

# The Urgency of Penal Mediation in Equitable Criminal Law Reform

Nur Isti Qomatun Nafi<sup>1</sup>, Kuswardani Kuswardani<sup>2\*</sup>, Andria Luhur Prakosa<sup>3</sup>

<sup>1,2,3</sup>Law Science Department, Universitas Muhammadiyah Surakarta

\*Corresponding author. Email: kus283@ums.ac.id

## ABSTRACT

Regulations regarding the protection of the status, rights, and concern of victims are no longer sufficient. Victims who have suffered damages due to the actions of the crime perpetrators cannot voice their rights and concerns. Therefore, criminal law reform is urgently required to fulfill the balance of rights between perpetrators, victims, and the community. Principally, criminal law reform is an attempt to review and reform the law in accordance with general sociopolitical, socio-philosophical, and cultural values of society. This study discusses the perpetuation of the regulation urgency related to penal mediation in an effort to reform equitable criminal law in Indonesia. The research conducted was descriptive with a normative legal approach. The results of this analysis prove that penal mediation could be taken as an effort to resolve cases outside of litigation. Penal mediation is in line with the historical, philosophical, sociological, and juridical aspects of Indonesia. Therefore, given the importance of a strong rule of law, there needs to be a legal reform in penal mediation.

**Keywords:** *Urgency, Penal, Criminal law reform*

## 1. INTRODUCTION

Penal mediation or mediation in penal matters is the resolution of criminal disputes through a statement of agreement, presenting the perpetrator and victim to accomplish problem resolution without win-lose status between the parties. Penal mediation is an alternative dispute resolution/cases outside the court or in civil terms often referred to as Alternative Dispute Resolution (ADR) [1].

Soerjono Soekanto states that the center of law enforcement is to harmonize the interrelationships between values which include attitudes of action in order to create a peaceful social life. The application of penal mediation as an alternative to the settlement of criminal cases out of court is one of the recommendations of the United Nations (UN) in order to overcome the negative effects of handling criminal cases [2].

The application of penal mediation in settling criminal problems helps to protect the rights of victims without neglecting the rights of the perpetrators, hence it is expected that the application of penal mediation as an alternative to solving criminal disputes outside the courts, which can help realize a just reform of Indonesian criminal law for perpetrators, victims, or affected communities. Fundamentally, penal mediation is an alternative for resolving criminal cases by applying an agreement between the parties as a reference in resolving cases.

Several cases in the community were resolved by peaceful mediation. As an example, the case of a tourist accident where the perpetrator and the victim do not settle through the courts but the agreement between the manager/tourist place provider and the victim's family/tourist [3]. Settlement of domestic violence is a common case in penal mediation, a settlement based on the interests of the parties [4].

This proves that the settlement through penal mediation can accommodate the interests of victims who are prone to negligence if it is settled through litigation/trial route, regardless of the suffering experienced, either material or immaterial damages [5]. Although this settlement has not been regulated in prevailing legal regulations, there should be legal regulations that govern the practice of settlement through penal mediation to have a strong legal foundation and reflect justice and legal certainty.

Cases settlement through mediation is not a new practice among Indonesian people because peaceful agreement in Indonesia better known by its popular term, gotong royong or mutual assistance, is an exceptional social potential for resolving conflicts, both at the prevention, dissolution, and post-conflict stages in society [6]. The Council of Europe in its recommendation No.R.(99)19 on Mediation in Penal Matters has recognized penal mediation as an alternative to resolving criminal cases outside the courts. Furthermore, various countries such as

Germany, Belgium, Austria, and others also acknowledge penal mediation [7].

Therefore, it is not a "preternatural" if Indonesia that is reforming the Criminal Code develops the substance of the Criminal Code by formulating such a solution as an alternative. This is confirmed by the international community in the conference, the International Penal Reform Conference which was held at the Royal Holloway College, University of London, from 13 to 17 April 1999. One alternative process that can be opted for is to overrule the implementation of the formal/official justice system through the courts, diverted to an informal system or mechanism in solving problems that are comparable to human rights benchmarks [2]. Therefore, this paper attempts to examine the importance of penal mediation in the context of reforming equitable criminal law, and in its discussion will present the urgency based on historical, philosophical, sociological, and juridical perspectives.

## **2. RESEARCH METHOD**

This research is a descriptive study with a normative legal approach since it will explain the urgency of penal mediation arrangements in Indonesian positive law reform [8]. The data used are secondary data in the form of legal documents, literature, journals, and relevant web sources. The data collection employed a literature study, by identifying secondary data, recording, and selecting data that can be used to answer the research problem. Data analysis used content analysis, which the researchers examined rigorously based on the connection of the criminal law reform principle, especially in relation to penal mediation.

## **3. RESULTS AND DISCUSSION**

The results obtained in this study indicate that the application of penal mediation has various benefits in reforming an equitable criminal law. Historically, the concept in previous criminal law applied a retaliatory approach, however many principles of reparations in the application of criminal law through reconciliation resolution between the parties employing deliberation and consensus. It is expected using the principle of reparations in criminal law can now fulfill a sense of justice for perpetrators, victims, and the community. This practice has existed before independence, which was practiced by regions in Indonesia, inside and outside Java-Madura islands. This solution prioritizes the harmony of society, following the nature of customary law, which is a commune, concrete, and constant.

Based on the philosophical perspective, the application of penal mediation in the reform of criminal

law does not conflict with Pancasila and the 1945 Constitution which act the legal bases in Indonesia, in which penal mediation is in line with the fourth principle of Pancasila and the preamble to the 1945 Constitution. Furthermore, penal mediation respectfully follows the values contained in the second principle of Pancasila, namely civilized humanity originates from divine values as well as the nature of customary law, namely religious-magical. The humanity value in this deliberation reflects that each party to the dispute has equal status and rights to voice their rights.

Sociologically, the application of penal mediation or often referred to as agreement has existed before the formation of laws and regulations governing penal mediation. The application of penal mediation has been established since the predecessors applied it first and it is proper to consider that penal mediation has become part of the social rules of Indonesian society shown when Indonesian people face problems among them, the first conduct undergone is deliberation in order to achieve peace. According to the juridical view, penal mediation in Indonesia has not yet obtained a strong legal basis in the statutory system. So far, the regulation governing penal mediation in Indonesian positive law is limited to regulations under the law. Therefore, criminal law reform regarding penal mediation is essential in order to implement a just state law. The regulation regarding penal mediation limited to regulations under the law is deemed void to serves as a legal umbrella, thus criminal law reform on penal mediation is needed in forms of Law, the Criminal Code, and the Criminal Procedure Code. Furthermore, criminal law reform in terms of historical, philosophical, and sociological terms does not conflict with the legal basis and ideals of Indonesia, therefore from a juridical perspective, criminal law reform in the penal mediation regulation should be exercised immediately in order to create an objective legal certainty.

Criminal law as part of Indonesian national law functions as a protection for the rights and interests of individuals, society, nation, and state. This task is represented by the government as a state official, including the protection of the rights and interests of perpetrators of criminal acts and victims. However, in practice criminal law burdens the provision of deterrent effect only for perpetrators, resulting in the negligence of the position, rights, and interests of victims who suffer material and immaterial damages [5].

Based on history perspective, the concept in criminal law above is a concept with a retaliation approach or commonly referred to as the theory of retributive punishment.

Based on the results of the study, retaliation with imprisonment for criminals is very vulnerable to a risk

of danger. Therefore, there needs to be a punishment reform to produce a humane and proportional imposition. This thought generated the Just desert theory, implying the perpetrators should be held accountable for punishment, a fair imposition so punishment does not represent an act of revenge [9]. David A. Starkweather asserts that in the just desert theory, it is necessary to involve the participation of victims in the criminal justice process to achieve a distributive punishment. Nevertheless, a plea bargaining process should be proposed.

In the process, the victim should be actively involved to solve the case and the victim has new rights, such as determining compensation, both material and non-material as a result of the crime [10]. This principle accommodates more the interests of victims, the rights of victims, and the community are taken into consideration in problem-solving. Thus, this theory is the settlement of cases through victim restorative justice. The principle of restorative justice is a principle that is directly associated with the rights of the victim which applies to anyone who is deemed a victim of a crime and there is no discrimination against the protection of this right [11].

Restorative principle is written in the penal mediation process, which has been profoundly practiced and developed in Indonesian society, such as dispute solving through an agreement between the parties using deliberation and consensus. Christopher W. Moore, a mediator, defines mediation as “The intervention in a negotiation or a conflict of an acceptable third party who has limited or no authoritative decision-making, who assists the involved parties to voluntarily reach a mutually acceptable settlement of the issue in dispute” [12]. This means that intervention in negotiations or problems by a third party is acceptable. The third party is limited or unable to make decisions as an authorized party. The role of the third party is to help the parties involved in the case voluntarily reach a mutually acceptable settlement of the dispute.

The thought progress of the implementation of penal mediation cannot be separated from the development of restorative justice as one of the ideas of reforming criminal law as the concept of penal mediation is principally one of the means to achieve the implementation of the restorative justice concept in the settlement of criminal cases that will benefit all parties to the dispute. Through the settlement of cases using penal mediation, it is expected that justice can be accomplished, either for perpetrators or victims. Perpetrators may obtain the opportunity to repent and commit to forbidding themselves from such actions in order to avoid imprisonment. Victims are entitled to their status, rights, and interests in seeking and finding justice. Furthermore, the settlement of criminal cases

through penal mediation also frees the parties to resolve the dispute by prioritizing the "win-win" concept. Covey argues that problem resolution by means of "win-win solution" can do more good for parties involved in cases/disputes [13]. There are no parties who will be imposed with harms, this is known as egalitarianism.

When viewed from the philosophical aspect, the consideration in regulation elaboration that is formed takes into account the life perception, awareness, and legal ideals which include the philosophy of the nation originating from Pancasila and the 1945 Constitution [14]. Therefore, philosophically, the application of penal mediation in the criminal law reform does not contradict Pancasila and the 1945 Constitution as the nation's foundation. Dispute settlement by means of penal mediation becomes a reflection of the protection of rights of perpetrators, victims, and community. The implementation of penal mediation is the embodiment of Pancasila values which contains the nation's view of life regulated in the principles of Pancasila, especially in first and fourth principles. The first principle of Pancasila states "The belief in one God " [15]. The reflection of penal mediation contained in the first principle of Pancasila contains in Allah's command regarding Peace in Q.S Al-Hujurat/49: 9-10 and the Hadith narrated by Adh Dhahak from Ibn Abbas which reads: [16].

وَأِنْ طَائِفَتَانِ مِنَ الْمُؤْمِنِينَ اقْتَتَلُوا فَأَصْلِحُوا بَيْنَهُمَا فَإِنْ بَغَتْ إِحْدَاهُمَا عَلَى الْأُخْرَى فَقَاتِلُوا الَّتِي تَبْغِي حَتَّى تَفِيءَ إِلَى أَمْرِ اللَّهِ فَإِنْ فَاءَتْ فَأَصْلِحُوا بَيْنَهُمَا بِالْعَدْلِ وَأَقْسِطُوا إِنَّ اللَّهَ يُحِبُّ الْمُقْسِطِينَ (9) إِنَّمَا الْمُؤْمِنُونَ إِخْوَةٌ فَأَصْلِحُوا بَيْنَ أَخَوَيْكُمْ وَاتَّقُوا اللَّهَ لَعَلَّكُمْ تُرْحَمُونَ (10)

Meaning: “And if two groups of believers fight each other, then make peace between them. But if one of them transgresses against the other, then fight against the transgressing group until they ‘are willing to’ submit to the rule of Allah. If they do so, then make peace between both ‘groups’ in all fairness and act justly. Surely Allah loves those who uphold justice (9). The believers are but one brotherhood, so make peace between your brothers. And be mindful of Allah so you may be shown mercy (10). Q.S Al-Hujurat /49: 9-10.

إِذَا كَانَ يَوْمَ الْقِيَامَةِ يُنَادِي مُنَادٍ فَيَقُولُ : أَيُّنَ الْعَافُونَ عَنِ النَّاسِ ؟ هَلُمُّوا إِلَى رَبِّكُمْ خُذُوا أَجُورَكُمْ ، وَحَقَّ عَلَى كُلِّ مُسْلِمٍ إِذَا عَفَا أَنْ يُدْعِلَهُ اللَّهُ الْجَنَّةَ

Meaning: “When the Day of Judgment comes, a voice says, "Which of the people in the past (in the world) forgave the mistakes of fellow human beings?" Come to your Lord and receive your rewards. And it is the right of every Muslim to forgive the mistakes of others to deserve a heaven.” Narrated by; Adh Dhahak from Ibnu Abbas [17]

Based on the verses of the Qur'an and the Hadith commanding peace to solve a dispute, it can be inferred that the application of penal mediation in the settlement of criminal cases is in line with the first principle of Pancasila which contains belief in God. In addition, the command in these verses of the Qur'an and hadith shows a pivotal human value; forgiving others for mistakes committed is the priority in resolving a case and forgiveness shall eliminate revenge and restore the balance of the rights of victims, perpetrators, and affected society. According to Liebmann, forgiveness of the victim to the defendant is the implementation of restorative justice principle with the formula described below: [18].

- a. Prioritize support and recovery of victims.
- b. The perpetrator is responsible for any actions done.
- c. Discussions between victims and perpetrators in order to reach a mutual understanding.
- d. A proper effort to correctly determine the damages suffered from the results of the criminal acts by perpetrators.
- e. Perpetrators should be self-conscious to avoid any crimes in the future.
- f. Community can help each other to reach an agreement between the parties.

Penal mediation is also in line with the fourth principle of Pancasila "democracy under the wise guidance of representative consultations." Phrase "representative consultation" in the fourth principle of Pancasila is a mirror of the application of the penal mediation process in criminal cases, wherein mediation the deliberation process has to be prioritized to reach a consensus that will provide justice for the parties involved without abandoning the status or rights of either party.

Further, penal mediation corresponds to the nation's view of life, carrying out world order where the International Penal Reform Conference held at Royal Holloway College, University of London, from April 13 to 17, 1999, mentions "One of the core factors in the process of law reform of criminal justice in countries is to override the implementation of the formal/official justice system and replace it with an informal system or mechanism in dealing with disputes that follow human rights standards."

The regulation regarding the nation's ideals of life is contained in the preamble to the 1945 Constitution of the Republic of Indonesia which reads " which shall protect all the people of Indonesia and all the independence and the land that has been struggled for, and to improve public welfare, to educate the life of the people and to participate toward the establishment of a world order based on freedom, perpetual peace, and social justice." [19] The implementation of penal mediation as an example of an informal mechanism in

criminal law is a part of criminal law reform that follows the International Penal Reform Conference mentioned above. Along with the implementation of the legal reform, either directly or indirectly, Indonesia has implemented world order as stated in the preamble of the 1945 Constitution as the ideal of the nation's life.

Sociologically, the application of penal mediation or often referred to as agreement has existed before the formation of laws and regulations governing penal mediation. The application of penal mediation has been established since our predecessors applied it first and it is proper to consider that penal mediation has become part of the social rules of Indonesian society shown when Indonesian people face problems among them, the first conduct undergone is deliberation in order to achieve peace, which can be solved in form of compensation or reparation into the initial state. Penal mediation as a form of restorative justice application is a new term for the old concept. This is stated in the United Nations Office for Drug Control and Crime Prevention that the approach through restorative justice is a settlement that involves perpetrators, victims, and the community to create equality between the perpetrators and the victims [20]. It is considered as a new term for the old concept because long before the term restorative justice in the criminal law system, the Indonesian community had already used the very same method in the settlement of cases that applied the restorative justice principle, in which it is known as mutual assistance of the Indonesian people.

The implementation of penal mediation in the realm of criminal law can be seen through the judge's decision which imposes the implementation of peaceful decisions to perpetrators of criminal acts. Decisions regarding peace as a result of penal mediation can be seen in Judges' Decisions No.1/Pid.c/2021/PN Rgt and No.5/Pid.c/2021/PN Rgt. that decides the case regarding the misdemeanor theft where it violates Article 364 of the Criminal Code which reads "Anyone who stoles partly or entirely, intending to possess against the law they have not been committed in a dwelling or at an enclosed yard where a dwelling is if the value of the thing stolen does not amount to more than Rp. 2,500,000.00 (two million five hundred thousand rupiah)".

However, some decisions by judges propose penal mediation as the only consideration in making decisions, albeit according to philosophical and sociological perception the implementation of penal mediation is in accordance with the national and cultural ideals of Indonesia, which prioritizes peace in dispute resolution. There are several decisions regarding acts of domestic violence (KDRT) that are in accordance with the elements of peace as a result of penal mediation applied by judges as the outcome of imposing decisions, such as Judge's Decision No.

19/Pid.Sus/2019/PN.Sim. The defendant, in this case, violated the provisions of Article 44 paragraph (1) of the Republic of Indonesia Law no. 23 of 2004 on the Elimination of Domestic Violence which reads " Anyone committing act of physical violence in the household as referred to in Article 5 letter a shall be punished with imprisonment of no longer than 5 (five) years or fine of no more than Rp15,000,000.00 (fifteen million rupiah)".

Although this case attaches a statement made by the perpetrator and the victim, denoting that the victim forgives the perpetrator and the victim has recovered, the peaceful settlement made between the victim and the perpetrator cannot abolish criminal responsibility or discontinue the criminal legal process.

This is not solely for retaliation but as preventive and repressive efforts so that the accused can reflect on action. Therefore, it is expected that there will be no similar criminal case. The implementation of penal mediation in the judge's decision, both in terms of consideration and application, is very much in line with the sociological aspect in Indonesian society which positions peace as the first solution to resolve cases between the parties. Hence, criminal law reform is required as it supports the social behavior and social rules of Indonesian society.

On a juridical foundation, penal mediation in Indonesia has not yet obtained a strong legal basis in the statutory system, because the regulation on penal mediation in Indonesian positive law is limited to regulations under the Decree of the Director General of the Judiciary Board of the Indonesian Supreme Court number 1691/DJU/SK/PS.00/12/2020 on the application of guidelines for restorative justice; Regulation of the Chief of the Indonesian National Police Number 6 of 2019 on Criminal Investigations; Regulation of the Indonesian Attorney General Number 15 of 2020 on the Cessation of Prosecution Based on Restorative Justice; as well as the Circular Letter of the Indonesian National Police Number 8 of 2018 on the Application of Restorative Justice in the Criminal Case Settlement, where according to the hierarchy of laws and regulations, there is a juridical consequence that laws with a lower hierarchy must not contest superior legislation (*lex superior derogate legi inferiori*) [21].

In practice, penal mediation is widely applied in the settlement of various criminal cases. The acknowledgment related to penal mediation does not have a strong basis now, making penal mediation seem profitable when the case resolved is related to criminal law enforcement, or it can be considered law in *concerto*, law enforcement influenced by customs or culture [22]. Therefore, regulations regarding penal mediation in a just criminal law reform based on juridical aspects are needed so as to create a strong legal

basis for the penal mediation implementation. Also, this is inseparable from the penal mediation implementation which is often opted for by judges in resolving cases. However, in the absence of a strong legal umbrella in the form of laws, the Criminal Code, and the Criminal Procedure Code which regulates penal mediation, legal reform is necessary for this context. Moreover, penal mediation is a means of criminal case settlement that does not compromise the rights of victims as well as perpetrators, and the affected community can be recovered without revenge. Hence, the humanity and justice values are embodied in penal mediation.

The urgency of penal mediation implementation in the Indonesian criminal justice system is important because: [23]

- a. The process of resolving cases through penal mediation is expected to diminish the accumulation of cases in court;
- b. Penal mediation is a fast, affordable, and simple dispute resolution process;
- c. Penal mediation is deemed an alternative dispute resolution that provides the wide array of possible access to the parties in terms of seeking justice;
- d. It strengthens and maximizes the functions of courts and dispute resolution in addition to the process of criminal charges.

In addition, previous studies with similar discussion topics were carried out, namely research conducted by Taufiqurrohman Abildanwa, with the research entitled "penal mediation as an effort to reform criminal law in Indonesia based on balance values." This research showed there was only a small part of criminal law policy in overcoming criminal acts through a settlement outside the positive legal process, and most of them were formal-oriented settlements. Meanwhile, it is now easier to find criminal problem handling through the implementation of restorative justice. However, the main problem is the absence of a strong legal umbrella regarding penal mediation arrangements, in the law, the Criminal Code, and the Criminal Procedure Code settings.

For this reason, criminal law reform can be initiated by acknowledging penal mediation as the norm in the law, the Criminal Code as a rule of law that contains criminal acts/criminal law, and the Criminal Procedure Code as formal criminal law. The criminal law reform is expected to fulfill the sense of justice and the protection of the status, rights, and interests of the perpetrators, witnesses, or victims. With the criminal law reform, it is expected that these rules become a legal umbrella for all regulations under the law concerning penal mediation and minimize conflicts between inferior regulations and superior regulations (*lex superior derogate legi inferiori*).

#### 4. CONCLUSION

Based on the formulation of the problem, explanation of the results, and discussion, it can be concluded that, historically, the concept in previous criminal law was a retaliatory approach that was no longer relevant to the progress of society. Therefore, following the era, a new concept in criminal law enforcement is discovered in form of a restorative approach that prioritizes the recovery of victims of criminal acts as the objective of the offender punishment. Legal action is expected to fulfill a sense of justice, both for victims, perpetrators, and the community.

Philosophically, the implementation of penal mediation in criminal law reform is not entirely contradictory to Pancasila and the 1945 Constitution. It is because dispute settlement by means of penal mediation reflects the protection of rights of perpetrators, victims, and the community. This also corresponds to Allah's command regarding Peace contained in Q.S Al-Hujurat / 49: 9-10 and the Hadith narrated by Adh Dhahak from Ibn Abbas, which in addition to following the nation's ideals, the implementation also contains human, justice, and divine values.

Sociologically, the application of penal mediation has existed before the establishment of laws and regulations governing penal mediation shown when Indonesian people face problems among them, the first conduct undergone is deliberation in order to achieve peace.

The implementation of penal mediation in judge decisions during consideration and implementation is according to the sociological aspects of Indonesian society because the application of penal mediation is consistent with social behavior and rules prevailed in Indonesia.

Juridically, penal mediation in Indonesia has not yet obtained a strong legal basis in the statutory system. So far, the regulation governing penal mediation in Indonesian positive law is limited to regulations under the law. Therefore, criminal law reform regarding penal mediation is essential in order to create a sense of justice in dispute settlement between perpetrators and victims and to create a strong legal basis for the implementation of penal mediation.

Penal mediation, whether viewed historically, philosophically, sociologically, or juridically, is a very appropriate application of criminal case settlement in terms of alternative settlements outside the court. Therefore, criminal law reform is necessary to create an equitable legal with certainty. It is expected that legal reform can create justice and protection, both for the

rights and interests of individuals, communities, as well as the nation and state.

The drawback of this study is the limited scope in analyzing penal mediation as an object of research on criminal law reform, yet it also provides advantages of the discourse of the urgency of penal mediation in terms of historical, philosophical, sociological, and juridical perspectives. This will be beneficial for writers, readers, and law enforcement in codifying regulations in the future.

The suggestions that need to be considered for further researchers who are interested in penal mediation in an equitable criminal law reform are, future researchers are expected to examine more sources and references related to the urgency of penal mediation in an equitable criminal law reform so that the results of the research can be improved and more complete. Moreover, future researchers are expected to equip themselves, both in the process of data sampling or collection so that research can be carried out properly

#### AUTHORS' CONTRIBUTIONS

The author's contribution of writing this manuscript, where all authors contributed in terms of discussion and achievement of this final manuscript. But besides that, there are several main tasks carried out by each author in the completion of this manuscript, where the first author is in charge of writing article manuscripts and looking for verses of the Qur'an and Al-Hadith related to peace, while the second author and the third author is tasked with analyzing the urgency of penal mediation as an alternative to criminal case settlement, both from the historical, philosophical, sociological and juridical aspects, where these things show the reasons for how important it is to reform criminal law in terms of arrangements regarding penal mediation in order to implement law enforcement fair. This proof has been optimized for online presentation.

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