

Penal Mediation As An Alternative For The Settlement Of Criminal Case Containing Civil Law Aspect In The Indonesian Criminal Justice System

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Abstract

It is a common phenomenon in the community that there are legal bindings which seem to have the characteristics of civil law (individual contract), but they actually indicate the characteristics of criminal conducts. This is because the contracts are only used as covers for crimes, such as falsification of documents, embezzlement and fraud. If such a case is processed in the criminal trial, the ending will be a situation with the characteristics of "lost-lost" or "win-lost". Therefore an alternative concept is needed to settle criminal cases containing civil-law aspect through penal mediation in order to reach win-win solution. In relation with the development and renewal of the Indonesian Criminal Law, it is necessary to conduct a study whether or not penal mediation can be the alternative for the settlement of criminal case containing civil-law aspect in the Indonesian criminal justice system.

According to the result of the research and the analysis, penal mediation can be applied as the alternative for the settlement of criminal case with civil-law aspect in the Indonesian Criminal Justice System because : (a) penal mediation will reduce the burden of the criminal justice system and this, in turn, will bring about positive impact to the quick trial process, simple and low-cost trial; (b) penal mediation is an alternative for the settlement of criminal cases with civil-law aspect that can actively involve the victims and such an alternative has an autonomous characteristic giving the best solution for the victim, especially related to the type, form and method of compensation; (c) penal mediation can give chances for the perpetrators to make amend for their gulits as a form of responsibility and free the perpetrators from their guilty feelings.

Keywords: Penal Mediation, Criminal case with Civil Law Aspect, Criminal Justice System

1. Introduction

Criminal law is often used to settle social problem, especially in relation with crime prevention. Such an application of criminal law is coherent with the function of law as a social control which is a planned process aimed at suggesting, advising, telling or even obliging citizens to obey existing legal norms or legal order (Soemitro 1984).

In line with the changes of time, the dynamics of the Indonesian society and the world in general, crimes have also developed into more complicated forms, qualifications and the damage that they cause has become more severe. Juridically, there is sometimes a legal binding between two individuals which seems to be an individual contract, but it is actually a crime. Legal events involve two or more individuals, such as cooperation contract, loan agreement, purchase agreement, leasing agreement and so on. When the agreement is made, one party may have bad intention or dishonestly participate in it. The agreement is made as a modus to cover criminal intention, such as conceiving lies, tricks or hiding some defects in order to convince other party to sign the agreement. In this way, fraud is committed, document is falsified and embezzlement may be committed.

Consequently, the party who intentionally breaks the agreement on the basis of bad intention or dishonesty will be tried in the criminal court. If such cases are brought to the criminal court, the accused will be examined and tried through the crime trial process in the criminal justice system according to the general principles of the criminal law. If the accused is proved to be guilty, a sanction will be imposed.

The common application of the criminal justice system as a tool to distribute justice is often regarded unfair by all parties. The reason of it is that the existing criminal justice system is fully burdened by formality, procedure, bureaucracy, tight methodology and the application of the same process for all kinds of problem. Therefore, it is understandable that the justice experienced by the modern community is bureaucratic one (Susanto 1996). On the other hand, the legal goal to achieve prioritizes on legal certainty, but justice and legal usefulness as two goals of the law are neglected. This condition is against the restorative justice principle which is expected by the community to be applied for the settlement of criminal case, especially, criminal case containing civil-law aspect (Kuswandi 2010).

In relation to criminal case with civil-law aspect, such as falsification of document, embezzlement or fraud, the verdict of the judge is only imposed on the accused who is proved to be guilty without the additional sanction in the form of obligation for compensating the loss suffered by the victim. Although the Act Number 8 of 1981 on Criminal Procedure stipulates that the victim is allowed to file a lawsuit (in accordance with the Civil Law) on account of the sufferings and the loss experienced by the victim (see Chapter XIII, Article 98-101 of the Code of Criminal Procedure), the long time needed for the process is a disadvantage for the victim.

Besides, the existing criminal justice system still prioritizes retributive justice (Packer 1968). It is realized through the implementation of the criminal justice as rationalization or objectivication of revenge against the perpetrator who break the criminal law (Mudzakir 2001). This consequently creates permanent suffering and negative stigma against individuals breaking criminal law.

Louk Hulsman states that criminal justice system is regarded as social problem because :

1. Criminal justice system brings suffering.
2. Criminal justice system is not able to meet its ideals.
3. Criminal justice system is uncontrolled.
4. The approach used in criminal justice system has a basic defect (Atmasasmita 1996).

The weakness of the criminal law enforcement implemented through the criminal justice process is that sanction is imposed as the retribution for the perpetrator's conduct. This consequently alienates perpetrator in the society. Further consequences of it is that the perpetrator has difficulties in correcting his or her attitude and behaviour to be a good and responsible citizen.

Due to existing reality, settlement through the agreement of penal mediation between conflicting parties is necessary in order to achieve fair procedural- justice and restorative justice. The idea of settling criminal case with civil-law aspect through penal mediation is relatively new. It is because the criminal Code (KUHP) and Code of Criminal Procedure (KUHAP) as well as other regulations covering criminal matters have not stipulated settlement through penal mediation for criminal case with civil-law aspect. Therefore, when there is a will to settle criminal case with civil-law aspect through penal mediation, there are not norms regulating it.

In order to develop and renew the Indonesian Criminal Code, the researcher carries out research to study whether or not penal mediation can be the alternative for the settlement of criminal case with civil-law aspect in Indonesian criminal justice system.

2. Research Methodology

This is a qualitative research employing normative legal-research variety. Normative legal-research is a procedure of scientific research in order to find the truth based on the logic of legal science, especially its normative side (Ibrahim 2010).

Normative legal-research is employed because the research departs from the analysis on the regulations which possibly allow penal mediation as an alternative for the settlement of criminal case with civil-law aspect in Indonesian criminal justice system.

In order to achieve the purpose of the research, this research employs statute approach and conceptual approach.

The legal materials used in this research include primary legal-material in forms Indonesian laws and regulations related to this research. In addition to that, there are secondary legal-materials and tertiary legal-materials.

The three collected materials are processed and analyzed by way of juridically qualitative method in order to answer the problems of the research.

3. Result of the Research and Discussion

The policy for installing penal mediation as the alternative for the settlement of criminal case with civil law-aspect in Indonesian criminal justice system is necessary for (1) improving criminal justice system to make it more effective and efficient, (2) strengthening the participation of the victim in settlement of criminal case with civil-law aspect, and (3) developing the responsibility of the perpetrator in order to make him/ her conscious about his/ her guilt.

3.1. Repairing Criminal Justice System in Order to Make it More Effective and Efficient for the Settlement of Criminal Case with Civil-Law Aspect

The enforcement of the criminal law is implemented in the system known as criminal justice system. That system consists of the police, judges, the courts and prisons. According to Mardjono Reksodiputro, criminal justice system is a system in the community used for overcoming criminal problems in order to keep them within the limits of tolerance of the community (Mardjono Reksodiputro 1994).

Romli Atmasasmita (1996) states that the terminology criminal justice system refers to the activities in crime prevention by applying the basic known as "systemic approach". Remington and Ohlin also propose that criminal justice system is the use of systemic approach in the administrative mechanism of criminal justice. The definition of the system itself has an implication in the form of interactional process rationally and efficiently prepared in order to achieve certain goal within some limits (Susanto 2004).

As a system, criminal justice system has a structural element or subsystem which is supposed to work coherently, coordinatively and integratively in order to reach the maximum efficiency and effectiveness (Muladi 1995).

Although the enforcement of criminal law is already implemented in a system, the result is still below the expectation. Some of the causal factors are weakness in the coordination and integration among subsystem of criminal justice, such as the weak coordination in inquiry and investigation phase causing the protracting investigation of a case, a lack of coordination between the investigator and the prosecutor causing the case file moves between the two institutions over and over, and the weak coordination as well as weak management causing the piling up of unfinished cases in all level of the courts and finally the overpopulated prisons as well as the state custody.

The application of the court way for settling criminal case is a facility given by the government or the state as a form of public service. However the application of this track entails the complicated and winding bureaucratic procedure and consequently it takes a long time to proceed from the police inquiry stage to the court decision and its execution.

It is not wise to fully prioritize the settlement of criminal case with civil-law aspect because criminal justice system has weakness and limitation. M. Yahya Harahap (1997) states that the settlement of case through criminal court has weakness as follows: "The settlement of cases through the criminal justice system takes a long time and has some disadvantages : wasting time, costly, has potential to create animosity, focusing on the past instead of the future and paralyzing all parties".

The settlement process of the criminal case with civil-law aspect is carried out according to the common examination process of criminal case which consists of five stages according to the code of criminal procedure, they are inquiry process, investigation process, prosecution process, trial examination and the execution of the court decision. Referring to the stages of the settlement process of criminal case, it is concluded that :

- a. The settlement of criminal case needs some stages. Before entering the core of the case, there are some process to go through in order to categorize the case as criminal one.
- b. Criminal case takes a longtime to process without time limitation and this consequently gives impression that the process is winding and very costly.
- c. Not all individuals can be punished because of what they do or their crime. All depend on the examination process from the inquiry stage until the court examination. Besides, there are many factors that can influence the decision of the court.

The complicated process of the settlement of criminal case with civil-law aspect is actually inherent in the administration and management of the court. Satjipto Rahardjo (1996) describes the court administration as :

The court administration involves many parties (police, department of justice, the court and prisons), and therefore, it needs a thorough management. The most complicated problem is how to organize those elements in a single working unit, while each has different duties and authorities. These differences do not signify anything until they deal with the same person : the suspect, the accused or the convict. If each institution holds its bureaucracy tightly, the efficiency of the criminal court administration will be disturbed.

The functioning of the criminal justice system in the process of criminal law enforcement is actually complicated, takes a lot of time and needs a high cost. Consequently, the principle of the quick, simple and cheap trial as stipulated in the point (4) of the Article (2) of the Act Number 48 of 2009 cannot be realized.

The decision made by the police, judges and the court only gives bureaucratic justice in the form of law implementation instead of substantial justice. Therefore, the final result cannot commonly fulfill the sense of justice for all parties (victim/ community and perpetrator) which finally result to the disappointment of the justice seekers. Such a disappointment give birth to distrust towards the court. Consequently, the goal of the criminal law enforcement in creating effective dan efficient public order, security and the peace in the community cannot be maximally realized.

Criminal case with civil-law aspect is a legal action in which there is an agreement between the perpetrator and the victim to establish a contract, such as cooperation agreement, loan agreement, transaction agreement, lease agreement and so on. The agreement is only used as a cover as if it were a private agreement, but before the agreement is made, the perpetrator has already had a bad intention or dishonest purpose in order to falsify letter, commit fraud or embezzlement. The loss caused by the crime is in the form of material loss in forms of personal belonging and assets with economic/ business value.

If the case is merely handled through crime trial process, it takes a long time for the victim to wait for the ultimate decision of the court (*inkracht van gewijsde*) which can be the basis for the victim to file a lawsuit through the court of civil law in order to ask for the compensation.

The sanction imposed on the perpetrator will not always deter the perpetrator from repeating his/ her crime because in reality there are repeated offenders (*recidivist*) (Manan 2008). It means, the resocialization system (sistem pemasyarakatan) as the substitute for imprisonment system is proven to be ineffective in minimizing the high crime-rate.

Law is not the only tool and not the most effectual instrument for solving problems, finding the truth and justice, nor the most appropriate element for controlling the activity of the community. The community has the right to get and achieve the truth as well as solving problem without making a new one.

The criminal justice system is a formal means as the result of the development of the modern law in order to enforce criminal law. However, there are still other satisfactory means in addition to the law. There are many ways and places to achieve justice, the criminal trial process is only one of them. Marc Galanter proposes theory known as "Justice in many rooms" (Galanter 1981) signifying that justice can be found everywhere, in any room. When criminal justice system cannot provide expected justice and it cannot efficiently and effectively solve the problem, parties involving in problem may find alternative to realize their hopes.

According to Muladi (1990), "the future criminal law should regards aspects related to condition of human, nature and tradition rooted in Indonesian culture". Nowadays, as the law applied in criminal justice is a modern law, it is necessary to pay attention to other means of social control in the community. The compulsory to settle criminal case with civil-law aspect through the trial process will not support the function of criminal law as *ultimum remedium*.

If we study the history of crimes against property in England, deception, fraudulence and embezzlement are not considered as crimes because the crimes happen due to the carelessness of the proprietors because they are supposed to be more intelligent than the offenders (Reid 1985). It means the criminal case with characteristic of civil law (falsification of letter, fraudulence and embezzlement) are not crimes as recorded in the history of England. Therefore, it is appropriate to settle criminal case with civil-law aspect through the peace agreement between the perpetrator and the victim by involving penal mediation.

It is wiser if the settlement of the criminal case with civil-law aspect does not fully prioritize criminal justice process. It should also apply other alternative through penal mediation in order to expedite the process, make it more simple and cheaper. In this way, the pile of cases in the court and the jam in the criminal justice system can be reduced. The population of the prisoners and detainee in prisons as well as the state custody can also be

reduced because those facilities are now overpopulated. The application of penal mediation is hoped to be able to help the amendment of criminal justice system in order to make it more effective and efficient.

In the effort of developing the criminal justice system in order to make it more effective and efficient, Jimly Asshidiqie (1995) states that the law enforcement in a broader sense cover legal action taken against the violation or deviance of the law committed by a legal subject through the court procedure, arbitration procedure or other mechanism of conflict settlement. Referring to Jimly Asshidiqie's theory, the use of penal mediation way as an alternative way for the settlement of criminal case containing civil-law aspect is actually a part of law enforcement (criminal law).

According to Muladi (1990), criminal justice system is a network of justice system employing material criminal-law, formal criminal-law as well as the law of the implementation of sanction. However, these institutions must be regarded from the social context. The overacting behaviour based merely on legal certainty will cause disaster in the form of injustice. The settlement of criminal case containing civil-law aspect through penal mediation is in line with social context. It does not only focus on legal certainty aspect, but also justice and usefulness. The settlement of criminal case containing civil-law aspect is the right choice for realizing justice as expected by the perpetrator, victim and community.

The application of penal mediation as alternative for the settlement of criminal case with civil-law aspect is a part of an effort to repair criminal justice system in order to make it more effective and efficient. The existence of penal-mediation institution will give the solution on how the settlement of criminal case containing civil-law aspect can be done outside criminal justice process. In this way, the working burden of the criminal justice system will be reduced because not all criminal cases with civil-law aspect must be settled through criminal justice process. The perpetrator and the victim of criminal case can have choices whether their case should be settled through crime trial process or penal mediation. Therefore, criminal justice system can operate more optimally in handling and settling criminal case with civil-law aspect. In this way, the process can be more effective and efficient.

This penal mediation can result to positive implication because philosophically, the process can be carried out quickly, simple and less expensive. It is because the mediation involve less people than conducting trial with components in the criminal justice system.

For the victim and the perpetrator, the settlement of the criminal case through the penal mediation is advantageous because it is quicker, less expensive and it provides win-win solution.

To make Indonesian criminal justice system run effectively and efficiently, penal mediation can be used as an alternative for the settlement of criminal case with the characteristic of criminal law. This is aimed at :

- a. Reducing the pile of cases in the institution of criminal justice system.
- b. Making the settlement quicker, simpler and less expensive.
- c. Giving the access as wide as possible for the perpetrator and the victim to achieve justice.
- d. Reducing the number of prisoners and detainees in prisons and state's custody which are presently overpopulated.
- e. Strengthening and maximizing the function of criminal justice system in settling criminal case with characteristic of civil law in order to make it more effective and efficient.

3.2. Strengthening the Involvement of the Victim in the Settlement of Criminal Case with Civil-Law Aspect

The protection for the victim in the Indonesian criminal justice system is relatively in need for more attention. This is because the Indonesian Code of Criminal Procedure places the graffity on the protection of the offender (offender oriented). On the other hand, according to the criminological point of view and the criminal law, crime is a conflict between individuals causing the loss suffered by the victim (Campbell 1990), the community and the offender himself/ herself. Among the three groups, the interest of the victim is the core of the crime. As Andrew Ashworth (1993) states, "*primary an offence against the victim and only secondarily an offence against the wider community or state*".

The protection for the victim is one subject which becomes the the focus of attention of international community. The United Nations Conference VII Year 1985 in Milan on Prevention Crime and the Treatment of Offenders, states that "victim's rights should be perceived an integral aspect of the total criminal justice system" (Arief 1998). The draft of resolution on victim protection was also proposed to the UN General council in this congress

and it was later approved as the UN Resolution (The Declaration Number *A/Res/40/34 Year 1985, September 6, 1985*) on the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power states Victims means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental right, through acts or omissions that are in violation of criminal laws operative within member states, including those laws proscribing criminal abuse power.

The protection on the crime victims in Indonesian criminal justice system has not become the object of serious attention. It can be seen from few stipulations on victim's right in national law. The inequality between protection on the victim and protection on the offender is a denial against the principle of "every citizen is equal before the law and government" which is stipulated in the 1945 Constitution.

There has been a point of view saying that when the offender has been examined, tried and sentenced, the protection on the victim has been given. Such a point of view is not correct.

The victim is actually the party suffering the biggest lost in criminal justice process because the offender is given the bigger portion of protection. Consequently, when the offender has been sentenced by the court, the condition of the victim is often forgotten. On the other hand, justice and respect on human rights are not only valid for the offender, but also the victim. In handling criminal case, law enforcement officials (police and general prosecutor) are often challenged by the obligation to protect two parties who seem to be opposing against each other. They are the interests of the victim and the offender. The victim's suffering (mentally, physically and materially) must be amended, while the offender's interest must be protected because he or she has the rights which must not be violated. Especially, when the offender has not yet been given the ultimate decision of the judge saying that he or she is guilty. In that case, the offender must be regarded innocent (the presumption of innocence).

In the settlement of criminal case including the case with civil-law aspect. The law is often prioritized the rights of the offender, while the rights of the victim are often neglected. Andi Hamzah (1986) states that: "In the discussion of the Code of the Criminal Procedure, especially related to human rights, there is a tendency towards discussing the rights of the accused without paying attention to the rights of the victim".

In the settlement of criminal case, it is common phenomenon that the victim is not appropriately protected in material sense nor non-material one. According to Geis : "*to much attention has been paid to offenders and their rights, to neglect of the victims*" (Mansyur & Gultom 2007). The victim is only placed as an instrument of proof giving information as witness. Therefore, the possibility for the victim to struggle for his or her right is small. The victim is not given authority and chances to actively involve in the investigation process until the trial. Consequently, the victim will lose the chance to fight for the right and restore his or her condition disrupted by the crime.

The victim of the criminal case with civil-law aspect, like the victim in common criminal case has a weak position. According to Romli Atmasasmita (2010), the criminal law commonly prioritizes the attitude of the state towards the offender in order to facilitate the sanctioning process instead of the importance of victim protection.

In every stage of the criminal justice, the victim does not directly involve in fighting for his or her rights because the victim is represented by the state through the institution in the criminal justice system. Such a system does not give the chance for the victim to communicate directly with the offender with a view to bring legal charges against the offender to struggle for his or her rights and restore the material loss caused by the crime.

To facilitate the involvement of the victim in fighting for his or her rights in the settlement process of the criminal case with civil-law aspect, the application of penal mediation is very urgent and relevant. This is in line with a working principle of penal mediation of which focus is the active participation of the conflicting parties, they are the offender and the victim. Barda Nawawi Arief (2008) states that a working principle of penal mediation is active and autonomous participation of the parties.

In the settlement of the criminal case with civil-law aspect through the penal mediation, the offender and the victim are not regarded as objects of the settlement procedure. They are regarded as the subject with personal responsibility and the ability to settle their case according to what they want.

The restorative justice approach is a paradigm that can be used as the frame of the strategy of the settlement of criminal case with civil-law aspect through penal mediation involving actively and autonomously all parties, including the victim.

Restorative justice is a concept of thought responding to the development of criminal justice system placing the gravity on the needs of the participation/ involvement of the victim (community) feeling neglected by the existing mechanism of the criminal justice system.

According to Tony Marshal, restorative justice is a process in which all parties involving in a crime work together to settle problems related to how to deal with problems after the crime is committed and its impacts in the future” (Mansyur 2010).

The article 1, point 6 of the Act Number 11 of 2012 on the Juvenile Justice System states that : “Restorative justice is the settlement of criminal case involving the offender, the victim as well as the family of the offender/ the victim and other related parties in order to work together to find a fair settlement by focusing on the effort of restoring the previous condition instead of revenge” .

Referring to the definition above, restorative justice is a process of criminal case settlement involving the offender, victim/ community and other parties in order to find fair settlement with principle as follows :

- a. Building participation involving offender, victim and communal group in order to settle an incidence or a crime. Placing the offender, victim and the community as stakeholders who cooperate with each other and directly make an effort to find fair solution for all parties (win-win solution).
- b. Obliging the offender to be responsible for the victim due to the incidence or crime causing injury or loss. Afterwards, the responsibility on the avoidance of committing the same crime is built.
- c. Placing an incidence or crime not as a violation of the law, but as a violation committed by an individual (a group of individuals) against an individual (a group of individuals). Therefore, the offender is directed to be responsible for the victim, instead of legal responsibility.
- d. Obliging the the settlement of an incidence or a crime through informal and personal ways instead of formal and impersonal ones (Zulfa 2011).

The active involvement of the victim in settling criminal case with civil-law aspect through penal mediation can be observed since the pre-settlement stage until the settlement stage of the criminal case with civil-law aspect. Before entering the settlement stage of the criminal case with civil-law aspect, the involvement of the victim is recognizable when he or she makes the choice according to his or her preference on crime trial or penal mediation. Besides, the involvement of the victim is also decisive for choosing the reliable penal mediator in order to settle his or her criminal case with the caharacteristic of civil law.

During the settlement process of the criminal case with the characteristic of civil-law through the penal mediation, the victim can autonomously and actively involve in each stage as follows :

1. The Creation of the Forum

During the creation of the forum, the victim can take part since the assemblage declaring the choice on penal mediator and the guidance for offender as well as victim given by the penal mediator. The victim starts to participate since the establishment of the basic rules of the negotiation. The victim also has the role to declare the expected rules of the negotiation. Besides, the victim can also develop relationship and trust with the offender.

2. The gathering and dispersion of the information

During the stage of gathering and dispersion of information, the penal mediator conduct separated meetings with the offender and the victim. The victim can give more information on the intention and interest related to his or her rights and compensation for the loss. By the help of the penal mediator, the victim can estimate and measure the loss as well as learning the bargaining method in the negotiation process.

3. Exposition of the problem

The penal mediator conduct common meetings or separated ones with the offender and the victim as the continuation of the previous ones. In this stage, the victim actively involves in planning, deciding and formulating the agenda of the settlement for criminal case with civil-law aspect. At the same time, the victim can develop the cooperation with the offender in order to

identify and clarify the problem, estimate and measure the loss caused by the conduct of the offender as well as making priorities.

4. The decision making (final result)

In the decision-making process, the active involvement of the victim is the more and more recognizable in positioning himself or herself during the process and evaluation of the problem-solving package, minimizing the differences with the offender, confirming and clarifying the agreement and finally constructing the formula of the problem-solving containing win-win solution principle. Besides, the victim actively and autonomously conducts the consultative discussion and signs the agreement as the final result of the settlement of criminal case with civil-law aspect through the penal mediation.

Referring to the explanation above, it can be understood that the settlement of the criminal case with civil-law aspect through the penal mediation can provide the role or give the chance for the victim to involve as an active and autonomous subject. The process of the penal mediation prioritizing the conflict settlement through the negotiation between the the offender and the victim has positive advantages as follows :

1. The victim can understand and learn about the offender.
2. The victim can pose questions for the offender.
3. The victim can express his or her feeling and need after the incidence of the crime with civil-law aspect as well as expressing his or her hope.
4. The victim has better chance to explain his or her loss and suffering caused by the crime with civil-law aspect committed by the offender.
5. The victim can understand the condition of the offender and accept the apology and/ or the compensation for the loss.
6. Settling the existing conflict and forgetting the crime with civil-law aspect that has happened.

The settlement of the criminal case with civil-law aspect through the penal mediation has placed the interest of the victim as the main and substantial consideration in the final result. The final result of the settlement of crime case with civil-law aspect through the penal mediation reflects the victim's interest, especially related to the type, form and the method of compensation as agreed. This shows that the process of the settlement of crime case with civil-law aspect through the penal mediation can give the best solution for the best interest of the victim. Therefore, the penal mediation can be used as the alternative for the settlement of criminal case with civil-law aspect in Indonesian criminal justice system.

3.3. Developing the Offender's Responsibility in Order to Realize His or Her Guilt

The settlement of the criminal case with civil-law aspect through the criminal justice process is commonly practiced for other criminal cases. The offender is examined and tried through some stages : inquiry/ investigation, prosecution, court examination and the execution of the court's decision. During the process, the offender can feel stressed and marginalized because he or she can receive negative stigma. It gets worse when the court decides that he or she is guilty and imposes a sanction because of that.

When the offender is declared by the police as the suspect, he or she is stressed or ashamed. It gets worse when he or she is found guilty by the court. To illustrate this, the suicide of Sarpani (37 years old), citizen of Tamiyang Layang, East Barito Regency, Central Kalimantan who was arrested in the Babirik District Police Station is an example of how a suspect hung himself to death because of being stressed and ashamed due to his status as the suspect of fraud against some citizens (Radar Banjarmasin 2013).

The individual behaviour influenced by the negative stigma will result to (Syaifuddin 1995):

1. Negative stigma will result to special attention to the bearer and consequently the stigma will be attached to the bearer.
2. Negative stigma will influence the bearer and consequently he or she will behave as stigmatized. This will finally make a criminal career or professional crime.

As the result of negative stigma given by the community to the offender, it is possible that the offender will commit the same crime after he or she is released from prison. The crime can be more professional. Such a phenomenon will not contribute to the solution in the effort to restore the attitude and behaviour of the offender in order to make him or her to be a good and responsible citizen.

The criminal case with civil-law aspect provides a possibility that the offender proven guilty agrees to compensate for the loss suffered by the victim. However the agreement to give the compensation will not substitute his or her criminal responsibility. This condition is not good for the offender who has a good intention to be responsible and amend his or her guilt.

The weakness of the settlement of criminal case with civil-law aspect through the criminal justice process as explained above is that the sanction imposed on the offender is only a retribution for his or her conduct. This can create permanent negative-stigma. Consequently, the offender can feel alienated in the community.

Barda Nawawi Arief (2010) states that the result of research on the effectiveness of the sentencing so far, cannot be used as the point of measurement for the justification on whether or not the imprisonment is one rational way to prevent crime.

To avoid the sentencing as explained above and create a more fair as well as useful settlement for the criminal case with civil-law aspect, it is necessary to make an alternative of the settlement of criminal case with civil-law aspect through penal mediation.

According to Soedarto (1983), one goal of sentencing is to make the peace or conflict reesolution. To completely settle criminal case with civil-law aspect in a peaceful situation between the offender and the victim, the settlement through the penal mediation must be prioritized.

Furthermore, Marshall and Merry (1990) states that : "Penal mediation can make the perpetrator more responsible, than feel humiliated and marginalized when the perpetrator of criminal acts addressed by the criminal justice system".

The settlement process of the criminal case with civil-law aspect through the penal mediation can give the chance for the offender to know and understand the condition of the victim caused by his or her conduct. He or she can also explain the background of his or her conduct. The chance to know and understand the condition of the victim and the offender can be the consideration to decide the type of the repair, restitution or flexible compensation which are more fair and more useful for the victim expressed in the agreement or the final result of the penal mediation.

The penal mediation process in the settlement of crime case with civil-law aspect give chances for the offender to amend for his or her guilt as form of responsibility and an effort to free the offender from permanent guilty feeling. In a dialog facilitated by a penal mediator, the victim can have the chance to directly express the result of the offender's conduct causing the material loss of valuable belongings. Besides, all parties directly involve in developing the scheme for compensation paid by the offender due to the loss suffered by the victim.

Penal mediation process does not regrad the offender and the victim as objects commonly practiced in the criminal justice process, but they are regarded as subjects with personal responsibility and ability to do something. The penal mediation prioritizes orientation on the quality of the process instead of the result in order to make the offender conscious about his or her guilt. Furthermore, the conflict resolution between the offender and the victim will free the latter from the fear and create peaceful condition.

This settlement is in line with the development of the new paradigm of the sentencing goal, one of them is found in the Article 54 of the draft of the Indonesian Criminal Code. It stipulates that the purposes of sentencing are :

1. Settling the conflict caused by the crime, restoring the balance and creating peaceful condition in the society;
2. Freeing the prisoners from guilty feeling;
3. Forgiving the prisoners;
4. Sentencing is not aimed at making individuals suffered and downgrading the human dignity.

Freeing the offender from guilty feeling and developing responsibility of the offender towards the victim are two principles of restorative justice. They are not only aimed at curing, restoring and repairing victim's suffering, but also eliminating the guilty feeling of the offender and developing responsibility towards the victim. Therefore, penal mediation can be the choice for the settlement of the criminal case with civil-law aspect.

4. Conclusion

Penal mediation can be the alternative for the settlement of criminal case with civil-law aspect in Indonesian criminal justice system because: (a) Penal mediation will give a solution as the working burden of the criminal justice system will be reduced and this consequently brings positive implication to the attainment of quick, simple and cheap trial; (b) Penal mediation is an alternative for the settlement of criminal case with civil-law aspect that can strengthen the active and autonomous involvement of the victim and this is hoped to be able to give the best solution for the interest of the victim, especially related to the type, form and method of compensation; (c) Penal mediation can give the chance for the offender to take repair action as a form of responsibility and effort to free himself or herself from guilty feeling.

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