Journal of Law, Policy and Globalization
ISSN 2224-3240 (Paper) ISSN 2224-3259 (Online)
Vol.71, 2018

Penal Mediation in the Theory and Practice in Indonesia

Dr. Urbanisasi
Senior Lecturer, Faculty of Law, Tarumanagara University, Jakarta, Indonesia

Abstract
Mediation is the process of problem-solving negotiations, where impartial parties cooperate with disputants to seek mutual agreement. Penal Mediation is an alternative to the settlement of criminal cases outside the court. In the settlement of criminal cases if through the courts are usually always a criminal punishment by the judge against the perpetrators, this is philosophically sometimes not satisfy all parties, therefore it is necessary for the thought of settling criminal cases through the Alternative Dispute Resolution line with the intention to be able to resolve the conflict between the perpetrator and the victim. Penal mediation does not yet have a legal basis in Indonesia's criminal justice system. There are only a few implied rules, which open up the possibility of mediation. Not penal mediation specific. In general, it can be seen in the Law of the Republic of Indonesia Number 39 Year 1999 on Human Rights, Law Number 11 Year 2012 on Child Criminal Justice System. While operational, the rules on penal mediation can be seen in the Letter of the Chief of Police of the Republic of Indonesia Number B/3022/XII/2009/SDEOPS dated December 14, 2009, Regulation of the Chief of Police of the Republic of Indonesia Number 7 Year 2008 and Presidential Instruction of the Republic of Indonesia Number 8 Year 2002.
Keywords: penal mediation, theory, practice, Indonesia.

I. Introduction

The legal system in Indonesia largely still follows the rules that apply to the Dutch, this is because in the early independence of the Republic of Indonesia there is no readiness to create its own legal system and legal rules that will apply to all citizens. This continues to this day, we can see the draft of the Criminal Code which until now has not been legalized, but the draft is the result of the thought of Indonesian legal experts who have adapted to the conditions and needs of the people of Indonesia and advances in the field of technology and information. In addition, the Civil Code still uses the French rule codified by the Netherlands and passed on to Indonesia, even so with some other rules.

When examined from the perspective of classification the law can be classified by its source, its contents, its place of validity, its validity, its means of defending it, its nature, and its form.[1] The current criminal law is mostly still using the French Criminal Code Codification or better known as the penal code. Criminal law in its development began to reap criticism because it is considered very rigid in its application and sometimes not touch the sides of justice in the community. One of the criticisms is the application of criminal law that puts forward the formalities that tend to be repressive and less appreciate the positions of victims and perpetrators of criminal acts, so impressed the criminal law that imposed only as a tool of vengeance, examples of cases of criminal acts that often occur in society such as theft or maltreatment, where the victims and perpetrators have agreed to reconcile but the police still continue the case up to the court. This is a clear example of how criminal law is applied as a formality regardless of the interests of victims and perpetrators.[2] This side of formalities in criminal law is what some people call the full cause of crowds of convicts in public institutions, so the report from the Directorate General of Corrections of the Ministry of Law and Human Rights of the Republic of Indonesia each year is definitely over capacity.

The consensus model that is supposed to lead to new conflicts should be replaced by the asensus model, because the intermediate dialogue between the disputants to solve the problem, is a very positive step. With this concept emerged the term Alternative Dispute Resolution (ADR) which in certain matters according to Muladi more meet the demands of justice and efficient. This ADR is part of the concept of restorative justice that places the judiciary in a mediating position.[3] For more details can be seen in the United Nations Office for Drug Control and Crime Prevention, stated that restorative justice is a new term to the old concept. Restorative justice approaches have been used in solving conflicts between the parties and restoring peace in the community. Because retributive or rehabilitative approaches to crime in recent years are considered unsatisfactory. Therefore it causes the urge to move to a restorative justice approach. The framework of the restorative justice approach involves perpetrators, victims and communities in an effort to create a balance between perpetrators and victims.[4] Restorative justice is a breakthrough that has existed long before it is regulated in Indonesian

[1] Lilik Mulyadi, Bunga Rampai Hukum Pidana Umum dan Khusus. Bandung: Alumni, 2012, p. 439
[2] Majalah Bantuan Hukum Sekolah Paralegal, Mediasi Penal "Penerapan Restorative Justice dalam Sistem Pidana Indonesia", 2012.
[3] Muladi, Hak Asasi Manusia, Politik dan Sistem Peradilan Pidana, Semarang: Badan Penerbit Universitas Diponegoro, 1997, p. 67
[4] United Nations Office for Drug Control and Crime Prevention, Handbook on Justice for Victims, centre for International Crime Prevention, New York, 1999, p. 42-43

legislation, especially on the Law of the Republic of Indonesia Number 11 Year 2012 on Child Criminal Justice System. But with the law, the value of restorative justice seems to be more desirable both by society and law enforcement.

The program of restorative justice is to use the concept of restorative justice and produce the objective of the concept of agreement between the parties involved. Agreement of the parties based on efforts to meet the needs of the victims and the community or the losses arising from the crime that occurred. the agreement here can also be interpreted as triggering the reintegration process between the victim and the perpetrator, therefore the agreement may take the form of a number of programs such as restitution or community service reparation.[1] These programs are very numerous, and have been widely practiced in many countries.

Mediation is the process of problem-solving negotiations, where impartial parties cooperate with disputants to seek mutual agreement.[2] Mediation is one form of dispute resolution option, commonly known in civil law. Penal mediation becomes an alternative to solve this problem. Penal mediation is no longer solely for minor criminal cases, but also serious crimes such as rape and murder.[3] Penal Mediation is a new dimension studied from the theoretical and practical aspects. Judging from the dimensions of practice, penal mediation will correlate with the attainment of the world of justice. As time goes by the increasing number of case volumes with all the forms and variations that go into court, so that the consequences become a burden for the courts to examine and decide cases according to the principle of simple, fast and light costs without sacrificing the attainment of the objectives of the justice of legal certainty, benefit and justice.[4] Based on the exposure, then the problem to be discussed in this paper is how the concept of mediation penal from the perspective of theory? and which rules are the legal basis so that penal mediation can be practiced in criminal law enforcement?

II. Research Method

The type of research used is the type of normative legal research, using a legal and conceptual approach.[5] Data collection techniques are conducted through library research by studying and reviewing a number of national legal rules, textbooks, research papers, legal journals, legal dictionaries, and then analyzed descriptively.

III. Results and Discussion

A. Penal Mediation Concept from Theory Perspective

Penal Mediation is an alternative to the settlement of criminal cases outside the court. In the settlement of criminal cases if through the courts are usually always a criminal punishment by the judge against the perpetrators, this is philosophically sometimes not satisfy all parties, therefore it is necessary for the thought of settling criminal cases through the Alternative Dispute Resolution line with the intention to be able to resolve the conflict between the perpetrator and the victim.[6] From a historical perspective, public criminal law as it is known today has gone through a long development. The development of criminal law is seen as an act of damaging or harming the interests of others and followed by a retaliation. The retaliation is generally not only an obligation of a person who is harmed or exposed to action but rather extends to the obligations of the whole family, and even some things become a public obligation. However, over time, the changes and dynamics of society are very complex on the one hand, while the other side of the regulation of legislative regulation as a partial legislation policy turns out that the public nature of criminal law shifts in character as it also relies on private domains with known and is practiced penal mediation as a form of court settlement outside the court.[7] Thus, although the criminal law is public law but does not rule out the possibility of a mediation in the settlement of the case.

From the perspective of the terminology, mediation of penal is known as mediation in criminal cases, mediation in penal matters, victim offenders mediation, offender victim arrangement (Inggris), *strafbemiddeling* (Dutch), *der Au Bergerichtliche Tatausgleich* (German), *de mediation penale* (French). Basically, penal mediation is an alternative form of dispute resolution outside the ADR courts commonly applied to civil cases. In this dimension, ADR outside the court has been regulated in the Law of the Republic of Indonesia Number 30 Year 1999 on Arbitration and Alternative Dispute Settlement. In this connection there have been several institutions that encourage the ADR method, including the Indonesian National Arbitration Board (BANI) which focuses on the world of trade and ADR in the settlement of construction service disputes (Law of the Republic of Indonesia Number 18 Year 1999 jo Law of the Republic of Indonesia Number Number 29 of 2000 jo Government Regulation of the Republic of Indonesia Number 29 Year 2000) with the jurisdiction of civil fields.

[1] Eva Achjani Zulfa, Pergeseran Paradigma Pemidanaan, Bandung: Lubuk Agung, 2011, p. 74
[2] Khotbul Umam, Penyelesaian Sengketa di Luar Pengadilan, Yogyakarta: Penerbit Pustaka Yustisia, 2010, p. 10
[3] DS. Dewi and Fatahillah A Syukur, 2011, Mediasi Penal: Penerapan Restorative Justice di Pengadilan Anak Indonesia, Jakarta: IICT, p. 79-80
[4] I Putu Indra Prasetya Wiguna, Apa Itu Mediasi Penal?, Article 2017
[5] Peter Mahmud Marzuki, Penelitian Hukum, Prenadamedia Group Jakarta, 2005, p. 35
[6] Sahuri Lasmadi, Mediasi Penal dalam Sistem Peradilan Pidana Indonesia, Artikel, p. 1
[7] Lilik Mulyadi, Mediasi Penal dalam Sistem Peradilan Pidana Indonesia: Pengkajian Asas, Norma, Teori dan Praktek, Jurnal Yustisia Volume 2 Nomor 1, Januari-April 2013, p. 1-2

Similarly, ADR is also known for copyright and intellectual work, labor, business competition, consumer protection, the environment and others.[1] ADR is a civil aspect of the legal system in Indonesia, but as the Law on the Criminal Justice System in Indonesia has arisen, the concept of ADR has been no longer limited to civil cases, but has also become a part of criminal law enforcement.

In Indonesia's positive law the principle of a criminal case can not be settled out of court, although in certain cases it may be possible to have a non-court settlement. However, law enforcement practices in Indonesia are often criminal cases resolved out of court through discretion of law enforcement officers, peace mechanisms, customary institutions and so on. The implications of the practice of settlement of cases outside the court so far there is no formal legal basis, so commonly there is an informal case has been done peace settlement through customary law mechanism, but still processed the court according to positive law that apply. The consequence of increasingly applied penal mediation existence as an alternative solution in the field of criminal law through restitution in criminal process shows that the difference between criminal and civil law is not so big and the difference becomes not working.[2] The existence of penal mediation is a new dimension studied from the theoretical and practical aspects. As time goes by as the number of cases of litigation increases in the courts, the polarization and penalty mechanisms are one solution to suppress the volume of cases, as long as they are truly desired with the parties (suspects and victims), and to achieve the interest broader, that is the maintenance of social harmonization.[3] To fulfill the broader interests is the main objective of penal mediation, so the case no longer merely has to enter the realm of litigation or trial and make the case increasingly accumulate.

On examination at the prosecution and trial level, Andi Hamzah explained that mediation can be done with consideration of legal certainty, legal benefit and legal justice.[4] Penal mediation has advantages such as flexibility, settlement speed, low cost, and power owned by the parties to determine the agreement to be achieved.[5] Currently, there are 1,300 programs spread across 17 countries. This means that more countries are trying to implement penal mediation.[6] From various provisions in various countries may be mentioned penal mediation is possible in a criminal case and provided with a legal framework (mediation within the framework of criminal law). Tony Peters presents the picture of the arrangement or "legal framework" in several European countries as follows:[7]

a. Included as part of the Juvenile Justice Act, namely in Austria, Germany, Finland, and Poland.
b. Included as part of the Juvenile Justice Act, in Austria, Germany, Finland and Poland.
c. Included in the Criminal Code, yaiu in Finland, Germany, and Poland, and
d. Autonomously regulated in the Mediation Act, such as in Norway, which applies to both children and adults.

According to Gunawan Widjaja mediation contains the following elements:[8]

1. Mediation is a dispute resolution process based on the principle of volunteerism through a negotiation.
2. The involved mediator is in charge of assisting the parties to the dispute to seek settlement.
3. The mediator involved shall be accepted by the parties to the dispute.
4. The mediator shall not authorize decision-making during the negotiations.
5. The purpose of mediation is to achieve or produce acceptable conclusions from the parties to the dispute.

According Sahuri Lasmadi, need to be developed about the principles contained in the settlement of cases outside the court i.e.:[9]

a. Need A Mediator In Handling Conflict.
   In this case the mediator must be able to convince those involved in the conflict by putting forward the communication process. In communication that crime if allowed to lead to interpersonal conflicts may sometimes escalate into mass conflict, for mediators must be able to explain the importance of mediation in order to eliminate pain and attempt to restore that events are errors that must be ignored on the basis of mutual understanding.
b. Priority to Process Quality
   In conducting the sought mediation is the quality of the process rather than the outcome to determine the losers and wins, here in the process there needs to be awareness of each side to mutual respect until the win-win solution is reached.

[1] Lilik Mulyadi, Loc.Cit., p. 2
[2] Barda Nawawi Arief, 2008, Mediasi Penal Penyelesaian Perkara Diluar Pengadilan. Semarang: Pustaka Magister, p. 4-5
[3] Lilik Mulyadi, Loc.Cit.
[4] Andi Hamzah, Terminologi Hukum Pidana, Jakarta: Sinar Grafika, 2009, p. 14
[5] DS. Dewi and Fatahillah A Syukur, Op.Cit., p. 78
[6] Ibid.
[7] Barda Nawawi Arief, Op.Cit., p. 39
[8] Gunawan Wijaya, Alternatif Penyelesaian Sengketa , Jakarta: Raja Grafindo Persada, 2002.
[9] Sahuri Lasmadi, Loc.Cit., p. 6

c. Proses Mediasi Bersifat Informal
In mediation it is attempted to avoid formal discussions, so that the parties involved feel mutually appreciated.

d. All efforts are involved in the Mediation Process
In mediation all should be planted a sense of responsibility about the results to be achieved in doing penal mediation. In the involvement of all parties embedded culture of shame and culture of mutual forgiveness with the goal if the mediation process has succeeded all parties do not feel humiliated.

Penal Mediation can be grouped into six models or forms, as follows:[1]

1. Informal Mediation,
This model is implemented by criminal justice personnel in its formal duties, i.e.:
- The Public Prosecutor invites the parties to an informal settlement in order not to proceed with prosecution if the agreement is reached.
- Social work or probation officer who believes that contact with the victim will have a major impact on the offender.
- Police Officers are calling for family disputes that may calm the situation without making a criminal prosecution.
- The judge may choose a remedial action outside the court and release the case.

This type of informal intervention is common throughout the legal system.

2. Traditional Village or Tribal Moots
According to this model, the whole community meets to solve the crime conflict among its citizens. This model exists in some less developed countries and in rural or inland areas. This model prefers the benefits to the wider community. This model precedes western law and has inspired most modern Mediation programs. Modern Mediation programs often try to introduce the advantages of tribal meetings in a form adapted to the structure of modern society and the legal rights of individuals.

3. Victim-Offender Mediation
This model involves the various parties who meet with attended by the appointed mediator. Many variations of this model. The mediator may come from a formal official, an independent mediator, or a combination. This mediation may be held at each stage of the process, either at the stage of prosecution, the stage of police policy, the stage of punishment or after the crime. This model applies to all types of offenders, some are specific to children, some are for certain types of criminal acts (e.g. abduction, robbery and violence), and some are primarily intended for child offenders, novice actors, but others heavy offenses and even for recidivists.

4. Reparation Negotiation Programmes
This model is solely to assess the compensation or remedies to be paid by the offender to the victim, usually at the time of trial. This program is not related to reconciliation between the parties, but only related to the planning of material improvement. In this model, the offender of a crime may be subject to a work program thereby saving money to pay compensation.

5. Community Panels or Courts
This model is a program to divert criminal cases from prosecution or judiciary to more flexible and informal community procedures and often involves elements of Mediation or Negotiation. Local officials may have separate institutions or bodies for the Mediation.

6. Family And Community Group Conferences
This model has been developed in Australia and New Zealand, involving community participation in the criminal justice system. Not only involving victims and perpetrators of criminal acts, but also the families of perpetrators and other community members, certain officials (such as police and child judges) and victim supporters. The perpetrator and his family are expected to produce a comprehensive and satisfying agreement of the victim and can help to keep the perpetrator out of the next trouble.

B. Legal Basis in Penal Mediation Practice

Penal mediation does not yet have a legal basis in Indonesia's criminal justice system. There are only a few implied rules, which open up the possibility of mediation. Not penal mediation specific. In the absence of Article 82 of the Criminal Code (KUHP), this article has not clearly defined the possibility of a peaceful solution between the criminal and the victim.[2] In general Article 1 Paragraph 7, Article 76 Paragraph 1, Article 89 Paragraph 4 and Article 96 of Law of the Republic of Indonesia Number 39 Year 1999 on Human Rights which gives authority to the National Commission of Human Rights to mediate in cases of human rights violations and

[1] Barda Nawawi Arief dalam Ridwan Mansyur, Mediasi Penal Terhadap Perkara Pidana KDRT (Kekerasan Dalam Rumah Tangga), Jakarta: Yayasan Gema Yustisia Indonesia, 2010.
[2] DS. Dewi dan Fatahillah A Syukur, Op.Cit., p. 81

for the Child is contained in the Law of the Republic of Indonesia Number 11 Year 2012 on the Criminal Justice System of Children. While operationally, the rules on penal mediation can be seen in the Letter of the Chief of Police of the Republic of Indonesia No. B/3022/XII/2009/SDEOPS dated December 14, 2009 on Case Handling Through Alternative Dispute Resolution,[1] Regulation of the Chief of Police of the Republic of Indonesia Number 7 Year 2008 on Basic Guidelines of Strategy and Implementation of Community Policing in the Implementation of Duties of the Police, Presidential Instruction of the Republic of Indonesia Number 8 Year 2002 on the Granting of Legal Assurance to Debtors Who Have Completed their Obligations or Legal Actions to Unfinished Borrowers Liabilities Based on the Settlement of Shareholder Obligations. Thus, penal mediation is not used for any type of crime or crime, convincing certain offenses.

Mudzakkir suggests the categorization of the scope of the case that can be resolved through penal mediation is as follows:[2]

a. The violation of the criminal law includes the category of offense complaint, both absolute complaints and relative complaints.
b. The violation of the criminal law has a fine as a criminal penalty and offenders have paid the fine (Article 80 KUHP).
c. The violation of the criminal law includes the category of "offense", not "crime", which is only threatened with a fine penalty.
d. Violations of the criminal law include criminal offenses in the field of administrative law which places criminal sanctions as ultimum remedium.
e. Violations of the criminal law are lightweight and law enforcement officials use their discretionary authority.
f. A violation of ordinary criminal law that is terminated or not proceeded to the court (*deponir*) by the Attorney General in accordance with the legal authority it possesses.
g. The violation of the criminal law includes categories of violations of customary criminal law that are resolved through customary institutions.

Gayus Lumbun mentioned that legal cases that have preference to be resolved through ADR are cases where the perpetrator (or the alleged offender) does not involve the state. Or, it can also be prioritized for the criminal acts that are included in the category of offense complaint. In addition, ADR may also be extended to include criminal acts whose victims are communities or citizens so that they themselves disclose the extent of their losses, and criminal acts which, although involving the state (as the perpetrator of the perpetrator), require remedies in view of the direct impact to the community. For example, for criminal offenses in the economic field where the state expects a state refund in cases of corruption.[3]

IV. Conclusion

Penal Mediation is an alternative to the settlement of criminal cases outside the court. In the settlement of criminal cases if the courts are usually always a criminal punishment by the judge against the perpetrators, this philosophically sometimes does not satisfy all parties, therefore it is necessary to think of settlement of criminal cases through the ADR line with the intention to resolve conflicts between perpetrator with the victim. In general the regulation on penal mediation can be seen in the Law of the Republic of Indonesia Number 39 Year 1999 on Human Rights, Law Number 11 Year 2012 on Child Criminal Justice System. While operational, the rules on penal mediation can be seen in the Letter of the Chief of Police of the Republic of Indonesia Number B/3022/XII/2009/SDEOPS dated December 14, 2009, Regulation of the Chief of Police of the Republic of Indonesia Number 7 Year 2008 and Presidential Instruction of the Republic of Indonesia Number 8 Year 2002.

References

Andi Hamzah, *Terminologi Hukum Pidana*, Jakarta: Sinar Grafika, 2009.

Barda Nawawi Arief dalam Ridwan Mansyur, *Mediasi Penal Terhadap Perkara Pidana KDRT (Kekerasan Dalam Rumah Tangga)*, Jakarta: Yayasan Gema Yustisia Indonesia, 2010.

[1] This letter serves as a reference for the police to solve cases of Criminal Act, such as Article: 205, 302, 315, 352, 373, 379, 384, 407, 482, this letter is effective if a case is still in the process of investigation and investigation. Some points of emphasis in the Police Letter, among others: (a) Seeking the handling of criminal cases that have minor material losses, the settlement may be directed through ADR; (b) Settlement of cases through ADR shall be agreed upon by the parties in the case, but if no agreement is reached, it shall be settled in accordance with applicable legal procedures professional and proportional; (c) Settlement of cases through ADR should be principled on consensus deliberation and should be known by the surrounding community; (d) Settlement of cases through ADR shall respect the norms of social/customary law and meet the principles of justice; and (e) For cases that have been resolved through the ADR to no longer be touched by other legal action. See Majalah Bantuan Hukum Sekolah Paralegal, Loc.Cit.

[2] Mudzakkir, Alternative Dispute Resolution (ADR): Penyelesaian Perkara Pidana Dalam Sistem Peradilan Pidana Indonesia, workshop paper, Jakarta, January 18, 2007, p. 4 in Lilik Mulyadi, Loc.Cit.

[3] T. Gayus Lumbun. Alternatif Dispute Resolution di dalam Sistem Peradilan Pidana, Workshop Paper, Jakarta, January 18, 2007, p. 3 in Lilik Mulyadi, Loc.Cit.

Barda Nawawi Arief, 2008, *Mediasi Penal Penyelesaian Perkara Diluar Pengadilan*. Semarang: Pustaka Magister.

DS. Dewi and Fatahillah A Syukur, 2011, *Mediasi Penal: Penerapan Restorative Justice di Pengadilan Anak Indonesia,* Jakarta: IICT.

Eva Achjani Zulfa, *Pergeseran Paradigma Pemidanaan*, Bandung: Lubuk Agung, 2011.

Gunawan Wijaya, *Alternatif Penyelesaian Sengketa* , Jakarta: Raja Grafindo Persada, 2002.

I Putu Indra Prasetya Wiguna, *Apa Itu Mediasi Penal?,* Article 2017.

Khotbul Umam, *Penyelesaian Sengketa di Luar Pengadilan*, Yogyakarta: Penerbit Pustaka Yustisia, 2010.

Lilik Mulyadi, 2012, Bunga Rampai Hukum Pidana Umum dan Khusus. Bandung: Alumni.

Lilik Mulyadi, *Mediasi Penal dalam Sistem Peradilan Pidana Indonesia: Pengkajian Asas, Norma, Teori dan Praktek,* Jurnal Yustisia Volume 2 Nomor 1, January-April 2013.

Majalah Bantuan Hukum Sekolah Paralegal, Mediasi Penal "Penerapan Restorative Justice dalam Sistem Pidana Indonesia", Article.

Mudzakkir, Alternative Dispute Resolution (ADR): Penyelesaian Perkara Pidana Dalam Sistem Peradilan Pidana Indonesia, workshop paper, Jakarta, January 18, 2007.

Muladi, *Hak Asasi Manusia, Politik dan Sistem Peradilan Pidana*, Semarang: Badan Penerbit Universitas Diponegoro, 1997.

Peter Mahmud Marzuki, 2005, *Penelitian Hukum*, Prenadamedia Group Jakarta.

Sahuri Lasmadi, *Mediasi Penal dalam Sistem Peradilan Pidana Indonesia,* Article.

T. Gayus Lumbuun. Alternatif Dispute Resolution di dalam Sistem Peradilan Pidana, Workshop Papaer, Jakarta, Januar 18, 2007.

United Nations Office for Drug Control and Crime Prevention, *Handbook on Justice for Victims, centre for International Crime Prevention*, New York, 1999.