

DOI: <https://doi.org/10.38035/jlph.v3i4>

Received: 24 May 2023, Revised: 12 Juli 2023, Publish: 28 August 2023

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Mediation of Criminal Cases as an Effort to Settle Criminal Actions Based on Local Wisdom in Indonesia

Dwi Andayani Budisetyowati¹, Joko Sriwidodo², Rr. Dijan Widijowati³, Juanda⁴

¹ Universitas Bhayangkara Jakarta Raya, Indonesia, dwi.andayani@dsn.ubharajaya.ac.id

² Universitas Bhayangkara Jakarta Raya, Indonesia, jokosriwidodo2016@gmail.com

³ Universitas Bhayangkara Jakarta Raya, Indonesia, dijan.widijowati@dsn.ubharajaya.ac.id,

⁴ Universitas Bhayangkara Jakarta Raya, Indonesia, prof.juanda@dsn.ubharajaya.ac.id

Corresponding Author: dwi.andayani@dsn.ubharajaya.ac.id

Abstract: Penal mediation is carried out to bring together criminal offenders and victims, so this penal mediation is often also known as "Victim Offender Mediation" (VOM). In Indonesia itself, the use of mediation can be seen in Law No. 30 of 1999 concerning Arbitration and Dispute Resolution. Settlement of cases through mediation is in line with the concept of local wisdom that lives in Indonesian society. The noble values contained in the Pancasila state foundation fade with the times and technology; the values contained therein, such as divinity, justice, decency, harmony, unity, humanity, and mutual cooperation, are no longer reflected in the lives of the nation, state, and society. Society is also included in the formulation of legal products. Penal mediation is less well known among Indonesians. In mediation, the urgency is the value of Pancasila in the settlement of criminal cases in Indonesia, which is the community's need for a progressive, humane criminal dispute settlement that provides a sense of justice for victims, society, and perpetrators, which cannot be carried out by national criminal law. The local wisdom of people in various regions of Indonesia in the settlement of criminal disputes based on deliberation and consensus (mediation) as local institutions has not been utilized optimally in answering this problem. The formation of law in Indonesia is based on historical aspects and is in accordance with the conditions and circumstances of the people. In mediation, it requires the involvement of all stakeholders in solving criminal acts through mediation based on local wisdom using impartial or neutral media and mediators.

Keyword: Mediation; Criminal Act; Local Wisdom; Alternative Dispute Resolution, Restorative Justice.

INTRODUCTION

Mediation is a way of resolving disputes through a negotiation process to obtain an agreement between the parties, assisted by the Mediator. While the Mediator himself is a Judge or other party who has a Mediator Certificate as a neutral party who assists the Parties in the negotiation process to find various possibilities for resolving disputes without using a

way of deciding or forcing a settlement, Criminal Mediation, or what we usually know as Penal Mediation, is also referred to by various terms, including "mediation in criminal cases" or "mediation in Penal matters" which in Dutch terms is called *strafbemiddeling*; in German terms it is called "*Der Aubergerichtliche Tat Ausgleich*" (abbreviated as ATA); and in French it is called "*de mediation penale*". Because penal mediation primarily brings together criminal offenders and victims, it is often also known as "Victim Offender Mediation" (VOM), *Tater Opfer-Ausgleich* (TOA), or Offender-Victim Arrangement (OVA). The developments in the use of mediation in criminal cases are: 1. In supporting documents of the 9/1995 UN Congress relating to criminal justice management (document A/CONF.169/6); 2. In the report of the 9th UN Congress (1955) on "the prevention of crime and the treatment of offenders" (document A/CONF.169/16); 3. In the Vienna Declaration, 10/2000 UN Congress (document A/CONF.187/4/Rev.3); 4. On March 15, 2001, the European Union made the EU Council Framework Decision on "the position of the victim in the criminal process"; 5. On July 24, 2002, Esococ (UN) accepted Resolution 2002/12 regarding "Basic Principles on the Use of Restorative Justice Programmers in Criminal Matters," which also includes the issue of mediation.

In Indonesia itself, the use of mediation can be seen in Law No. 30/1999 Concerning Arbitration and Dispute Resolution. Settlement of cases through mediation is in line with the concept of local wisdom that lives in Indonesian society. This is also due to the fact that the formation of law in Indonesia is based on historical aspects and in accordance with the conditions and circumstances of the people. In following the development of science and technology, the Supreme Court, as the main judiciary institution, issued Supreme Court Regulation Number 3 of 2022 concerning Electronic Mediation in courts, which further gives hope to justice seekers in finding justice more quickly and at minimal cost. Mediation is an alternative method of settling cases that many people love. Apart from mediation, the settlement of cases, which is also now a world trend, is based on restorative justice. Mediation is also part of resolving cases through a restorative justice approach. As an alternative to resolving cases, restorative justice includes several main elements, including: "First, crime is seen as a conflict between individuals that can cause harm to victims, society, and the perpetrators themselves; Second, the aim of the criminal justice process must be to create peace in society, all parties, and compensate for losses caused by the dispute; Third, the criminal justice process facilitates the role of victims, perpetrators, and society in finding solutions to the conflict. These elements are the same as the provisions in the application of mediation regulated in Perma No. 1 of 2016 and also Perma No. 3 of 2022.

Mediation of criminal acts, or what we usually call penal mediation is an alternative form of dispute resolution outside the court (which can be known as ADR or "Alternative Dispute Resolution", some call it "Appropriate Dispute Resolution").¹ ADR is generally used in civil cases,² not for criminal cases. Based on the current legislation in force in Indonesia (positive law), criminal cases cannot be resolved outside the court in principle, although with certain matters it is possible to settle criminal cases outside the court.³

The penal mediation model mentioned above is in line with the local wisdom values that develop in Indonesian society. Local wisdom in criminal law is known as the teaching of material lawlessness in its positive and negative functions, which can be used as a basis or reason for abolishing a crime or a basis for convicting people. Related to local wisdom, according to Von Savigny, that law is seen from the perspective of historical phenomena assumes that in principle every law is different, and that difference depends on the place and

¹Lilik Prihartini, *Perspektif Mediasi Penal Dan Penerapannya Dalam Perkara Pidana*, Pakuan Law Review, Vol. 1, No. 1 2015, p.2

²Lilik Prihartini, *Perspektif Mediasi Penal Dan.....Ibid.* p.3

³Emilia Susanti, *Mediasi Pidana Sebagai Alternatif Penyelesaian Perkara Pidana Berbasis Kearifan Lokal*, Lampung, Pustaka Ali Imron, 2021, p.72

time of application of the law. Law must be seen as the spiritual embodiment of a nation (volksgeist). Assumption: F.C. Von Savigny suggests that the law has no validity and/or is not universally applied because every society has built its own legal environment, manners, customs, and distinctive language. All these normative directives are seen more as a symbol of group "identity" that differentiates it from other social groups (as a symbol of group identity) and as a source for forming the "world view" of the community group concerned.⁴ The crime prevention strategy using customary criminal law is in line with the conclusions of the 7th UN Congress on the prevention of crime and the treatment of offenders, point 15, which states: *Crime prevention and criminal justice should not to be treated as isolated problems to be tackled by simplistic, fragmentary methods, but rather as complex wide ranging activities requiring sistematic strategies and differentiated approaches in relation to: a). The sosio-economic, political and cultural context and circumstances of society in wich they are applied; b). The developmental stage, with special emphasis on the changes taking place and likely to occur and the related requirements; c). The respective traditions and customs, making maximum and effective use of human indigenous options.*⁵

According to Soetandyo, the experience of the Dutch East Indies colonial government juxtaposed 'law sanctioned by the state' with 'customary law adhered to by the people' through a policy of dualism, which was more or less successful; in fact, it was not continued during the era of the Republic of Indonesia government. Dualism, which recognizes the real coexistence between Western law and the people's living laws, and pluralism, which sees in reality many kinds of laws that are equally significant in national life, according to Marc Galanter in his article "Law in Maby Rooms", according to Soetandyo, are apparently not considered by Republican leaders. The national aspiration to unite Indonesia as a political unit and under a single legal unitary government has ignored the fact of the plurality of laws that apply in society. Instead of being aware of and reconsidering existing policies, it is precisely the policy of unification of law that continues to be enforced.⁶ Article 2 Paragraphs (1) and (2) of Law Number 1 of 2023 concerning the Criminal Code (hereinafter abbreviated as the New Criminal Code) of 2023 determine: (1) The provisions referred to in Article 1 Paragraph (1) do not reduce the validity of the law that lives in society, which determines that a person should be punished even though the act is not regulated in this Law. (2) The law that lives in the community as referred to in paragraph (1) applies in the place where the law lives and as long as it is not regulated in this Law and is in accordance with the values contained in Pancasila, the 1945 Constitution of the Republic of Indonesia, human rights, and general legal principles that are recognized by the community of nations.⁷

Furthermore, from article 2 paragraph (1) of the New Criminal Code of 2023, it can be interpreted that it is a fact that in certain areas of Indonesia, there are still several unwritten legal provisions that live in society and apply as law in those areas; such things also exist in the field of criminal law, namely what is usually referred to as customary crime. In order to provide a solid legal basis regarding the enactment of customary criminal law, this matter can be strictly regulated in the Criminal Code. The provisions of this paragraph constitute an exception to the principle that criminal provisions are regulated by legislation. It is acknowledged that these customary crimes are to better fulfill the sense of justice that exists in certain communities.⁸ By looking at this description, mediation of criminal acts based on local wisdom is very necessary, considering that criminal mediation in this way is very animate to the customs and habits that live in Indonesian society.

⁴Erna Dewi, *Sistem Pemidanaan Indonesia Yang Berkearifan Lokal*, BP Justice Publisher, Bandar Lampung, 2014, p. 42

⁵Erna Dewi, *Sistem Pemidanaan Indonesia Yang...Ibid.* p.42

⁶Abd. Halim, *Teori-teori Hukum Aliran Positivisme dan.....Ibid.* p.44

⁷Abd. Halim, *Teori-teori Hukum Aliran Positivisme dan.....Ibid.* p.45

⁸Undang-Undang Nomor 1 Tahun 2023 tentang Kitab Undang-Undang Hukum Pidana

METHOD

This research, as seen from its kind, is normative legal research. As seen from its nature, this research is descriptive. The object of this research is related to the criteria for criminal acts, the punishment of perpetrators of criminal acts, and solutions to overcome problems within the scope of criminal acts, as well as how to involve all stakeholders in solving criminal acts through mediation based on local wisdom using impartial or neutral media and mediators. The data used in this study is only secondary. The data analysis in this study was carried out qualitatively. The method of drawing conclusions in this study was carried out deductively, namely drawing conclusions from general provisions to specific provisions.

RESULTS AND DISCUSSION

Arrangements for Mediation of Criminal Cases in Indonesia

Penal mediation is an alternative form of dispute outside the court that is commonly known as ADR (*Alternative Dispute Resolution*). Although in general dispute resolution outside the court only exists in civil disputes, in practice criminal cases are often resolved outside the court through various law enforcement officials' discretion, deliberation or conciliation mechanisms, or forgiving institutions in society.⁹ Penal mediation is basically a form of restorative justice. According to Eva Achjani Zulfa¹⁰, Restorative justice is understood as a form of approach to solving criminal cases by involving the perpetrator, victim, family of the perpetrator or victim, and other related parties to jointly seek a fair solution by emphasizing restoration to its original state and not retaliation.¹¹

The development of law demands a settlement of criminal cases that, philosophically, can satisfy all parties and does not always end with the imposition of a sentence by a judge against the perpetrator. So that ADR is seen as a way or an alternative to settlement through a litigation process that can resolve criminal cases in a fair manner and provide benefits to the wider community based on the principle of a win-win solution and not a win-lose solution.¹² Alternative settlement of cases through penal mediation has the principle of "win-win solution", and not "win-lose solution", which means that even though there are parties who are guilty and harmed, the settlement in this way is expected to provide justice for the victim, and the perpetrator should not be subject to criminal penalties according to applicable law.¹³

As for criminal cases that usually use the non-litigation route in Agus Raharjo's research, they include Article 310 (insult or defamation), Article 311 (slander), Article 352 (minor maltreatment), Article 359 (due to negligence causing the death of another person), Article 372 (embezzlement), and Article 378 (fraud). In addition to the cases mentioned above, criminal cases regulated in Article 285 (rape), Article 332 (running away underage girls), and Article 367 paragraph (2) (theft committed by family members) can also be resolved through This. Several criminal cases outside the Criminal Code that have been

⁹ Liliana Tedjosaputro dan Krismiyarsi, "Kebijakan Penanggulangan Kejahatan Melalui Mediasi Penal Sebagai Alat Alternatif Penyelesaian Tindak Pidana KDRT", *Jurnal Kriminologi Indonesia*, Vol. 8, No. 1, 2012. p.59

¹⁰ Eva Achjani Zulfa, "Konsep Dasar Restorative Justice", Papers for Criminal Law Training and Criminology "Asas-asas Hukum Pidana Dan Kriminologi Serta Perkembangan Dewasa Ini", by Faculty of Law Gadjah Mada University and MAHUPIKI, Yogyakarta, 23 – 27 Februari 2014. p.1

¹¹ Muhammad Taufiq, Sarsiti, Rindha Widyaningsih dan Rani Hendriana, Mediasi Sebagai Penguatan Kearifan Lokal Banyumas Dalam Penyelesaian Perkara Pidana, *Jurnal Media Hukum*, Vol. 24 No. 2, Desember 2017, DOI: 10.18196/jmh.2017.0089. p.137-146

¹² A. P. Mahendra, Mediasi Penal pada Tahap Penyidikan Berlandaskan Keadilan Restoratif, *Jurist Diction*, 3 (4), 2020, 1153-1178, p.1156

¹³ Teguh Hariyono, Mediasi Penal sebagai Alternatif Upaya Penyelesaian Perkara Pidana di Luar Pengadilan, *JURNAL PENEKAKAN HUKUM DAN KEADILAN*, Vol. 2 No. 1, Maret 2021: 1-18, P-ISSN: 2746-0967, E-ISSN: 2721-656X

carried out through non-litigation channels are counterfeiting of trademarks (UU No. 15 of 2001 concerning Trademarks), domestic violence (UU No. 23 of 2004 concerning the Elimination of Domestic Violence), and Political Money (UU No. 12 of 2003 concerning the General Election of Members of the DPR, DPD, and DPRD).¹⁴

The legal basis for implementing penal mediation in Indonesia is:

1. Prosecutor's Regulation Number 15 of 2020 Concerning Termination of Prosecution Based on Restorative Justice (Attorney's Office 15/2020);
2. Decree of the Director General of the General Courts Number: 1691/DJU/SK/PS.00/12/2020 concerning Guidelines for the Implementation of Restorative Justice in the General Courts Environment (SK Badilum Number: 1691/DJU/SK/PS.00/12/2020);
3. Police Regulation Number 8 of 2021 concerning the Handling of Crimes Based on Restorative Justice (Perpol Number 8 of 2021);
4. Regulation of the Head of the National Police of the Republic of Indonesia Number 6 of 2019 Concerning Investigation of Criminal Acts (Perkapolri 6/2019);
5. Circular of the Head of the National Police of the Republic of Indonesia Number SE/8/VII/2018 of 2018 concerning the Implementation of Restorative Justice in the Settlement of Criminal Cases (SE Kapolri 8/2018);
6. Police Chief Letter, Police Number: B/ 3022/ XII/ 2009/ SDEOPS, dated December 14 2009, concerning Case Handling through Alternative Dispute Resolution (ADR). This letter is a reference for the police to resolve cases of minor crimes, such as articles 205, 302, 315, 352, 373, 379, 384, 407, and 482;
7. Regulation of the Head of the National Police of the Republic of Indonesia Number 7 of 2008 concerning Basic Guidelines for Strategy and Implementation of Community Policing in the Implementation of Polri's Duties;
8. Supreme Court Regulation (PERMA) Number 1 of 2016 Regarding Mediation Procedures in Courts;
9. Presidential Instruction (Inpres) Number 8 of 2002 concerning Providing Legal Certainty Guarantees to Debtors Who Have Completed Their Obligations or Legal Actions to Debtors Who Have Not Completed Their Obligations Based on the Settlement of Shareholders' Obligations;
10. Law Number 21 of 2001 concerning Special Autonomy for the Province of Papua, which is regulated in Article 50 and Article 51, essentially regulates the jurisdiction of the judiciary in the Province of Papua and recognizes the existence of customary justice in certain customary law communities;
11. Under Law No. 11 of 2012 concerning the Juvenile Criminal Justice System, articles 7–8 are required to carry out diversion of cases involving children who are in conflict with the law. Diversion is carried out against criminal offenses with a penalty of imprisonment under 7 years and is not a repetition of a crime;
12. Law Number 39 of 1999 concerning the Human Rights Court, which gives authority to Komnas HAM to mediate in cases of human rights violations (Article 1–7, Article 6–1, Article 89–4, Article 96).

In addition to these laws and regulations, the settlement of non-litigation cases has been regulated by several statutory provisions, namely: 1. Explanation in Article 3 paragraph 1 of Law Number 14 of 1970: "All courts throughout the territory of the Republic of Indonesia are State Courts and are determined by law". This article implies that, apart from the State Judiciary, it is no longer permitted to have trials conducted by non-State Courts. Settlement of cases outside the court on the basis of peace or through a referee is still permitted; 2.

¹⁴ Agus Raharjo, "Mediasi Sebagai Basis Dalam Penyelesaian Perkara Pidana", *Mimbar Hukum*, FH Universitas Gadjah Mada Yogyakarta, Vol. 20, No. 1, Tahun 2008, p.98-99

Article 1851 of the Civil Code, which reads: "Reconciliation is an agreement whereby both parties, by handing over, promising, or withholding an item, end a case that is hanging or prevent a case from arising. This agreement is not valid but was made in writing"; 3. Article 1855 of the Civil Code: "Every settlement only ends the disputes contained therein, whether the parties formulate their intentions in specific or general words, or that intention can be concluded as the only absolute consequence of what is written"; 4. Article 1858 of the Civil Code: "All peace has between the parties a force such as a judge's decision at the final stage. Peace cannot be disputed on the grounds of an oversight regarding the law or on the grounds that one of the parties has been harmed"; 5. Alternative Dispute Resolution is only regulated in one article, namely Article 6 of Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution first emphasized the existence of a mediation institution as an alternative institution for settling cases. In Article 1, point 10, it is stated: "Alternative dispute resolution is a dispute settlement institution or difference of opinion through a procedure agreed upon by the parties, namely the settlement of disputes outside the court by way of consultation, negotiation, mediation, conciliation, or expert judgment". However, the regulation does not regulate or provide a more detailed understanding of the contents of arbitration.¹⁵

Penal mediation has actually been widely practiced by law enforcement officials in Indonesia. However, this practice previously had no formal legal basis. Usually, the settlement mechanism for this case will use a peaceful settlement method with customary law.¹⁶

Communication is the most important thing to do to solve a case. Communication that exists between parties will be more productive in solving problems, so unwanted things don't happen. The mediator, who is a third party, is an important element in assisting the parties in resolving cases that occur through communication and discussion, which will lead to an agreement on a solution or alternative settlement.

Regarding the advantages contained in the penal mediation, they can be traced from the statement put forward by Umbreit as follows: *As a process that gives victims of property crimes or minor assaults the opportunity to meet the perpetrators of these crimes in a safe and structured setting, with the goal of holding the offenders directly accountable while providing important assistance and compensation to the victim. First, victims volunteer to meet with the offender who committed an offense against them (and in many programs, the offender's participation is also voluntary). Second, victims and offenders are encouraged by mediators to share their feelings regarding the impact as well as the facts of the crime event. It is believed that this kind of exchange helps humanize the process by "putting a face" on the offender and the victim: the offender sees the impact of the actions and the people, and the victim can put a face on the person who has caused pain and loss. Third, typically there is an opportunity for offenders to help "make things right" for the victim through working out an agreement that may include a formal apology, restitution, community service, or some other response that the offender and victim mutually agree to. The mediator may or may not formalize this agreement into a written contract to be shared with a court.*¹⁷

Furthermore, the results of international meetings at the 9th UN Congress in 1955 and the 10th Congress in 2000 regarding "Prevention of Crime and the Treatment of Offenders"

¹⁵ Adi Nugroho, *Mediasi Sebagai Alternatif Penyelesaian Sengketa*, Jakarta: PT. Telaga Ilmu Indonesia, 2009, p. 24- 25.

¹⁶ Lilik Mulyadi, *Mediasi Penal Dalam Sistem Peradilan Pidana Indonesia: Pengkajian Asas, Norma, Teori Dan Praktik*, *Yustisia Jurnal Hukum*, Volume 2. Nomor 1, 2013.

¹⁷ CSA Teddy Lesmana, *Implementasi Mediasi Penal Dalam Penanganan Perkara Pidana (Studi Kasus Pada Satreskrim Polres Sukabumi Kota)*, *JURNAL RECHTEN: RISET HUKUM DAN HAK ASASI MANUSIA*, Vol. 2 No. 2 Tahun 2020, p.31-32

and the International Conference on Criminal Law Reform (International Penal Reform Conference) in 1999 encouraged the emergence of international instruments on mediation in criminal cases as a consequence of the emergence of the concept of restorative justice. In relation to restorative justice, Dignan stated the following: Restorative justice is a new framework for responding to wrongdoing and conflict that is rapidly gaining acceptance and support by educational, legal, social work, and counseling professionals and community groups. Restorative justice involves looking beyond retribution to find deeper solutions that heal broken relationships.¹⁸

Likewise with Tony F. Marshall, who formulates the definition that restorative justice is "a process whereby parties with a stake in a specific matter collectively resolve how to deal with the aftermath of the offense and its implications for the future."¹⁹

Implementation of Criminal Case Mediation as an Effort to settle local wisdom-based crimes

Penal Mediation has principles underlying its implementation, as specified in recommendation no. 99, 19 *The Comité of ministers of The council Of Europe about Mediation in Penal Matters*, Some general principles are stated as follows: Problem solving by mediation can only take place if the parties agree to mediation. The parties should also be able to withdraw consent to mediation during the mediation process. All kinds of matters discussed in penal mediation are confidential and will not be used after that, except with the agreement of the parties. Penal mediation must be available at every stage of the criminal justice system. The implementation of penal mediation must be given sufficient autonomy within the criminal justice system.²⁰

Penal mediation is the same as the idea of reforming criminal law (law reform) in Indonesia and its pragmatic issues. Law Reform in the field of criminal law prioritizes the interests of victims compared to the interests of perpetrators. By developing ideas of harmonization, restorative justice, and overcoming rigidity or formality in the prevailing system, this kind of thinking is a way out of the classic problems that have been faced by the Indonesian nation so far. especially in the case of criminal law, which is too formalistic and pragmatic.²¹ The ideas regarding penal mediation aim to immediately overcome the negative effects caused by the current Indonesian criminal justice system. Penal mediation exists as an alternative to imprisonment or custody). Pragmatic problems that are happening at the moment include "reducing the problem of court case overload, simplifying the judicial process, and so on."²²

Each law enforcement institution begins to design the implementation of a restorative justice approach in its institution. It also contains arrangements related to penal mediation. It was started by the judiciary institution that issued Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice (Perja Number 15 of 2020). At the end of 2020, the Director General of the General Courts issued a Decree of the Director General of the General Courts Number: 1691/DJU/SK/PS.00/12/2020 concerning Guidelines for the Implementation of Restorative Justice in the General Courts

¹⁸ CSA Teddy Lesmana, Implementasi Mediasi Penal Dalam Penanganan Perkara Pidana *Ibid.* p.32

¹⁹ CSA Teddy Lesmana, Implementasi Mediasi Penal Dalam Penanganan Perkara Pidana.....*Ibid.* p.32

²⁰ Laely Wulandari, "Kebijakan Penanganan Kekerasan Dalam Rumah Tangga Melalui Mediasi Penal". *Law Reform*, 4, No. 1, Tahun 2008: p.16.

²¹ Rudini Hasyim Rado, Barda Nawawi Arief, Eko Soponyono, "Kebijakan Mediasi Penal Terhadap Penyelesaian Konflik Sara Di Kepulauan Kei Dalam Upaya Pembaharuan Hukum Pidana Nasional". *Law Reform*, 12, No. 2, Tahun 2016: p. 268.

²² Fry Anditya Rahayu Putri Rusadi dan Pujiyono, Optimalisasi Mediasi Penal Sebagai Alternatif Penyelesaian Perkara Tindak Pidana di Indonesia, *Jurnal Ilmu Hukum Fakultas Hukum Universitas Riau*: Vol. 10, No. 1, Februari 2021, p.153-166.

Environment (SK Badilum Number: 1691/DJU/SK/PS.00/12/2020). Most recently, the police institution issued Police Regulation Number 8 of 2021 concerning the handling of Crimes based on Restorative Justice (Perpol Number 8 of 2021).²³

1. Settlement of Pancasila Value-Based Criminal Cases

The noble values contained in the foundation of our country (Pancasila) fade with the times and technology; the values contained therein, such as divinity, justice, decency, harmony, unity, humanity, and mutual cooperation, are no longer reflected in the lives of the nation, state, and society, including in the formulation of legal products.²⁴

The urgency of Pancasila values in the settlement of criminal cases in Indonesia is a societal need for progressive, humane criminal dispute resolution and provides a sense of justice for victims, society, and perpetrators that cannot be carried out by national criminal law. The local wisdom of people in various regions of Indonesia in the settlement of criminal disputes based on deliberation and consensus (mediation) as local institutions has not been utilized optimally in answering this problem.

Pancasila in the life of the nation and state is the philosophy and ideology of the Indonesian nation and state. The values contained in Pancasila come from the Indonesian people themselves, namely the values of customs, culture, and religious values. Based on the position of Pancasila, Pancasila is a basic value and norm to regulate the state government and state organizers. Therefore, all the implementation and administration of the state, especially the state laws and regulations, are spelled out and derived from the values of Pancasila.²⁵ According to M. Ali Mansyur, Pancasila as the basis of the state is a national legal philosophy that should have an imperative nature, namely that Pancasila is used as the basis and direction for the development of a national legal philosophy and becomes a reference in the preparation, guidance, and development of a legal philosophy that is consistent and relevant to the values of Pancasila itself. From several explanations about the position of Pancasila, it is clear that, as the basis of the state philosophy, Pancasila is the source of all sources of law for the Indonesian people.²⁶

Soerjanto Poespowardojo argued that Pancasila is the philosophy of the state; therefore, Pancasila is the basic normative value of the entire administration of the Republic of Indonesia. Based on this opinion, it is inevitable that in establishing a regulation that is the basis for carrying out the life of the nation and state, it is necessary to use Pancasila values as a philosophical foundation. Apart from being the basic philosophy of the Indonesian nation, Pancasila is also the Indonesian nation's way of life, namely a guide to all activities of life and life in all fields. This means that all the behavior and actions of every Indonesian human being must be imbued with and are the emanation of all the Pancasila precepts, because Pancasila as a *weltanschauung* is always a unity and cannot be separated from one another because all the precepts in Pancasila are an organic unit.

The same explanation about Pancasila as the basis of state philosophy was also put forward by Noor MS Bakry; according to him, Pancasila was essentially divided into two

²³ Hanifah Febriani, Carissa Maharani, dan Sadida Amalia Izzatul Haq, Pengaturan Mediasi Penal Pasca Regulasi Keadilan Restoratif Di Kepolisian, Kejaksaan, Dan Mahkamah Agung, *Media Keadilan: Jurnal Ilmu Hukum*, Volume 14 Nomor 1 April 2023. <http://journal.ummat.ac.id/index.php/jmk> e-ISSN 2685-1857 | p-ISSN 2339-0557: <https://doi.org/10.31764/jmk>

²⁴ Erfandi, "Implementasi Nilai-Nilai Pancasila dalam Pembangunan Sistem Hukum Pidana di Indonesia", *Jurnal Ilmiah Pendidikan Pancasila dan Kewarganegaraan*, Vol. 1 No. 1, Juni 2016, p. 27

²⁵ Emilia Susanti, *Mediasi Pidana Sebagai Alternative Penyelesaian Perkara Pidana Berbasis Kearifan Lokal*, Lampung, Pustaka Ali Imron, 2021.

²⁶ M. Ali Mansyur, Pancasila Sebagai Dasar Pengembangan Ilmu Hukum Indonesia, *Jurnal Hukum*, Vol. XV No. 1, Juni 2005, p. 66

groups, namely materially and formally. Pancasila is the basis of state philosophy, namely as the source of all sources of Indonesian state law and also as the noble agreement of the Indonesian people in the state. Pancasila does not only have meaning and benefits in providing answers to questions about the origin of the country, the nature of the country, the goals of the state, the duties of the state, and attitudes, but Pancasila is also a guide for determining attitudes and giving forms to a state that can be accounted for scientifically. In this case, Pancasila is scientifically a guideline in nation and state for the people of Indonesia.²⁷ Since the beginning of Indonesia's independence, the Indonesian people have explicitly stated that they want to build a new legal system. The Indonesian nation is a new country that expresses its firmness in wanting to build a new legal system based on the Pancasila spiritual foundation, which is referred to as the Pancasila Legal System.²⁸

2. Restorative Justice

One of the duties and responsibilities of the State towards its people, as stated in Article 28D of the 1945 Constitution, is that everyone has the right to recognition, guarantees, protection, fair legal certainty, and equal treatment before the law.²⁹ Bagir Manan, in his writings, describes the substance of "restorative justice," which contains principles, including "Building joint participation between perpetrators, victims, and community groups in resolving an incident or crime. Placing perpetrators, victims, and the community as "stakeholders" who work together and immediately try to find a solution that is seen as fair for all parties (win-win solutions) According to Barda Nawawi Arief, the purpose of punishment is based on "public protection" and "protection or guidance of individual perpetrators of criminal acts".³⁰ The concept of restorative justice can be an important answer for parties to get justice, so that there is an opportunity for a criminal case not to end in punishment and imprisonment. A concept of criminal dispute resolution that emphasizes the conditions for creating justice and balance between victims and perpetrators of criminal acts.³¹

Kevin I. Minor and J.T. Morrison: Restorative Justice may be defined as a response to criminal behavior that seeks to restore the losses suffered by crime victims and facilitate peace and tranquility among opposing parties. (Restorative justice can be described as a response to criminal behavior to recover losses suffered by victims of crime and facilitate peace between conflicting parties).³² Liebmann simply defines restorative justice as a legal system that "aims to restore the welfare of victims, perpetrators, and communities damaged by crime and to prevent further violations or criminal acts."³³

3. Criminal Mediation as Local Wisdom in Indonesian Society

Local wisdom is a way of behaving and acting for a person or group of people to respond to changes that are typical in the scope of the physical and cultural environment. Local wisdom, when viewed from its function and form, can be understood as a human effort to use his mind (cognition) to act and behave towards something, an object, or an

²⁷ Noor MS Bakry, *Pancasila Yuridis Kenegaraan*, Yogyakarta: Liberty, 1994, p. 66

²⁸ Satjipto Rahardjo, *Pendidikan Hukum Sebagai Pendidikan Manusia*, Yogyakarta: Genta Publishing, 2009, p. 118

²⁹ UUD 1945 Perubahan ke-2

³⁰ Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana*, (Jakarta: PT. Kencana Prenada Media Group, 2008), p. 98.

³¹ Afthonul Afif, *Pemaafan, Rekonsiliasi dan Restoraiive Justice*, Yogyakarta: Pustaka Pelajar, 2015, p. 341-350.

³² Kevin Minor and J.T. Morrison, *A Theoretical Study and Critique of Restorative Justice*, in Burt Galaway and Joe Hudson, eds., *Restorative Justice: International Perspectives*, Monsey, New York: Ceimical Justice-Press andKugler Publications, 1996, p.117.

³³ Marian Liebmann, *Restorative Justice, How it Work*, London and Philadelphia: Jessica Kingsley Publishers, 2007, p.25

event that occurs in a certain space. The above understanding is arranged etymologically, where wisdom is understood as a person's ability to use his mind in acting or behaving as a result of an assessment of something, an object, or an event that occurs. As a term, wisdom is often interpreted as "wisdom or policy".³⁴

Substantively, local wisdom is the set of values that apply in a society. Values that are believed to be true become a reference in the daily behavior of the local community; therefore, it is very reasonable if Greetz says that local wisdom is an entity that really determines human dignity in their community. This means that local wisdom, which contains elements of creative intelligence and local knowledge from elites and the community, is what determines the development of community civilization.³⁵ Further explained, there are several functions and meanings of local wisdom, namely:³⁶

- a. Serves for the conservation and preservation of natural resources;
- b. Serves to develop human resources, for example, related to life cycle ceremonies, the concept of *handa par rite*;
- c. Functioning for the development of culture and science, for example, in the Saraswati ceremony, belief in and worship of the banners;
- d. Serves as advice, beliefs, literature, and challenges;
- e. Has a social meaning, for example, in communal or relative integration ceremonies;
- f. It has a social meaning, for example, in the agricultural cycle ceremony;
- g. Ethical and moral meaning, which is manifested in the cremation ceremony and purification of ancestral spirits;
- h. It has a political meaning; for example, bowing down and languishing over the power of a patron client.

Related to local wisdom, according to Von Savigny³⁷ That law, seen from the perspective of historical phenomena, assumes that, in principle, every law is different, and that difference depends on the place and time of application of the law. The law must be seen as the spiritual embodiment of a nation (*volksgeist*). F.C. Von Savigny suggests that the law has no validity and/or is not universally applied because every society has built its own legal environment, manners, customs, and distinctive language. All these normative directives are seen more as a symbol of group "identity" that distinguishes it from other groups in society (as a symbol of group identity) and as a source for forming the "worldview" of the community group concerned. The strategy for developing national law originates and is extracted from the legal values that live in society. This can also be seen in scientific meetings, such as national law seminars, which have been held several times and whose results are in the form of resolutions, conclusions, and reports. The development of national law must pay attention to customary law, which is a living law in society (The Living law). Crime prevention strategy using customary criminal law, in line with the conclusions of the 7th UN Congress on the prevention of crime and the treatment of offenders, point 15,³⁸ that state: *Crime prevention and criminal justice should not to be treated as isolated problems to be tackled by simplistic, fragmentary methods, but rather as complex wide raging activities requiring sistematic strategies and differentiated approaches in relation to : a). The sosio-economic, political and cultural context and circumstances of society in wich they are applied; b). The developmental stage, with special emphasis on the changes taking place and likely to occur and the related*

³⁴ Sandy Ari Wijaya "Pinsip Mediasi Penal dalam Tindak Pidana KDRT Jurnal IUS | Vol II | Nomor 6 | Desember 2014 | p. 518 IUS Kajian Hukum dan Keadilan 516-525

³⁵ Emilia Susanti, *Mediasi Pidana Sebagai Alternative Penyelesaian Perkara Pidana Berbasis Kearifan Lokal*, Lampung, Pustaka Ali Imron, 2021. p. 86

³⁶ Emilia Susanti, *Mediasi Pidana Sebagai Alternative Penyelesaian Perkara.Ibid.* p. 87

³⁷ Emilia Susanti, *Mediasi Pidana Sebagai Alternative Penyelesaian Perkara.Ibid.* p.89

³⁸ Emilia Susanti, *Mediasi Pidana Sebagai Alternative Penyelesaian Perkara.Ibid.* p. 90

requirements; c). *The respective traditions and customs, making maximum and effective use of human indigenous options.*

4. Implementation of Mediation by Traditional Institutions

Dispute resolution through deliberation and consensus (local wisdom) in Indonesian society is the implementation of the Indonesian people's philosophy of life, namely Pancasila and the 1945 Constitution. For example, in the Lampung area, there are various cases that can fulfill the elements of a crime as stipulated in Article 332 of the Criminal Code regarding bringing a woman of not enough age (elopement or arrival), Article 310 of the Criminal Code on defamation, Article 351 of the Criminal Code on abuse, Negligence causing injury or death to others (collision or accident cases), Articles 359 and 360, carrying sharp weapons, and so on. In this case, the community prefers to resolve disputes through local wisdom or customary law.³⁹ The role and existence of mediation through customary law as an alternative to solving criminal cases have been carried out in many regions of Indonesia, for example, the Nagari Customary Courts in West Sumatra, the Adat Courts in Papua, the Gampong Customary Courts in Aceh, and others. In several countries, the practice of customary justice is also used and included in regulations as an alternative mechanism, namely in West Samoa, the Fiji Islands, Papua New Guinea, the Solomon Islands, and several other countries in the Pacific. In addition, several countries in North Africa, Peru, Bangladesh, and the Philippines still maintain their original community laws.⁴⁰

Apart from the issue of harmony as a process of developing its validity, it is also important to pay attention to the fundamental principles of the implementation of customary justice, which absolutely cannot be ignored in the process of its implementation, as in the BPHN study. The principle consists of three, namely:

- a. The principle of local wisdom This principle bases its implementation on traditions that have been maintained and widely accepted among indigenous peoples from generation to generation. Local wisdom is recognized as a very important part of community life as a basis for social interaction as well as a marker of morality, which is recognized as a local belief;
- b. The principle of social justice This principle emphasizes the realization of a sense of justice that is felt to be very important in the midst of its implementation, or something that has social significance. This social justice looks at the 'fair' side from the perspective of not only 'law' and 'law enforcement', but also the reach of a sense of justice for the wider community, whose considerations reflect social ideals;
- c. Third, the principle of human rights (HAM). This principle includes the perspective of the universality of human rights, non-discrimination, equality, human dignity, not separating one human right from another (indivisible and interdependent), and placing the state's responsibility in efforts to promote and protect human rights. Of course, its size is not only human rights law, as has been promulgated in state regulations or law, as well as international law, but rather emphasizes the philosophy of right morality.

Criminal mediation, which is a reference to customary mediation, is developed on the basis of working principles that include: a). Conflict Handling, In the context of national criminal law, mediators are generally law graduates who have received certain education or training, whereas in customary law, the position of mediator is occupied by traditional structures such as kings, traditional elders, and community leaders. In penal mediation in customary institutions, the mediator's job is to make the parties forget the legal framework and encourage them to be involved in the communication process. It is

³⁹ Erna Dewi, *Sistem Pemidanaan Indonesia Yang Berkearifan Lokal*, BP Justice Publisher, 2014, p.14

⁴⁰ Erna Dewi, *Sistem Pemidanaan Indonesia.....Ibid.* p.14

based on the idea that crime has given rise to interpersonal conflict. It is this conflict that is addressed by the mediation process. b). Process Orientation, mediation is more oriented to the quality of the process than to the results, namely, among other things, making the offender aware of his mistakes, solving conflict needs, and calming the victim from fear; c). informal proceeding, penal mediation is an informal process, not bureaucratic, avoiding strict legal procedures; d). active and autonomous participation, perpetrators and victims are not seen as objects of criminal law procedures but rather as subjects who have personal responsibility and the ability to act. They are expected to act on their own free will. The resolution of customary violations at the application level is comprehensive, unifying, and open.

5. Implementation of Mediation by the Village Head

The function of the village head as a dispute resolution is very strategic in supporting the operation of the state judiciary in Indonesia, moreover in fact this country is currently experiencing a change and shift from *gemeinschaft* (community) to *gesellschaft* (*patembayan*). In order to strengthen community values, the function of the village head as a local wisdom-based dispute resolution which has been confirmed by Law Number 6 of 2014 concerning Villages must be utilized as much as possible as an endeavor to expand access to justice for community members.⁴¹

Settlement of criminal disputes through mediation, which is the local wisdom of the community, especially rural communities and indigenous peoples, which in fact are still alive and are the choice of dispute resolution by the community, is very important in resolving disputes in the community he leads. This is because, in his capacity as a village leader, a village head is obliged to resolve disputes that occur in village communities as stipulated in Article 26 (1) of Law Number 6 of 2014 Concerning Villages, namely, "The village head is tasked with organizing village government, carrying out village development, village community development, and village community empowerment."⁴² Article 26 (4) letter (k) states that in carrying out the tasks referred to in Paragraph (1), the village head is obliged to resolve village community disputes.

The village head is a figure who can play an important role as a mediator in resolving disputes in his community. This is inseparable from the position of the village head, who is generally a figure respected by the community. As stated in Law Number 6 of 2014 concerning Villages, the village head is a government leader who has a strong (authoritative) position so that it is expected to be effective in carrying out the role of a mediator or dispute resolution.⁴³ Based on the results of research conducted by Sri Lestari Rahayu et al., "all sample village heads in their research have carried out their duties as mediators and often, meaning that 100% of sample village heads have been mediators of dispute resolution in society".⁴⁴

The mediation process begins with an opening by the village head by first reminding the parties to respect the course of the mediation process, then asking for an explanation from each party regarding the subject matter of the dispute by listening to information from the victim first. After listening to the victim, the village head gives the perpetrator the opportunity to convey clarification regarding what was conveyed by the victim. After listening to statements from the parties, the village head led the deliberations to find the right solution to resolve the dispute between the two parties impartially. In the deliberation

⁴¹ Sri Lestari Rahayu, Mulyanto, Anti Mayastuti, Penguatan Fungsi Kepala Desa Sebagai Mediator Perselisihan Masyarakat Di Desa, *Jurnal Yustisia*, Edisi 95 Mei, Agustus-2016.

⁴² Undang-Undang No 6 Tahun 2014 Tentang Desa

⁴³ Undang-Undang No 6 Tahun 2014 Tentang Desa

⁴⁴ Sri Lestari Rahayu dkk, "Penguatan Fungsi Kepala Desa Sebagai Mediator Perselisihan Masyarakat Desa", *Jurnal Yustisia*, Edisi 95 Mei, Agustus-2016.

process, the village head also received input from community leaders, other village officials such as RT, RW, and other village officials, religious leaders, and Babinkamtibmas. The solution produced in the deliberation is expected to accommodate the interests of both parties; for the victim, at least, the results of the mediation produced can be compensation for restoring the situation before the dispute occurred or at least approaching that situation, and for the perpetrator, the results of the mediation should be a form of fair accountability for what he has done. The role of the village head is very large in the mediation process; this is similar to the role of the mediator as known in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, which requires more flexible communication so that disputes can be more easily resolved. The village head needs skills to be able to control the atmosphere so that there is no tension between the disputing parties. The main issue must always be the focus of the discussion, so that if there is a deviation, the village head, as the intermediary, can remind him to return to the focus of the problem.

CONCLUSION

The legal basis for implementing penal mediation in Indonesia is: 1) Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice (Attorney's Office 15/2020); 2) Decree of the Director General of the General Courts Number: 1691/DJU/SK/PS.00/12/2020 concerning Guidelines for the Implementation of Restorative Justice in the General Courts Environment (SK Badilum Number: 1691/DJU/SK/PS.00/12/2020); 3) Police Regulation Number 8 of 2021 concerning the handling of Crimes based on Restorative Justice (Perpol Number 8 of 2021); 4) Regulation of the Head of the National Police of the Republic of Indonesia Number 6 of 2019 concerning the Investigation of Criminal Acts (Perkapolri 6/2019); 5) Circular of the Head of the National Police of the Republic of Indonesia Number SE/8/VII/2018 of 2018 concerning the Application of Restorative Justice in Settlement of Criminal Cases (SE Kapolri 8/2018); 6) Letter from the Chief of Police No. Police: B/ 3022/ XII/ 2009/ SDEOPS dated December 14, 2009 concerning Case Handling through Alternative Dispute Resolution (ADR); 7) Regulation of the Head of the National Police of the Republic of Indonesia Number 7 of 2008 concerning Basic Guidelines for Strategy and Implementation of Community Policing in the Implementation of Polri's Duties; 8) Supreme Court Regulation (PERMA) Number 1 of 2016 concerning Mediation Procedures in Courts; 9) Presidential Instruction (Inpres) Number 8 of 2002 concerning the Granting of Legal Certainty Guarantees to Debtors Who Have Completed Their Obligations or Legal Actions to Debtors Who Have Not Completed Their Obligations Based on Settlement of Shareholders' Obligations; 10) Law Number 21 of 2001 concerning Special Autonomy for the Province of Papua; 11) Law No. 11 of 2012 concerning the Juvenile Criminal Justice System; and 12) Law Number 39 of 1999 concerning the Human Rights Court.

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