalam tindak pidana ringan dengan tujuan mewujudkan keadilan restoratif dan keadilan yang sederhana, cepat dan murah.

Kata kunci: Mediasi Penal, Keadilan Restoratif, Tindak Pidana Ringan.

ABSTRACT

This article discusses the prospect of applying penal mediation in the settlement of minor crimes by prioritizing the realization of restorative justice. This is in accordance with the contemporary theory of the purpose of punishment, which aims to achieve restorative justice. The purpose of this research is to know the prospects and developments in the application of penal mediation in the settlement of minor crimes. This research wants to answer about the penal mediation process that is ideally applied to handling minor crimes, considering that so far there has been no legal basis for it.

The results of this study are that penal mediation must be contained in the rules of criminal procedural law, so that there is a uniformity in the model for resolving minor crimes cases with penal mediation, and law enforcement officers need to gain sufficient understanding of the need to apply penal mediation. Researchers suggest integrating penal mediation in the Indonesian Criminal Procedure Law (KUHAP) and providing socialization to all law enforcement officers to implement penal mediation in minor crimes with the aim of realizing restorative justice and justice that is simple, fast and cheap.

Keywords: Penal Mediation, Restorative Justice, Minor Crimes.

A. INTRODUCTION

The law that applies in social life is always experiencing development, and renewal along with changes in social life in society so that the law has many types. Law can be studied from various aspects, including based on a study of functional aspects, one of which is public law, one of which consists of criminal law. Essentially criminal law can be divided into material criminal law (material strafrecht) and formal criminal law (formeel strafrecht).¹

Criminal law as one type of public law is also constantly undergoing development and renewal. One aspect of the development of criminal law is in terms of criminal law enforcement

which has undergone many significant reforms in line with the development of community needs for law. Criminal law reform is carried out with a policy approach, because the essential element of criminal law reform is one part of legal politics in general, and in particular is part of criminal law politics (penal policy).

One form of reforming Indonesian criminal law is the implementation of penal mediation. Penal mediation is a form of settlement of criminal cases carried out outside the formal criminal justice process carried out in court. This reform, of course, opens up wide opportunities for the growth of values that exist in society, and makes criminal law more flexible and reaffirms criminal law as the ultimum remedium. However, the

¹ Lilik Mulyadi, *Bunga Rampai Hukum Pidana Perspektif Teoritis Dan Praktik* (Bandung: Alumni, 2008), 1.

problem that arises in the implementation of penal mediation is that there is no regulation regarding this mechanism in the rules of positive law (*ius constitutum*). The probability that penal mediation can be implemented or not depends on the values that grow and develop in Indonesian society, given that in Indonesia, living values develop which become guidelines for the community in solving the problems they face. Of course, if penal mediation is based on the development of values that live in society, then penal mediation is an alternative that can be developed properly because it is in line with the wishes of the community in solving the problems it faces.

Likewise, penal mediation in an international scope has existed since the International Penal Reform Conference in London in 1999 which resulted in a formulation that one element of criminal law reform is to enrich the formal justice system in court and outside the court with appropriate dispute resolution mechanisms. with Human Rights (HAM)

standards. This conference also formulated 9 (nine) development strategies in carrying out criminal law reform, namely developing restorative justice; alternative dispute resolution; informal justice; alternative to custody; alternative ways of dealing with juveniles; dealing with violent crimes; reducing the prison population; the proper management of prisons; and the role of civil society in penal reform.²

Penal mediation is closely related to restorative justice, both of which are an integral part in fulfilling justice for the parties involved in criminal cases, especially minor crimes. The implementation of penal mediation aims to provide balanced benefits for the parties involved in criminal cases, both victims and perpetrators. Therefore, penal mediation should be integrated with restorative justice. Several countries have implemented penal mediation as an alternative for resolving criminal cases and it can be implemented properly and has a positive impact on victims,

² Barda Nawawi Arief, *Mediasi Penal: Penyelesaian Perkara Pidana Di Luar Pengadilan* (Semarang: Penerbit Pustaka Magister, 2012), 13–14.

perpetrators, and society in general. Countries that have implemented penal mediation include countries in Europe, namely Belgium, Poland, Austria, Germany, France, the United States, Japan, Canada, Norway, Denmark, Australia and Finland.³

Penal mediation aims to bring together the perpetrators of criminal acts and the victims to find a better settlement of criminal cases than the settlement by criminal justice. So this penal mediation is often also known as "Victim Offender Mediation" (VOM), Täter Opfer Ausgleich (TOA), or Offender Victim Arrangement (OVA).⁴ Penal mediation is an alternative settlement of criminal cases outside the criminal justice pathway which has a fairly good opportunity to be developed considering several considerations, one of which is that the United Nations has recommended penal mediation as an alternative effort

to resolve criminal cases to reduce the negative impact of the implementation of criminal justice in court.⁵

Although penal mediation does not yet have a legal basis in the positive law legislation in Indonesia, penal mediation has been known since the issuance of the National Police Chief Letter No. Pol: B/3022/XII/2009/SDEOPS dated December 14, 2009 regarding Case Handling Through Alternative Dispute Resolution ("ADR"). The letter from the Chief of Police emphasizes that the settlement of cases with ADR must be agreed upon by the litigants, but if there is no agreement then the settlement of criminal cases is carried out through a criminal justice process in court. Based on this, penal mediation is actually very good to be implemented in resolving criminal cases, especially minor crimes, namely by agreement between the victim and the perpetrator.

³ Mansyur Ridwan, *Mediasi Penal Terhadap Perkara KDRT (Kekerasan Dalam Rumah Tangga)* (Jakarta: Yayasan Gema Yustitia Indonesia, 2010), 166.

⁴ Barda Nawawi Arief, *Kebijakan Legislatif Dalam Penanggulangan Kejahatan Dengan Pidana Penjara* (Semarang: Badan Penerbit Universitas Diponegoro, 1996), 16.

⁵ Salman Luthan, "Mediasi Penal: Sistem Peradilan Pidana" (Mahkamah Agung Semarang 25-27 Mei, 2011).

Based on this background, there are 2 (two) problems to be answered in writing this article, namely: how is the existence of penal mediation and restorative justice in the Indonesian criminal justice system? and what are the prospects for implementing penal mediation as an alternative to minor crimes?

B. RESEARCH METHODS

This research is a type of qualitative research using a normative or literature approach. Data collection through literature studies is related to the focus of research in literature studies, theories, and documents. Triangulation data analysis is used in collecting data, data reduction process, presentation, and the withdrawal of conclusions.

C. DISCUSSION.

1. The Existence of Penal Mediation and Restorative Justice in the Indonesian Criminal Justice System.

According to **Barda Nawawi Arief**, penal mediation in several terms

is also referred to as "mediation in criminal cases" or "mediation in penal matters" which in Dutch is referred to as *strafbemiddeling*, in German it is referred to as "*Der Aubergerichtliche Tataus-gleich*" and in French referred to as "*de mediation penal*". Penal mediation as a step to bring together victims and perpetrators for the settlement of criminal cases is often known as "Victim Offender Mediation".⁶

Martin Wright defines penal mediation as a process in which the victim and the perpetrator communicate with the help of a neutral (impartial) third party, either directly or indirectly through a third party, enabling the victim to convey their needs that must be met by the perpetrator as a form of responsibility. for criminal acts committed which have harmed the victim as a form of responsibility.⁷

⁶ Arief, *Mediasi Penal: Penyelesaian Perkara Pidana Di Luar Pengadilan*, 1–2.

⁷ Salman Luthan, *Hukum Pidana Indonesia, Perkembangan Dan Pembaharuannya*, Kumpulan A. (Bandung: Remaja Rosdakarya, 2013).

Criminal mediation in the Explanatory Memorandum to the Council of Europe Recommendation on Mediation in Penal Matters as stated in Mediation in Penal Matters, Recommendation No. R (99) adopted by the Committee of Ministers of the Council of Europe on September 1999, defines penal mediation as a process in which victims and perpetrators of crimes are enabled voluntarily, to participate actively in solving problems they face as a result of the crime committed. by the perpetrator by involving a third party or a mediator.⁸

Penal mediation as part of the alternative settlement movement has two main attributes: the autonomy of the parties and the judicial economy. The autonomy of the parties is inherent in mediation, a process in which a neutral third party facilitates a mutually acceptable resolution to the disputing parties. The judicial economy serves as a selling point that offers an alternative to litigation because it is effective and efficient.⁹

The existence of penal mediation as a mechanism for resolving criminal cases can be placed in 2 (two) positions, namely on the one hand as an alternative to criminal case settlement efforts that are alternative to the formal criminal justice system, which is faced with a court hearing, and on the other hand is part of the criminal justice system. which so far have not paid attention to the provision of protection and fulfillment of the rights of victims who have been harmed by the occurrence of a crime.

Penal mediation needs to be integrated into the criminal justice system based on 5 (five) things, namely:

- a. Penal mediation has a very potential impact in tackling and controlling the accumulation of criminal cases handled by law enforcement officers;
- b. Penal mediation is an effective and efficient mechanism in dealing with minor crimes, so that

⁸ Ibid.

⁹ Larysa Simms, "Criminal Mediation Is the BASF of the Criminal Justice System: Not

Replacing Traditional Criminal Adjudication, Just Making It Better," *Ohio State University. Moritz College of Law* 22, no. 3 (2007): 1, <http://hdl.handle.net/1811/77132>.

- law enforcement officers can prioritize the settlement of other crimes that are more serious and require more serious handling;
- c. Penal mediation is in accordance with the principle of restorative justice as it is known that in penal mediation an agreement will be obtained between the victim and the perpetrator, namely a form of accountability from the perpetrator to the victim for the losses suffered by the victim as a result of the crime he committed. So that after the penal mediation is carried out, the victim's condition can recover as before before he was harmed by the perpetrator for the crime he committed. This is a manifestation of restorative justice (restorative justice), namely the restoration of the victim's condition for the losses he suffered as a result of the crime committed by the perpetrator;
- d. Penal mediation encourages traditional plea gains. Plea gain is an alternative means to reduce the burden on the courts in the operation of the criminal justice system. Law enforcement officers and perpetrators can consult to reach an agreement to resolve a criminal case by taking into account the interests of the victim as the injured party;
- e. Penal mediation can solve the difficulty of proving in formal justice, for example in a condition where there is difficulty in proving the guilt of the perpetrator, but on the other hand it is clear that the victim has been harmed by the actions of the perpetrator.
- Restorative justice to be achieved by penal mediation is oriented to 3 (three) objectives as follows:
- a. Restorative justice which focuses its attention on the victim focuses on providing justice to the victim as well as benefits for the victim and recovery for the loss suffered

- as a result of the criminal act committed by the perpetrator;
- b. Restorative justice is an entry point for the community, especially victims in conveying their wishes and demands for their rights as victims. Bearing in mind that the current formal criminal justice process only refers to a procedural justice, so that the interests of victims are often neglected;
- c. Restorative justice is also beneficial for perpetrators because it is possible to consider giving lighter sentences or changing forms of punishment. As far as the perpetrator is able and can be responsible to the victim for his actions, then he will also be treated with favorable treatment for him.

If penal mediation is associated with restorative justice, it can be said that the values that are the essential values as the basis of penal mediation are restorative justice. Meanwhile, success in implementing penal mediation to realize restorative justice

is determined by law enforcement officers as mediators who handle it. It is the same as the Attorney General who has the discretion to carry out deponering or who is often known as the waiver of cases in the public interest guaranteed by law. So it is the case with investigators, especially investigators from the police, who have discretion, namely penal mediation which can be applied when in the existing material facts it can be considered that the settlement of criminal cases does not have to be continued at the prosecution or trial stage, especially in minor crimes.

The existence of penal mediation has actually been recognized in the criminal justice system in Indonesia, although it is only partial. The concept of penal mediation has actually been applied to the handling of children's cases using special efforts, namely diversion. Diversion is actually a process of transitioning the settlement of criminal cases in the courts to settlements outside the courts. The main basis of diversion, namely the best interests of the perpetrator's child,

is actually the same spirit as the implementation of penal mediation. The difference is from the legal subject, diversion only applies to the child of the perpetrator.

Penal mediation can also be found in customary law that applies to indigenous Indonesians whose existence is guaranteed constitutionally. Settlement of cases according to custom has been covered by a positive legal rule even though it is on a regional scale.

For example:¹⁰ Aceh Provincial Regulation Number 7 of 2000 concerning the Implementation of Customary Life, which provides an opportunity for peaceful settlement of cases through customary deliberations. Some of the articles that show these provisions are:

- a. Article 13 which states: "Disputes are resolved peacefully first by customary deliberation";
- b. Article 14 which states: "Peace binds the parties, who do not heed the customary decisions,

are subject to customary sanctions";

- c. Article 15 which states: "If the parties are not satisfied with the customary decision, they can submit their case to law enforcement officials, and the customary decision can be considered by law enforcement officials".

In the practice of criminal law enforcement, penal mediation has often been implemented by law enforcement officers (investigators, public prosecutors, and judges) in the settlement of certain criminal cases even though they do not yet have a legal basis in national legislation. Many criminal cases that are resolved by penal mediation are traffic violations that cause other people to be injured or die.¹¹ In addition, it is also applied in cases of Domestic Violence (KDRT), although it has been regulated in Law Number 23 of 2004 concerning the

¹⁰ Luthan, *Hukum Pidana Indonesia, Perkembangan Dan Pembaharuannya*, 50.

¹¹ Trisno Raharjo, "Kebijakan Hukum Pidana Dalam Penyelesaian Konflik Antara Pelaku Dan Korban Tindak Pidana Melalui Mediasi Penal" (Universitas Diponegoro Semarang, 2011), 15.

Elimination of Domestic Violence.¹² Penal mediation is also applied in several complaints offenses.

2. Prospects of Implementing Penal Mediation as an Alternative for Settlement of Minor Crimes

Law as a norm that regulates human behavior and aims to protect human interests is essentially nothing that is static (static) but will always experience change and development. **Von Savigny**, said that the law is not made but grows and develops with the community, the law originates from the soul of the people, therefore the law will be different at every time and place, it does not make sense if there is a law that is universal and eternal.¹³

The growth and development of law goes hand in hand and in line with the development and changing human needs for law. So law enforcement that aims to realize justice, benefit, and legal certainty will always and always be oriented to human development.

Likewise, criminal law is always evolving. The development of criminal law, one of which is the development of crimes that occur in society which used to be only conventional crimes, has now developed with the emergence of sophisticated and modern crimes. The presence of penal mediation in the midst of crime growth is the right thing and needs to be developed, because by conducting penal mediation on cases that are classified as minor cases, the focus of criminal law enforcement can be oriented and prioritized to deal with modern and sophisticated crimes and it is necessary for proper handling. are you serious.

The provisions and procedures for the implementation of criminal law in the criminal justice system in Indonesia are carried out based on Law Number 8 of 1981 concerning the Criminal Procedure Code (hereinafter referred to as the Criminal Procedure Code) which provides guidelines on procedures for handling criminal cases to enforce material criminal law. Criminal law enforcement through

¹² Ridwan Mansyur, *Mediasi Penal Terhadap Perkara KDRT* (Jakarta: Yayasan Gema Yustitia Indonesia, 2010), 13.

¹³ Lili Rasjidi and Ira Thania Rasjidi, *Pengantar Filsafat Hukum* (Bandung: Mandar Maju, 2010), 63.

procedural law provisions can be divided into preliminary examinations and examinations at the trial level in court. The criminal law enforcement process regulated in formal criminal law aims to seek and find material truth and punish someone who has been proven legally and convincingly to commit a crime in a judge's decision (vonnis) as charged by the public prosecutor and proven in the evidentiary agenda.

The Criminal Procedure Code as a statutory rule made by Indonesia is actually incomplete if it is applied to the criminal justice system in Indonesia. The Criminal Procedure Code which implements the provisions of the material criminal law only carries out the provisions in the Criminal Code which still have a colonial spirit. Meanwhile, the current KUHP is a criminal code of colonial heritage which still uses the design rules for the colonized country, namely *Wetboek van Straftrech voor Nederlandsche Indie*.

The validity of the Criminal Code, which is the colonial legacy of the Dutch East Indies, of course, in its implementation is not in accordance with the conditions of the Indonesian people, especially with the development of law in today's society. The Criminal Code as a rule of colonial law for a colonized country is certainly not in accordance with the values that grow and develop in society. So the presence of penal mediation is actually a very good thing to be developed because it is in accordance with Pancasila, especially the 4th principle, one of which is deliberation for consensus.

Although criminal law is a public law which in its enforcement process is represented by the state which in this case is carried out by law enforcement officers (police, prosecutors, judges, and correctional institutions), the purpose of criminal law as a law is actually the same as the law in general, namely one one is to provide benefits to society. The application of penal mediation in minor cases is of course more beneficial to the community,

which in this case is specifically the victim. The victim can be met with the perpetrator and convey the things that are his demands and desires to the perpetrator as a form of his responsibility for the criminal act he has committed. Law enforcement officials on the other hand can consider the agreement for the settlement of minor criminal cases that occur by looking at the appropriate form of accountability for the perpetrator, either in the form of lighter criminal sanctions or not imposing criminal sanctions but asking the perpetrators to carry out the agreement that has been made with the victim in order to fulfill violated the rights of the victim.

Penal mediation is a breakthrough in criminal law reform which is closely related to restorative justice. The implementation of penal mediation as an alternative to the criminal justice process, especially in resolving minor crimes, is not new and is a must to implement. The application of penal mediation is intended to provide balanced benefits and justice for the victim and for the perpetrator.

Furthermore, what is meant by a minor crime (tipiring) is regulated in Article 205 paragraph (1) of the Criminal Procedure Code, which states that a case that is examined by means of an examination of a minor crime is a case that is punishable by imprisonment or imprisonment for a maximum of 3 (three) months and/or or a maximum fine of Rp. 7,500, - (seven thousand five hundred rupiah) and a light insult. Minor crimes are examined by quick examination procedures, such as cases of road traffic violations. The examination of minor crimes (tipiring) was examined in a quick manner because in fact minor crimes were offenses against the Criminal Code as regulated in book III.

Based on the description above, penal mediation is an alternative for resolving minor criminal cases. Penal mediation is carried out openly, so that in practice it will minimize the occurrence of irregularities as occurs in formal courts. In addition, penal mediation is also a renewal of criminal law in terms of the purpose of punishment, with penal mediation the

purpose of punishment is no longer as retributive justice but rather restorative justice. Restorative justice (restorative justice) as a form of recovery due to the commission of a crime by the perpetrator is an essential justice because it is an agreement between the litigants.

Through the penal mediation process, the highest peak of justice is obtained as a result of an agreement between the two parties involved in a criminal case. The victims and perpetrators are expected to be able to find and reach solutions and the best alternatives to resolve the case. The implication of this achievement is that the perpetrators and victims can apply for compensation that is offered, agreed upon, and negotiated between them together so that the solution obtained is "win-win" or literally known as a win-win solution. In addition, through penal mediation, it will have positive implications because philosophically, achieving justice is carried out quickly, simply, and at low cost because there are relatively fewer parties involved than through a judicial

process with components of the Criminal Justice System.

The importance of implementing penal mediation into the criminal justice system in Indonesia is based on the following reasons:¹⁴

- a. Penal mediation is expected to overcome the accumulation of cases;
- b. Penal mediation is an alternative dispute resolution that is faster, less expensive, and simpler;
- c. Penal mediation provides broad opportunities for the disputing parties to obtain justice for all parties;
- d. Penal mediation strengthens and maximizes the functions of court institutions and dispute resolution in addition to imposing sentencing.

Penal mediation is closely related to the concept of restorative justice and discretion owned by law enforcement officers, in other words it can be said that the basis of penal mediation is restorative justice.

¹⁴ Dewi and Fatahillah A. Syukur, *Mediasi Penal: Penerapan Restorative Justice Di Pengadilan Anak* (Jakarta: Indie Publishing, 2011), 80.

Meanwhile, the driving wheel for the realization of restorative justice in criminal justice lies in the discretion of law enforcement officers. This can be seen in the authority possessed by the Attorney General to sideline cases in the public interest (deponering). This authority is one of the discretions possessed by law enforcement officers in the context of resolving criminal cases outside the judiciary. Thus, discretion can be said to be the rationale for the realization of restorative justice.

According to **Barda Nawawi Arief**, criminal law reform must be carried out with a policy approach, because essentially criminal law reform is only part of legal policy or politics in general and in particular part of criminal law politics (criminal law/penal policy or strafrechtpolitiek).¹⁵

Legal politics is an integral part of law enforcement policy and criminal policy. In this regard, in the implementation of penal mediation, every policy-making taken by the

government must be oriented and aimed at the values that grow and develop in society.

Criminal law reform in Indonesia is an effort to review and reconstruct criminal law in accordance with the central socio-political, socio-philosophical, and socio-cultural values of Indonesian society. In this regard, future criminal law reforms must be rooted in, guided by, and in accordance with the socio-cultural aspects of Indonesian society.

The imposition of criminal sanctions in the form of imprisonment for minor criminal acts is no longer effective to implement. The costs for providing guidance to non-combat offenders are no longer commensurate with the benefits obtained because the costs incurred by the state for the daily necessities of life for inmates who commit minor crimes are not small. In addition to the costs for coaching, the implementation of penal mediation can prevent the negative effects of imprisonment which is often a "criminal school" for inmates and the

¹⁵ Arief, *Mediasi Penal: Penyelesaian Perkara Pidana Di Luar Pengadilan*, 54–55.

expected goals of coaching are not achieved. Resolution with penal mediation that focuses on restorative justice is a more optimal effort, in addition to the interests of the victims and their families, but also for the interests of the perpetrators of the crime themselves.

D. CLOSING

1. Conclusion.

a. The existence of penal mediation actually already exists in the criminal justice system in Indonesia, both in terms of the rule of law and in terms of law enforcement practice. Several laws and regulations have regulated penal mediation that are oriented towards the realization of restorative justice, and these rules have been implemented in law enforcement practices. One proof of the implementation of penal mediation is in the handling of criminal cases for children, it is known that there is diversion which is a form of

settlement by penal mediation which is carried out in the best interests of the child. The problem that arises in the application of penal mediation is that the regulation regarding penal mediation has not been systematized into the main regulation of criminal procedural law, namely the Criminal Procedure Code.

b. The application of penal mediation in the settlement of minor criminal cases is an appropriate alternative for resolving criminal cases to be enforced. Penal mediation is one form of effort to support a simple, fast, and low-cost trial as one of the principles in criminal procedural law in Indonesia. In addition, penal mediation is also in accordance with the values that live, grow, and develop in the life of the Indonesian people, namely deliberation for consensus. Penal mediation can also prevent the negative effects of imprisonment in the form of

stigmatization from society, and the negative effects of prisons which often become “criminal schools” for inmates.

2. Recommendation.

- a. There is a need for regulation on penal mediation in all stages of criminal case examination in the Criminal Procedure Code. Penal mediation arrangements in the Criminal Procedure Code are needed in order to obtain unity and suitability for the application of penal mediation in criminal justice in Indonesia.
- b. It is necessary to conduct socialization to law enforcement officers related to the importance of applying penal mediation in the settlement of criminal cases considering the benefits obtained.

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