

THE ROLE OF PENAL MEDIATION TO RESOLVE CRIMINAL ACTS THAT CAUSE HARMS TO OTHERS IN INDONESIAN MILITARY COURT

Koerniawaty Sjarif, Universitas 17 Agustus 1945

ABSTRACT

In the settlement of criminal cases, usually judges impose criminal conviction against the perpetrator. This usual process is philosophically sometimes not satisfying all parties. Therefore it is necessary to have a criminal case settlement outside judicial process in order to resolve the conflict between the perpetrator and the victim. In the context of military courts, penal mediation has not yet been implemented considering that it has not been regulated in Law No. 31 Year 1997 on Military Court. By using normative legal research methods, this study will examine the possibility of applying penal mediation in military justice mechanisms in Indonesia.

Keywords: Penal Mediation, Military Court, Restorative Justice.

INTRODUCTION

Based on the Indonesian positive law, there has been no option for criminal law mechanism to be proceeding outside the formal procedural law. However, in practice, there have been also some practices that make it possible to use the non-procedural mechanism such as: by cultural institution (*lembaga adat*) or discretion at legal enforcer level. In this matter, this study argues that penal mediation could be used as other non-procedural mechanism.

Settlement of crimes that cause harm to others through a penal mediation mechanism is deemed more beneficial for the parties, especially in criminal offences committed by the Indonesian National Armed Forces (TNI) who have reconciled with compensation for the actions committed by the perpetrators.

In this study, I would like to analyze how important penal mediation in the Indonesian military court procedure. These studies acknowledge that the existing Indonesian Law No. 31 Year 1997 on Military Court does not regulate the penal mediation mechanism. Thus, by using the normative research methodology, this study proposed the possibility of penal mediation as alternative settlement mechanism of criminal acts that cause harms to others in Indonesian military court.

Juridical, Philosophical, and Sociological Perspective on Penal Mediation

Penal mediation is an alternative resolution outside the court; in the settlement of civil cases in general it is called as Alternative Dispute Resolution (ADR). Penal mediation or Mediation in Criminal Cases or Mediation in Penal Matters, which in German is known as “*Der Aubergerichtliche Tataus-gleich*” (ATA), in Dutch be known as “*Strafbemiddeling*” and in French called as “*De Mediation Penale*”, because of penal mediation settles cases by bringing victims along with the perpetrators of crime, the penal mediation is often known as “*Victim-*

Offender Mediation” (VOM), *“Täter-Opfer-Ausgleich”* (TOA), or *“Offender-victim Arrangement”* (OVA) (Arief, 2008).

Juridical, penal mediation, has not been regulated in Indonesia’s legislation, principally criminal cases based on Indonesia’s acts cannot be resolved outside the court. Although in principle, criminal cases based on Indonesia’s laws cannot be resolved outside the court, there are certain things that allow these criminal cases to be resolved outside the court. It means that even though it is not explicitly stated in the laws and regulations, the mechanism for resolving offenses outside the court is actually regulated, including the settlement of juvenile delinquency through diversion (Arief, 2008).

Viewed from a philosophical perspective, penal mediation contains the principle of applying a *“win-win”* and does not end with a *“lost-lost”* or *“win-lose”* win (Albert et al., 2005), as the judiciary wants to achieve formal justice through law enforcement process. Settlement of criminal cases through penal mediation is expected to reach the absolute justice (Bercovitch & Lee, 2003) because of the existence of an agreement concerning the establishment dispute settlement between the parties. This concept is certainly different from what is obtained through litigation (judicial), where dispute resolution ends in a *“win-lose”* situation (Mulyadi, 2016).

Philosophically, settlement of criminal cases through penal mediation is to implement the principle of justice that is fast, simple and inexpensive because the parties involved in resolving this case are relatively small compared to conventional criminal cases or through judicial processes in the criminal justice system, the duration of settlement is faster than judicial process and more efficient so that it guarantees the fulfillment of legal certainty and justice of the disputing parties (Garkawe, 1999). According to Arief (2000), *“one of the reasons for using penal mediation in settling criminal cases is because of the idea of victim protection, the idea of harmonization, the idea of restorative justice, the idea of overcoming the rigidity (formalities) and the negative effects of the criminal justice system, and efforts to find alternative punishment (beside prison)”*.

The process of resolving cases through the process of penal mediation is sociologically rooted in a family culture that grows and develops in the Indonesian society that puts forward the principle of deliberation to resolve a dispute within a social system through the mechanism of customary institutions/body, settlement of cases in a peaceful manner to maintain social harmony thus criminal acts against perpetrators of crime by state apparatus are deemed no longer needed because they are considered to damage the social harmony that has been achieved (Mulyadi, 2016).

The long-known penal mediation has become a means of resolving violations that occur in indigenous peoples in Indonesia (Yusriando, 2015). Penal mediation is an alternative effort for the community to settle disputes that occur between them and pave the way to get harmony, orderly and peacefully. In addition, for the penal mediation community in violation of decency customs, it has become an alternative effort to protect the perpetrators, victims and the society who’s related to the incident (Wissler, 1995).

The nature and substance of penal mediation is the same as the nature of customary law, namely prioritizing the settlement of disputes among society members by means of deliberation and consensus (Pont, 2015). Ensure that disputing parties forgive each other so there is no need to bring their case to court. Thus, maintaining good relations, harmonization between the parties, so that the harmony in the society that disrupted due to the occurrence of disputes can be restored like the original condition and keep maintaining the friendly relations among the society.

Penal Mediation Mechanism in Indonesian Military Court

Settlement of criminal cases that cause harm to other people in the Military Courts, is legally regulated under Paragraph III concerning Compensation Claims, Article 183-187 of Law Number 31 year 1997 concerning Military Courts. The settlement of the case is submitted together with the settlement of the criminal case or what is referred to as the merging of the claim for compensation, in the Explanation of Article 183 paragraph (1) of Law Number 31 of 1997, the incorporation of the lawsuit Case in this criminal case so that the claim case at the same time is examined and decided at once with the relevant criminal case. “*Harms for others*” is included in the harms of the victim (Art 183 (1) Law Number 31 year 1997).

The mechanism for compensation requests in Law Number 31 of 1997 concerning Military Courts is the same as the mechanism for compensation claims in chapter XIII Article 98 up to Article 101 of the Penal Procedure Code.

Criminal case settlement combined with a claim for compensation or an incorporation of compensation claims in the Military Court is settled based on the law, which is carried out sequentially, meaning that the criminal case is settled first then following the settlement of the compensation, if the aggrieved party requests the incorporation of the lawsuit to the criminal case, The Court will consider its authority to adjudicate the claim, about the basic truth of the claim, and about the penalty for reimbursement that has been incurred by the injured party. If the claim for compensation has been determined by the Court, the compensation claim becomes a sanction that must be met by the perpetrator of the crime in addition to criminal sanctions. Sanctions Repayment is a sanction that requires someone who has acted to harm another person to pay a sum of money or goods to the person who was harmed.

The compensation claim is having “*accessoir*” characteristic (Sofyan & Azis, 2014) of the existing case, which means that the compensation decision is inherent and follows a criminal case decision in several aspects. The dependency or nature of the assessor owned in the settlement of the incorporations of compensation claims is the same as the nature of the assessor in the settlement of the incorporations of compensation claims in the District Court.

The impact of the settlement of the compensation claim filed along with the criminal case, as explained above is the same as the settlement of the case of the incorporations of compensation claims stipulated in the Criminal Procedure Code, deemed inefficient because it takes a long time and does not provide legal certainty due to its asset nature. Therefore, the settlement of criminal cases followed by compensation claims in the Military Courts is almost never submitted by the victims, so that the settlement of criminal acts that cause harm to others is more often done through a penal process.

Both the settlement of a crime that causes harm by combining compensation cases and through Penal in the Military Court, if proven, even though it shows that there has been reconcile between the two parties, with the payment of compensation even the victim has tried to revoke the report, always ends with punishment for offenders, although sometimes the criminal is conditional, conditional criminal, namely criminal conditional punishment (conditional criminal) which is regulated in Article 14 letter (a) paragraph (1) of the Criminal Procedure Code.

According to the Law, an offender who was sentenced to a conditional sentence, he did not need to undergo his sentence until the end of his trial period, but for Defendants of the Indonesian National Army (TNI) it would still have an effect on administrative sanctions in the form of postponing promotions for 5 (five) period or 2.5 (two and a half) years, the rights of the Suspect to attend education are revoked and released as long as the limit stipulated in the Force Cash Decision. This action, of course will be very detrimental to the perpetrators of the crime

who have replaced all the losses suffered by the victims, so that they are seen as not giving a sense of justice.

In addition, the settlement of criminal cases which always ends with the conviction, will give the label/negative stigma for the soldier and psychologically the negative stigma will reduce relax the spirit of the soldiers to carry out their basic duties, so that sometimes it will lead to other criminal acts such as, Domestic violence, persecution or repeating the same actions.

In 2013 to 2015 in Surabaya Military Court III-12 there were 8 criminal cases which caused harm to others, all of which were not followed by a claim for compensation from the victim. The judges' legal considerations in deciding criminal cases that cause harm to others can be observed from several decisions that have permanent legal force, as follow:

Decision Number 240-K/PM.III-1/AD/XII/2013 in the name of Defendant Sudirman, Lieutenant CPM/2910112601269 proved to be legally and convincingly guilty of committing a crime of Fraud. Therefore, the Military Prosecutor requested that the defendant be sentenced to imprisonment for 7 (seven) months. And was decided by the Military Court III-12 Surabaya with imprisonment for 5 (five) months with a trial period of 10 (ten) months.

Observing the verdict of the settlement of criminal cases that caused harm to others, which was carried out through the aforementioned Penal, it was concluded that the compensation paid by the Defendant was only used as a legal consideration regarding the conditions that alleviated the punishment in imprisoning, based on the following conditions:

1. The defendant and the victim have reconciled and forgiven each other.
2. The defendant has helped with medical expenses or compensation for the actions he has committed.
3. The defendant acknowledges his actions, feels guilty and promises not to repeat it.
4. The defendant has never been convicted.

Even though the facts revealed that the Defendant had given compensation, the victim had not sued the Defendant, had forgiven the Defendant's mistake and between the victim and the Defendant had reconciled as before, so that the problems between the two had been resolved. These conditions were not considered by the Panel of Judges to conclude a situation that there were no more problems between the Defendant and the victim so that there had been a legal balance, therefore to fulfill a sense of justice for both parties in the litigation there was no need for punishment. On the contrary, the Judge in his consideration argued that the TNI soldiers did not deserve to act against others, because they would defame the TNI so that it would affect the carrying out of duties in TNI, so that the Defendants had to be punished and sentenced in order to give deterrent effect and not imitated by other soldiers. Therefore, the defendants shall be punished with conditional punishment.

The practice of completing a crime that causes harm to another person in the Military Court as described above, is deemed not to fulfill the aspirations of both parties who litigate, does not fulfill a sense of justice and does not restore relations between the two parties who are disputing. This is because the existing rules do not regulate how to settle criminal cases if previously there has been a peaceful settlement, so that the rules can be used as a legal basis, even though criminal case settlements that always end with punishment cannot necessarily fulfill the parties' sense of justice and have not certainly can restore relations between victims and perpetrators.

Therefore, the existing rules regarding the settlement of criminal acts that cause losses in the Military Court with combining compensation claims are considered out of date with the development of the society, especially the military community who want to settle the cases

effectively, certainly, simply and low costs and can fulfill the aspirations of both parties in litigation, where legal developments should be able to keep up with the development of society. With the existence of the “*out of date*” legal rules, it is necessary to have a new regulation through legal renewal (Rado et al., 2016) in the settlement of criminal acts that cause harm to other people in the Military Court if both parties want a peaceful settlement, in which it is in accordance with the development and culture of Indonesian people who want to settle the case by deliberation to reach consensus, so that the law can fulfill its purpose to provide justice for justice seekers, by means of penal mediation.

The penal mediation from the point of view of the theory of justice both and Islamic Law is part of Retroactive justice, assessed as a more appropriate case settlement if both parties are agreed, due to it will give a sense of justice and fulfill the parties' aspirations and be more beneficial because victims' losses can be replaced. Subsequently, the perpetrator of the crime can play an active role in correcting his mistakes so that the settlement through penal mediation will provide legal certainty (Shapland, 2016). The criminal acts that can be solved by penal mediation are:

Crime Related to Property

Crimes related to assets, in this term are criminal acts covered by Article 362 Theft, Article 372 Embezzlement, Article 378 and Article 480 of Code of Criminal Procedure, except for criminal acts of Corruption and Narcotics.

Criminal cases that occur due to negligence without any intention as written in article 359 and 360 of the Criminal Code, including traffic cases which result in death or injury whether the perpetrators are their own family or other people.

Minor criminal offenses include Article 352 of the Criminal Code for minor persecution, Article 354 of the Criminal Code for minor thievery, Article 373 of the Criminal Code for minor embezzlement, Article 379 of the Criminal Code for Fraud, Article 482 of KHUP minor gratification and other criminal acts with a maximum threat of 3 months or a maximum fine Rp. 7,500-(Seven Thousand Five Hundred Rupiah).

Criminal acts stipulated in Law Number 23 of 2004 concerning the Elimination of Domestic Violence (KDRT).

Apart from being seen from the types of criminal acts, the settlement of criminal cases by underpinning restorative justice is also seen from the side of the perpetrators as follows:

1. The perpetrator only commits the crime for the first time or the crime is not a repetition.
2. Victims and perpetrators agree to settle criminal cases peacefully.
3. Actors and victims have family relationships.
4. The perpetrators are already old.

Hence, the criminal acts included in the above criteria will be more useful if resolved through the penal mediation mechanism. One thing or another if the above criminal acts are not resolved through the penal mediation mechanism, it will cause new cases.

CONCLUSION

This study concludes that since Indonesian Law No. 31 Year 1997 on Military Court does not regulate about penal mediation, thus this mechanism could be an alternative to fill the legal loophole to settle the criminal acts that caused harms to others. Moreover, settlement of criminal

cases through penal mediation philosophically is to realize the principle of justice that is fast, simple and inexpensive. This mechanism is sociologically rooted from the Indonesian origin culture to overcome disputes with amicably basis.

Criminal settlement that causes harm to other people, in the Military Court, if there has been an agreement between the victim and the perpetrator to settle the case in a amicably manner, it will be more beneficial, giving a sense of justice and providing legal certainty to be resolved by penal mediation. Settlement of criminal cases with penal mediation will help TNI Soldiers who have made mistakes can immediately account for and correct their mistakes without interfering with their basic duties as a TNI soldier. In other side, with the settlement of criminal acts through the penal mediation it will make the TNI soldiers not repeat their actions or commit other criminal acts and for other soldiers they can give a deterrent effect. Thus, the state effort to provide legal protection can be achieved.

ACKNOWLEDGEMENTS

This paper is published for the purpose to fill the requirement of doctoral studies at Faculty of Law, Universitas 17 Agustus 1945. The author would like to appreciate for Prof. Dr. Basuki Rekso Wibowo, S.H., MS. (supervisor) and Dr. Otto Yudianto, S.H., M.Hum. (Co-supervisor) that always provide generous assistance and advice in building the idea of the use of penal mediation in Indonesian military court.

REFERENCES

- Alberts, J.K., Heisterkamp, B.L., & McPhee, R.M. (2005). Disputant perceptions and satisfaction with a community mediation program. *International Journal of Conflict Management*, 16(3), 218-239.
- Arief, B.N. (2000). *Legislative policies in crime prevention with imprisonment*. Badan Penerbit Universitas Diponegoro, Semarang.
- Arief, B.N. (2008). *Mediation of penal: settlement of offenses*. Pustaka Megister, Semarang.
- Bercovitch, J., & Lee, S. (2003). Exploring the relevance and effectiveness of directive strategies in mediation. *International Journal of Peace Sciences*, 8(1), 1-25.
- Garkawe, S. (1999). Restorative justice from the perspective of crime victims. *QUT Law Review*, 15(1), 40-59.
- Mulyadi, L. (2016). Penal mediation implementation as an evaluation of pancasility value for supporting legal supremacy in national development framework. *Journal of Legal Reform*, 2(1), 23-45.
- Pont, A.V. (2015). The existence of non-litigation mediation in Indonesia. *International Journal of Scientific and Technology Research*, 4(8), 108-128.
- Rado, R.H., Arief, B.N., & Sopyono, E. (2016). Penal mediation policy on the settlement of Sara conflict in Kei Islands in the national criminal legal efforts. *Journal Law Reform*, 12(2), 266-282.
- Shapland, J. (2016). Forgiveness and restorative justice: Is it necessary? Is it Helpful? *Oxford Journal of Law and Religion*, 5(1), 94-119.
- Sofyan, A., & Azis, A. (2014). *An introduction to criminal procedure code*. Kencana, Jakarta.
- Wissler, R.L. (1995). Mediation and adjudication in the small claims court: The effects of process and case characteristics. *Law and Society Review*, 29(2), 323-345.
- Yusriando, K. (2015). Penal mediation implementation as an evaluation of pancasility value. *Journal of Legal Reform*, 2(2), 23-45.