

THE EXISTENCE OF PENAL MEDIATION IN THE PERSPECTIVE OF INDONESIAN CRIMINAL LAW REFORM

Ghufron Kamatsala Ghafarulloh ^{a*)}

^{a)} Jenderal Soedirman University, Purwokerto, Indonesia

^{*)}Corresponding Author: kamatsala.ghafarulloh@mhs.unsoed.ac.id

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Abstract. The law has long been viewed as a rigid set of norms that is overly focused on the formal legal system; this situation, in turn, has given rise to various complexities and conflicts in the social life of the community. In order to bridge the gap between the law which has traditionally been formal and inflexible and the real-life conditions within Indonesian society, one approach that can be taken is to provide space for mechanisms to resolve criminal cases outside of court, known as Penal Mediation. This study aims to examine and discuss the status and relevance of Penal Mediation as an alternative pathway in the handling of criminal cases, particularly from the perspective of criminal law reform in Indonesia. The method used in this study is normative legal research based on a literature review. The findings of this study reveal that the implementation of Article 132(1)(g) of Law No. 1 of 2023 on the Criminal Code further strengthens the legitimacy of resolving criminal cases through non-litigation channels. This marks a significant milestone, given that previously, regulations regarding such mechanisms were scattered across various sectors and lacked comprehensiveness within the existing regulations and internal policies of law enforcement agencies in Indonesia.

Keywords: Penal Mediation; Alternative Settlement of Criminal Cases; Criminal Law Reform.

I. INTRODUCTION

Law is basically a set of rules designed to guide human behavior towards the attainment of justice. Therefore, rational considerations cannot be separated from the existence of law as a set of values and norms that are born and develop in the midst of people's lives, for the realization of order and order in common life. This view is in line with Meuwissen's opinion as quoted by Arif Sidharta, who emphasized that law is a system of order that aims to shape and direct human behavior so that in pursuit of its needs and interests it is always carried out in a balanced and not excessive manner, while still being based on moral values and general principles that can be accounted for ethically.[1]

So far, law is often understood as a set of rules that tend to be rigid and focus more on the legal system itself, without connecting it to the real problems faced by society. This rigidity can cause complexity as well as trigger various conflicts in social life. Therefore, a legal concept is needed that is not only acceptable to the community, but also able to adapt to their character and life patterns. Thus, to realize Indonesian national law that is relevant to social conditions, it is necessary to make efforts to explore values that are alive and believed as noble values in society.

One of the efforts to harmonize the law with the characteristics of society, especially the Indonesian people, is to recognize the application of alternative criminal case resolution through the concept of Penal Mediation. In various

international literature, penal mediation is called *mediation in penal matters* and *mediation in criminal cases*, as well as *strafbemiddeling* in Dutch and *de mediation pénale* in French.[2] This concept is rooted in the principle of restorative justice, because it basically aims to bring together the perpetrators of criminal acts with the victim in one settlement forum. This approach puts the interests of the perpetrator and the victim in a balanced way, so that no one party is the most disadvantaged. In practice, victims are given the opportunity to convey their demands or desires directly to the perpetrator until a peace agreement is reached. Other terms for penal mediation are *Victim Offender Mediation (VOM)*, *Tater Opfer Ausgleich (TOA)*, and *Offender-victim Arrangement (OVA)*.

One of the settlement of cases based on restorative justice is penal mediation, which is certainly not a new thing for the Indonesian people. This can be seen from the practice of dispute resolution carried out through deliberation. Historically, Indonesian society has a strong culture of prioritizing consensus through traditional mechanisms.[3] The settlement of a dispute or case through channels outside the judicial mechanism can be recognized as legally valid, as long as it is based on mutual agreement from the parties involved.[4] In this regard, Soerjono Soekanto is of the view that the essence of law enforcement actually lies in how the values contained in legal norms can be combined and then manifested in real life behavior. The end of all these efforts is none other than to

create, maintain, and maintain order and peace in community life.[5]

Nelly Pinangkaan stated that the practice of penal mediation is increasingly widely used, especially after the issuance of the National Police Chief's Letter No. Pol: B/3022/XII/2009/SDEOPS which regulates the handling of cases through *Alternative Dispute Resolution* (ADR). Although it is limited, the letter contains principles related to the implementation of penal mediation. The substance of the policy emphasizes criminal settlement through alternative mechanisms based on the agreement of the parties. However, considering the variety of criminal cases, if an agreement is not reached, the settlement can be continued through the applicable formal legal channels, in the hope of producing a professional and proportionate verdict.

The current implementation of criminal case resolution by law enforcement officials shows a shift from a retributive justice approach to restorative justice. According to Barda Nawawi Arief, the use of the mediation system for criminal case resolution is based on a number of considerations, including as part of efforts to reform the criminal law (*penal reform*) and pragmatic reasons. In addition, this approach is also driven by the importance of protection for victims, efforts to create harmony, and the application of the principles of restorative justice. Penal mediation is also a means to reduce the rigidity of legal formalities and the adverse impact of the criminal justice system and the existing penal system, as well as an alternative in seeking a more effective and proportionate form of punishment.[6] This idea was then realized through the birth of the National Criminal Code. In Article 132 paragraph (1) letter g, it is stated that if the case is resolved outside the judicial process in accordance with the provisions of the law, it can abort the prosecution authority. This arrangement basically aims to strengthen the settlement of criminal cases through alternative channels, so that the handling process by law enforcement officials can bring a sense of justice while maintaining balance.[7]

Departing from the background explanation as described above, the author considers it necessary to examine and discuss the position of Penal Mediation in the framework of criminal law reform in Indonesia. The formulation of the problem that is the focus of this writing includes two main things, namely how the legal construction of criminal cases is resolved outside the court channels, and how the existence of Penal Mediation when viewed from the perspective of Indonesian criminal law reform. Meanwhile, the goal to be achieved through the writing of this scientific article is to find and discuss the extent of the relevance of the presence of Penal Mediation as an alternative to criminal case resolution in the context of criminal law reform in Indonesia.

II. RESEARCH METHODS

The research method used is the normative juridical method. This approach is carried out through literature studies by examining various legal sources, including laws and regulations, book literature, as well as journals and scientific articles that have academic validity. This research is descriptive

analytical, which focuses on presentation, study, and explanation in a structured manner accompanied by analysis of regulations related to the research topic.

This research uses several approaches simultaneously, including the approach of laws and regulations, conceptual approaches, historical approaches, and case approaches. The data sources used in this study are secondary data consisting of three categories of legal materials, namely primary legal materials in the form of laws and regulations, secondary legal materials that include journals and scientific articles, and tertiary legal materials which include dictionaries and various relevant online sources. All of the data that has been collected is then analyzed using a number of analysis techniques, namely descriptive, comparative, evaluative, interpretive, constructive, and argumentative techniques, in order to produce a comprehensive and in-depth discussion.

III. RESULTS AND DISCUSSION

Legal Construction of Criminal Case Settlement Outside Court

The idea of settling criminal cases out of court began with a vandalism case in the city of Elmira, Ontario Province, Canada in 1974. At that time, two young men in a drunken condition destroyed various properties belonging to about twenty local residents. After the two were arrested by the authorities, the victims then chose to resolve the problem through a mediation mechanism with the main goal of recovering the losses that occurred. According to them, even severe punishment will not completely eliminate the impact of the losses that have been experienced. From a process known as *victim offender mediation*, both parties finally managed to reach an agreement that the perpetrators do not need to go through the criminal justice process, but instead they are obliged to bear and compensate for all the losses that have been done. This event will later become the initial seed of the growth and development of the idea that criminal cases do not always have to be resolved through a green table.

Criminal cases are basically a series of legal processes that start from the existence of a criminal act, then continue through various stages ranging from investigation, investigation, prosecution, trial, to finally the implementation of the verdict against the guilty party. In reality, resolving criminal cases through conventional channels often takes a long time, takes a lot of energy, and costs a lot of money. This kind of condition reflects that the enforcement of criminal law within the framework of the Criminal Justice System (SPP) is still not running as it should. On that basis, the need for a simpler, faster, and more cost-effective case resolution mechanism outside the courts is becoming more and more urgent, and one of the answers to this need is through the application of penal mediation.

There are several other terms for penal mediation in a number of other legal systems, for example in Dutch it is called *strafbemiddeling*, in German it is known as *Der Außergerichtliche Tatausgleich* (ATA), and in French it is called *mediation penale*. In essence, this mechanism seeks a direct meeting between the perpetrator and the victim to jointly find a solution agreed upon by both parties. so it is often also

called *Victim-Offender Mediation* (VOM). At first glance, penal mediation has similarities to *Alternative Dispute Resolution* (ADR) which is commonly used in civil cases. The difference is that ADR is generally intended for civil disputes, not criminal ones. In Indonesia itself, in principle, criminal cases are not designed to be resolved through alternative channels outside the court. However, this does not mean that the door is completely closed, because under certain circumstances such a settlement is still possible, especially when both parties are able to find a mutually beneficial agreement. The path that can be taken is through deliberation and negotiation that prioritizes the spirit of peace and the restoration of relations between perpetrators and victims as the main goal.

The development of criminal law thinking in various countries lately shows a fairly clear direction, namely the tendency not to always resolve criminal cases through the courts. One of the alternatives that is starting to be widely used is penal mediation as a more flexible way to handle criminal cases. According to Detlev Frehsee, the increasing use of restitution in criminal proceedings shows that the boundaries between criminal law and civil law are no longer as rigid as they once were. This practice has also shifted the paradigm of criminal case resolution, from a positivistic approach to a more humanistic approach.[2] Criminal *policy* should be carried out through an integrated and comprehensive approach. This approach can be carried out both through penal and non-penal means, which include coaching or rehabilitation of perpetrators/law violators and coaching the community. Treatment of *society* is defined as an effort to improve social conditions that are factors that trigger crimes, such as socio-economic inequality, unemployment, low levels of education, poverty, low standards for adequate (decent) living, and social and racial discrimination.[8]

Criminal law has undergone the development of theories and concepts, including the application of *restorative justice* as one of the new breakthroughs in solving problems in the criminal justice system in Indonesia, which has enriched the understanding of these concepts. The term RJ or *restorative justice* is also used by various other designations such as *communitarian justice*, *positive justice*, *relational justice*, *reparative justice*, and *community justice*. [9] There are several principles in the implementation of *restorative justice*, namely: [10] The justice that is aspired to in this approach focuses more on reparations for those who have suffered losses due to a criminal act. In addition, every party involved or affected by the criminal incident should be given space and opportunity to actively participate in every stage of its resolution. In this context, the government has the function of maintaining order in the community, while the community itself plays the role of guardian and maintainer of the values of peace in common life. Departing from these principles, it is possible to recognize three main elements that affirm that penal mediation is essentially an integral part of the concept of restorative justice. First, *encounter*, which provides a space for the parties to meet and discuss problems that occur, both before and after the criminal event. Second, *amends* (reparations), which is the obligation of the perpetrator to take remedial

action for the losses caused. Third, *reintegration* (reintegration into society), which is a comprehensive recovery effort so that the parties can return to play a role and contribute positively to social life.

Based on this view, non-litigation settlement (out of court) actually recognizes that the protection and fulfillment of victims' rights is the most important thing in the *criminal justice system*. However, there are still problems related to the extent to which the public prosecutor and judges in imposing the verdict really pay attention to and determine the provision of restitution and compensation for victims who are harmed materially or immaterially. The idea of victim protection implied in various laws also provides criticism of the positive laws that apply today. In this case, the Criminal Code and various other related regulations should be directed to foster and develop dignified human values, as well as be aligned with the principles and values that live in the life of the nation and state, for the realization of the noble ideals of the Indonesian nation.[11]

The Existence of Penal Mediation in the Perspective of Indonesian Criminal Law Reform

Philosophically, positive law has not been fully able to solve the problem of criminal acts through mechanisms outside the litigation route. However, in certain circumstances, criminal cases can be resolved in a non-litigation manner (outside the court) if the mediation process is effective and results in an agreement between the perpetrator and the victim. In the practice of *law enforcement* in Indonesia, the settlement of criminal cases outside the judicial process can be possible through the use of discretion by the police as one of the law enforcement officials. In addition, a similar settlement model is also known in traditional (customary) law which has a mechanism for resolving cases peacefully, as well as in various other forms of settlement.[12] One example of the application of penal mediation in the customary system can be found in the Megou Pak Tegamo'an custom in resolving the problem of adultery. This institution has legal rules that apply in its customary environment, including a mechanism for handling cases of adultery that are carried out without the involvement of formal law enforcement officials. The settlement process is carried out through negotiations involving the traditional head and traditional leaders to determine the time and place of implementation. Furthermore, the families of the perpetrators and the victims were invited to attend the forum. In the meeting, the provisions of Megou Pak Tegamo'an customary law were explained, then customary sanctions were determined and peace was agreed between the two parties.[13]

Penal mediation based on the value of restorative justice from a historical perspective is not foreign to the Indonesian people. This can be seen from the tradition of resolving disputes through long-rooted deliberation. Culturally, Indonesian people are known to have a strong orientation towards consensus, by prioritizing joint decision-making and problem solving through customary mechanisms. Penal mediation is also closely related to the cultural background in various regions in Indonesia that uphold family values, as well as the habit of resolving conflicts through deliberation in social life. From a sociological perspective, the practice is related to local wisdom that lives in customary law. In the history of legal

development, the enactment of law initially relied heavily on customary law as a reflection of people's awareness of the norms that live in their environment. This is in line with Snouck Hurgronje through *the theory of Receptie*, which explains that customary law is a social norm that lives in society and functions as a means of social control.[14]

In the development of international law, penal mediation has long been known. This can be seen from the 1995 UN Conference which discussed mediation, restitution, conciliation, and compensation in criminal justice. The results are outlined in Document A/CONF 169/6 which encourages countries to consider transferring some of the functions of law enforcement and justice to more private mechanisms and the implementation of *alternative dispute resolution* (ADR). Then, at the International Conference on Criminal Law Reform in 1999, it was emphasized that one of the fundamental things in the efforts to reform the criminal law is to expand and enrich the formal justice system by integrating informal settlement mechanisms, while still adhering to applicable human rights standards and principles. From this idea, nine development strategies were born, including strengthening *restorative justice*, *alternative to custody*, handling children's cases, handling violent crimes, reducing the number of inmates, better management of correctional institutions, and increasing the role of civil society in criminal law reform. The development of penal mediation is also contained in Document A/CONF.187/4/Rev.3 which emphasizes the need for victim protection through mediation and restorative justice approaches. As a follow-up, various international instruments were born, such as *the Recommendation of the Council of Europe* 1999 No. R (99) and ECOSOC Resolution 2002/12. Based on these recommendations, a number of countries then adopted penal mediation into their national legal systems, including Germany, Poland, France, Austria, and Belgium.[12]

Indonesia has implemented the concept of penal mediation in juvenile criminal cases through a mechanism called diversion, which aims to resolve cases in a non-litigation manner (outside the court) with the record that there is an agreement between the victim and the perpetrator to reconcile or end the conflict that occurs. This is stated in Law No. 11 of 2012, the law requires the settlement of cases through diversion deliberations. Although using different terms, the mechanism is basically a form of penal mediation. The concept of diversion is rooted in the tradition of deliberation and consensus that has long been part of the culture of Indonesian society, especially in resolving disputes through customary law, local wisdom, and religious values. Consensus deliberation itself is an ancestral cultural heritage which in essence is in accordance with the principles of mediation in conflict resolution.[15] In article 7 paragraph (1), it is emphasized that law enforcement officials are obliged to apply diversion to juvenile criminal cases in the District Court, especially for criminal acts committed for the first time (not recidivism) and the criminal threat is under 7 (seven) years. This provision represents a shift in approach from retributive-oriented justice to restorative justice focused on restorative justice. Restorative justice is at the heart of penal mediation and is philosophically understood as an approach that results in a "win-win" solution. This concept emphasizes that justice is not only victim-oriented, but also considers the

perpetrator, so that the perpetrator is encouraged to admit his mistakes and take responsibility for his actions towards the victim and the community.

In addition, penal mediation can also be applied to cases of domestic violence (Domestic Violence), in Articles 51 to 53 it is emphasized that physical, psychological, and sexual violence is included in the complaint offense. This is to ensure that the household remains intact, the settlement of domestic violence cases in practice is often pursued through mediation mechanisms. This is done so that conflicts in the family do not continue until the prosecution process at the prosecutor's office. Basically, domestic problems are seen as private affairs, so they are sought to be resolved familially without involving formal judicial channels.

Based on this description, it can be concluded that the concept in Indonesia does not have a strong juridical foundation and its implementation is still highly dependent on practice in the field. The arrangement is still limited, as stipulated in the Letter of the National Police Chief No. Pol: B/3022/XII/2009/SDEOPS dated December 14, 2009 concerning Case Handling Through *Alternative Dispute Resolution* (ADR), which basically emphasizes that the settlement of criminal cases through ADR can be carried out if agreed upon by the parties to the case. Barda Nawawi Arief stated that the implementation of penal mediation in the settlement of criminal cases is based on various considerations, such as reforms in the criminal law and practical reasons. In addition, this concept is also driven by the need for victim protection, harmonization efforts, the application of restorative justice principles, and the reduction of rigidity in legal formalities. Penal mediation is also seen as a response to the negative impact of the criminal justice system and the prevailing penal system, as well as an alternative in finding a more appropriate form of punishment. However, because it does not have a strong legal basis, the application of penal mediation occurs more in practice (*law in concreto*), namely law enforcement that is still influenced by legal culture or habits that develop in society.

The National Criminal Code that is currently present is one of the forms of reform in criminal law in Indonesia. The update is not solely interpreted as a limited change through a change in the norms in the newly passed Criminal Code, but also includes more fundamental changes. The policy pursued should use an integrated approach, namely by updating it to the level of basic ideas and values that want to be built in the criminal law system. From a criminal policy perspective, this integral policy approach is a rational way to design social protection to tackle crime, with the main goal of realizing the welfare of the community.[6] Criminal law reform is basically motivated by various aspects, such as sociopolitical, sociophilosophical, sociocultural, as well as various policies that include social policies, criminal policies, and law enforcement policies. Thus, the update is a form of change and adjustment to the factors and policies that are the basis for its preparation. In general, criminal law reform is interpreted as an effort to be in harmony with the main values that develop in Indonesian society, both from sociopolitical, sociophilosophical, and sociocultural aspects. These values are

then used as the basis for the formulation of law enforcement policies in Indonesia.

The idea of reform that accommodates sociocultural, sociophilosophical, and sociopolitical values is embodied in the regulation of alternative mechanisms for resolving criminal cases. This can be seen in Article 132 paragraph (1) of the National Criminal Code which emphasizes that the prosecution authority is removed if the case has been resolved through non-litigation channels or outside the judicial process in accordance with the provisions of laws and regulations. This provision strengthens the legitimacy of alternative criminal case resolution, which was previously still widespread and sectoral in various laws and policies of law enforcement agencies in Indonesia. This arrangement was born from various considerations, including victim protection, harmonization, the application of restorative justice, efforts to overcome the rigidity of legal formalities, and as a response to the negative impact of the applicable criminal justice and penal justice system. This is an effort to find a more appropriate alternative form of punishment. Thus, the arrangement is directed to realize a better system in case resolution, so that the handling process by law enforcement officials can provide a sense of justice as well as balance.

IV. CONCLUSION

Based on the discussion above, the following conclusions can be drawn: The settlement of criminal cases outside of court was born out of the need to provide justice that is more restorative-oriented, as seen from the practice of *victim-offender mediation* in Canada, which later evolved into the concept of penal mediation. This mechanism emerged in response to the limitations of the conventional criminal justice system which tends to take a long time, cost a lot of money, and has not fully met the sense of justice, especially for victims. Along with the development of criminal law thinking in various countries, there has been a paradigm shift from a retaliatory approach to a more humanist approach through *restorative justice*, which emphasizes the recovery of victims' losses, the active involvement of the parties, and the improvement of social relations. Penal mediation, with elements of encounter, *amends*, and *reintegration*, is one of the important instruments in realizing this goal. However, in the Indonesian context, its implementation still faces obstacles, especially related to the legal basis and consistency of implementation, although there is still room for implementation under certain conditions. Therefore, it is necessary to strengthen regulations and more comprehensive policies so that penal mediation can function optimally in realizing a more fair, balanced, and human-oriented criminal justice system. Penal mediation is an alternative to the settlement of criminal cases that philosophically, sociologically, and historically have strong relevance, both in the practice of Indonesian customary law and in the development of international law. Although positive law in Indonesia has not yet fully provided a solid juridical foundation, the practice of out-of-court settlement is still possible through the discretion of law enforcement officials, customary mechanisms, and limited arrangements such as diversion in juvenile justice and domestic violence case

settlement. This shows a paradigm shift from retributive justice to restorative justice that emphasizes recovery, balance, and peace between perpetrators and victims. On the other hand, the presence of the National Criminal Code provides a new direction by recognizing out-of-court settlements as the basis for the removal of prosecutions, thereby strengthening the legitimacy of penal mediation. Therefore, it is necessary to strengthen more comprehensive and integrated regulations so that penal mediation can be implemented optimally in realizing a more fair, humane, and in accordance with the values of Indonesian society. Referring to the results of this study, the author encourages the government to immediately provide a strong legal basis for the practice of penal mediation by making it one of the official mechanisms for resolving criminal cases recognized by the state through the establishment of comprehensive laws and regulations. This step is seen as urgent, considering that the practice of penal mediation has actually grown and developed widely among the community as the chosen way to resolve the criminal cases they are facing. More than that, the institutionalization of penal mediation can also be a significant legal breakthrough in order to welcome and prepare for the enactment of the provisions of Article 132 paragraph (1) letter g of the National Criminal Code, before the regulation officially comes into effect in 2026.

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