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PENAL MEDIATION IN THE SETTLEMENT OF THE CRIMINAL ACT OF CYBER INSULTATION

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ABSTRACT

Penal Mediation is a settlement of cases out of court. Peaceful settlement of this criminal case can provide satisfaction and justice for perpetrators and victims of crime, so reforms must be carried out. The criminal justice system is a criminal justice network using criminal law as its material. The settlement of criminal cases at that time in Indonesia based on the Criminal Code was recognized as a litigation model. So that by using the settlement of cases outside the court by using penal mediation. The research method used in this research is normative juridical by orienting the approach to interpretation of the law and comparative interpretation. The results of the study indicate that there is an urgency in the regulation of penal mediation as a settlement of criminal cases of Humiliation in Cyber Media, namely by explaining several stages from the competent authorities and can be drawn down in the form of a law as described. The arrangement as an alternative method must contain significant substance with the tasks and methods and process stages in accordance with existing procedures in accordance with the law. In order to achieve a peace and negotiations with the victims and perpetrators of the litigation. As well as explaining the elements that make investigators, public prosecutors, judges as mediators with their respective stages. The arrangement as an alternative method must contain significant substance with the tasks and methods and process stages in accordance with existing procedures in accordance with the law. In order to achieve a peace and negotiations with the victims and perpetrators of the litigation. As well as explaining the elements that make investigators, public prosecutors, judges as mediators with their respective stages. The arrangement as an alternative method must contain significant substance with the tasks and methods and process stages in accordance with existing procedures in accordance with the law. In order to achieve a peace and negotiations with the victims and perpetrators of the litigation.

KEY WORDS

Penal mediation, insult, social media, SPP, litigation.

Along with developments in Indonesia and science, there are several theories and some new concepts. Basically justice is a legal goal that is currently in the spotlight of the media community. So that it is explained where there is justice there must be people in it, it can also be said that at least where there is a procedure for handling problems there must be people in it. Furthermore, as an Indonesian citizen, he has a right known as human rights which cannot be interfered with.

Developments in humans in the field of development technologytelecommunications and information become the spearhead to overcome the problem of limited distance, space and time in various ways, especially for socializing which will make a basic human need, development telecommunication and information technology indirectly changes life and mindset by eliminating the boundaries of space, time, and distance.

The relationship of social interaction carried out by humans will not be separated from the norms that govern it. When there is a social interaction involving two different cultural categories, it is possible to have differences regarding the concept of privacy as well as matters related to personal matters, and this interaction is very possible in this era by using internet media.¹

¹Budi Agus Riswandi, 2004. *Aspek Hukum Internet Banking, Diktat Perkuliahan Telematika Fakultas Hukum Universitas Islam Indonesia, Yogyakarta. Halaman 37.*



The presence of the internet in human life will slowly leave conventional boundaries which sometimes become a problem. In addition, the existence of the internet is also able to support the economy, facilitate and expand access to information and facilitate communication with others. This is a tangible form of progress and convenience provided by the internet. However, the convenience offered by the presence of the internet in our lives turns out to also provide new problems for which there is still no concrete solution.

In an enforcement of a criminal law, this is carried out in a system called the Criminal Justice System/SPP. In this SPP, there are supporting institutions, such as the Indonesian Police, the Prosecutor's Office, the Court, and the Penitentiary. So with this a criminal law enforcement has been implemented in a system, so the results are still far from an expectation.

In the millennial era, the system of exchanging news or news is no longer through letters or radio, namely through social media so that it is not limited by distance or time. Even though times have advanced, some people do not understand the meaning of the nature of social media, so they often use it for the wrong purposes, not just as a means of exchanging news.² So, it can be said that the person is affected badly by social media.

Bad influence on the use of social media that is not wise, for example, swearing at each other or insulting each other on social media and even using sarcastic words. This is what people imitate because they follow the latest fashion. On social media, there are also features that allow individuals or groups of people to give each other their opinions on a matter without having to meet face-to-face. So that it causes an interpersonal interaction to become uncontrollable, so in the millennial era it is not surprising that people insinuate each other because they are affected by the bad influence of social media.

Indonesia is categorized as a country with a bad reputation in law enforcement. The increasing number of users of restitution in criminal proceedings suggests that the difference between criminal and civil law is not that great and that the difference is becoming dysfunctional, according to Detlev Frehsee.³

"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" This is mediation according to Moore.⁴

However, the restorative justice approach requires the settlement of cases accompanied by efforts to restore or repair the negative impacts experienced by the victims of criminal acts, restore the suffering experienced by the victims, and restore the relationship between the victims and the perpetrators of the crime.⁵ Restorative justice as an alternative approach in the settlement of criminal acts does not ignore the formal role of the criminal justice system to impose a sentence on the guilty offender.⁶

According to Muladi, dialogue with the disputants to resolve the problem is a very positive step. With this concept emerged the term ADR which in certain cases more meets the demands of justice and efficiency. ADR is a part of restorative justice.⁷ Which puts the judiciary in the position of a mediator.

There are many definitions for mediation, from Donald T. Weckstein's book there is no shortage of definitions for mediation all from different angles. The definition contains two general elements: (1) a third-party neutral who helps facilitate a dispute, but who (2) lacks power to dictate the resolution.⁸ The limited power of the third party neutral over the outcome

²Tumimi Rahardjo, *Literasi Mediasi&Kearifan Lokal: Konsep dan Aplikasi* (Salatiga: Kerjasama Universitas Kristen Satya Wacana, 2012), Hlm. 53

³Detlev Frehsee (Professor of Criminology and Criminal Law, University of Bielefeld, Germany), "Restitution and Offender-Victim Arrangement in German Criminal Law: Development and Theoretical Implications", <http://wings.buffalo.edu/law/bclc/bclr.htm>, diakses tanggal 06 Maret 2021.

⁴Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict*. (San Fransisco: Jossey Bass.), 2003. hal 15, dalam Barda Nawawi Arif. Op.Cit, hal. 8.

⁵Howard Zerd & Barb Toewn, eds, 2004, *Critical Issues in Restorative Justice*, New York: Criminal Justice Press, Page. 385

⁶Howard Zerd, 2001, *Little Book of Restorative Justice*, Pennsylvania: Intercourse, hal. 22; Howard Zerh, *Transcending Reflexions of Crime Victims*, Pennsylvania: Intercourse, hal. 194.

⁷Restorative justice merupakan sebuah istilah baru terhadap konsep lama. Pendekatan restorative justice telah digunakan dalam memecahkan masalah konflik antara para pihak dan memulihkan perdamaian di masyarakat. Lihat Dokumen United Nations Office for Drug Control and Crime Prevention, *Handbook on Justice for Victim*, Centre for Internasional Crime Prevention, New York, 1999, hlm. 42.

⁸Donald T. Weckstein, *In Praise of Party Empowerment-And of Mediatpr activism*, 33 willamette l. Rev. 501, 508, (1997)



is a product of the central emphasis in mediation to ensure the parties' self-determination.⁹

Concern about criminal mediation thus mark every participant in the process. Nevertheless, criminal mediation is becoming more and more common. In the state of Idaho, for example, some trial court judges strongly encourage mediation, sometimes treating it as "a pre requisite to trial".¹⁰

Resolution of problems related to ITE violations which are part of criminal law trials can be resolved through the penal mediation stage as a more efficient step. This trial had to be held because¹¹:

- a. To limit the number of cases to be resolved;
- b. Part of the form of handling disputes and disputes through flexible, uncomplicated channels and having a high level of reliability;
- c. Opening equal opportunities for the accused and the disputing prosecutor in order to obtain the same level of fairness;
- d. Maximizing the role of the judiciary in handling disputes in addition to deciding criminal penalties.

Dispute resolution through mediation is an alternative form of problem solving in the community, through out-of-court channels (which is commonly known as ADR or "Alternative Dispute Resolution"; some call it "Apropiate Dispute Resolution").¹²

Based on the description of the background above, the authors formulate the problem, as follows: what is the urgency of alternative arrangements for penal mediation in criminal acts of humiliation in cyber media?

METHODS OF RESEARCH

This research applies normative juridical techniques, namely techniques in research to examine doctrines in the science of law that have a relationship with the issues to be discussed. The technique applied in the research is to determine the truth based on the mindset, understanding of the law and normative.¹³ This research uses secondary data because it applies literature studies in the accumulation of data. The literature study technique is a technique applied to research in the field of law to accumulate data by examining the material.¹⁴ Because this research applies normative juridical, so the approach techniques applied are:

- The estimation of the law (statute approach) for ITE violations which are referred to in the article on reputational damage, humiliation is contained in Article 27 Paragraph (3) of Law no. 11 of 2008 related to ITE;
- Comparative Approach. This research applies comparative estimates, namely micro comparative with presupposes the main points of provisions applicable in other countries in detail in the legal provisions of the research to be studied¹⁵;
- Conceptual Approach. Conceptual approach is to explain objects of interest from practical and theoretical perspectives;
- Types and Sources of Legal Research Materials. There are three types of legal materials applied, including:
 - Primary Law Material;
 - Secondary Law Material;
 - Tertiary Legal Material;
 - Legal Material Analysis Techniques.

⁹See Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Conneceted Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. Rev. 1, 23-27(2001) (stating that self-determination gave the parties the opportunity to create options for settlement and to control the final outcome of the mediation).

¹⁰Coversation with various participants of the "Mediating the Criminal Case", Northwest Institute for Dispute Resolution, University of Idaho College of Law, May, 2003. Show.

¹¹DS. Dewi dan Fatahilah. A. Syukur, *Mediasi Penal: Penerapan Restorative Justice Di Pengadilan Anak Indonesia*, Indie Publishing, Jakarta, 2011, hlm. 80

¹²New York Satate Dispute Resolution Association, inc, *alternative dispute resolution in new york satte, an overview*, diakses tanggal 6 Maret 2021.

¹³Johny Ibrahim, 2006, *Malang, Teori dan Metodologi Penelitian Hukum Normatif*, Bayumedia Publishing, Hlm. 57

¹⁴Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat*, PT. Grafindo Persada, Jakarta, 2009, hlm. 13-14

¹⁵Peter Mahmud, 2008, *Jakarta, Penelitian Hukum, Kencana*, hlm. 93.



RESULTS AND DISCUSSION

Indonesia has rules regarding the settlement of criminal cases out of court only in Law Number 11 of 2012 concerning the Juvenile Criminal Justice System. This alternative penal mediation arrangement reflects on several rules governing mediation in Indonesia, including Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, PERMA Number 4 of 2014 concerning Guidelines for Implementing Diversion in the Juvenile Justice System, and PERMA Number 1 of 200116 on Mediation Procedures in Court. This explanation concludes that there is a legal vacuum in the regulation of penal mediation, especially in criminal acts of humiliation in cyber or social media in Indonesia. Based on this, it can be considered the establishment of rules regarding penal mediation in criminal acts of humiliation with the following restrictions:

a. There are conditions for the application of Penal Mediation:

The conditions for the application of penal mediation are only for insults on social media and not for repetition. Does not apply to repeat offenders because they are considered not reflecting on previous practice. If given the opportunity to improve oneself is not used properly, then naturally it is not given the same opportunity as in the beginning.

As in Article 27 paragraph (3) of Law Number 19 of 2016 concerning Amendments to Law Number 11 of 2008 concerning Information and Electronic Transactions, it cannot be separated from the main norm, namely Article 310 of the Criminal Code. This is also related to Article 488 of the Criminal Code which regulates the addition of a third of the punishment if repeating a crime. Therefore, it is very natural that the perpetrator who repeats the crime cannot be mediated by a penal, to make the perpetrator aware of his actions and improve the future of the litigating party.

b. There is an Authorized Law Enforcer:

Law enforcers who are authorized to conduct penal mediation are the public prosecutor, the Indonesian police, and judges. The penal mediation model that might be suitable to be applied is Victim-offender mediation. A mediation model that involves several parties, namely victims, perpetrators, the police/prosecutor, and a professional mediator appointed by the Government. Law enforcers who can perform penal mediation include the following:

1. Indonesian Police Investigator.

Police duties are divided into two types, namely repressive tasks and preventive tasks. Repressive, carrying out a ruling or command that is in power if a legal event has occurred, while Preventive is maintaining and supervising so that legal regulations are not violated by anyone. In accordance with Article 7 Letter J of the Criminal Procedure Code that the police as investigators in the criminal justice system can take other actions according to law.

2. Public Prosecutor.

The Prosecutor's Office has state powers in the field of prosecution and other authorities based on the law.¹⁶ Furthermore, according to Article 14 Point I in the Criminal Procedure Code, the prosecutor as a public prosecutor in the criminal justice system has the authority to take other actions within the scope of duties and a responsibility to become a public prosecutor in accordance with the provisions of this Law. has the task of compiling a letter of indictment originating from the results of the investigation by the police. The results of this investigation are studied or examined before the preparation of the indictment. So that in researching the case file, the prosecutor can assess whether this case can be resolved outside the court or not. If it can be done to be resolved out of court, the prosecutor can take another action as stated in the Act.

3. Judge.

Judges have an important role in the criminal justice system. Even a Judge is considered as the "hand of God" because it gives a person's right and wrong about a

¹⁶Marwan Effendy, *Kejaksaan Republik Indonesia, Posisi dan Fungsinya dari Perspektif Hukum, Ghalia Indonesia, Jakarta, 2007, hlm. 127.*



case. Many considerations, the judge can decide someone is guilty and give punishment for the act committed. Freedom for judges is in deciding a case. The judge's freedom is defined as the position of the judge who should not take sides, the meaning of impartiality here is that the decision handed down must be in favor of the right one, according to Muchsin. This judge has a role, namely as the impression of someone who is fair and impartial. We look in the mirror from the diversion process in the Juvenile Criminal Justice System, through PERMA Number 4 of 2014 concerning Guidelines for Implementing Diversion in SPP, the facilitator in resolving this diversion is a judge. The role of the judge is quite large in a diversion process with several considerations. So that these two reasons are used as reasons why judges have the authority in the penal mediation process in resolving cases of criminal acts of humiliation on social media.

Furthermore, it was concluded that each of these institutions acted as mediators and could use their role to reconcile the parties so that the case did not proceed to the trial stage. In the penal mediation process, the mediator functions as a neutral party leading the negotiation process. His job is to keep the negotiation process running and remain conducive, to help clarify what the real problems and interests of the problematic parties are. The mediator is none other than controlling the mediation process, while the role of the litigant parties is to control the content of the negotiations.¹⁷The penal mediation still comes from the litigants even though they are waiting for the final outcome of the decision. Penal mediation is carried out in a closed manner only presented by the victims, perpetrators, investigators, police/prosecutors/judges, and professional mediators. The results of this agreement are from the negotiation process as outlined in a penal mediation agreement signed by the parties present in the mediation process.

c. There is a level of implementation of Penal Mediation.

A procedure for regulating the implementation of penal mediation in Indonesia is carried out in 3 (three) stages. These 3 (three) stages are both penal mediation carried out but by different institutions, the following is the explanation:

1. Investigation Stage.

The penal mediation stage is carried out by a police officer together with a professional mediator. It is regulated in Article 1 Number 2 of the Criminal Procedure Code that an investigation is a series of actions by an investigator in terms of and according to the method regulated in the law to search for and collect evidence for which the existence of such evidence makes clear about the criminal act that occurred and in order to find the suspect. The purpose of this investigation is to designate who has committed a crime and provide evidence regarding the problem he has committed. To achieve this, the investigator will collect information with certain facts or events.¹⁸Investigators take a series of actions and find the suspect, the police can hold penal mediation and to mediate the litigants, here the parties are expected to find a way out and be able to dismiss the case so that the file is not delegated to the prosecutor.

2. Prosecution Stage.

The prosecution stage is carried out if the penal mediation at the investigation stage does not produce results. There are several forms of resolving criminal cases outside the court currently in force, namely setting aside cases in the public interest by the Attorney General.¹⁹According to Article 1 Number 7 of the Criminal Procedure Code for prosecution, an action by the public prosecutor to delegate a criminal case to the competent district court in the manner stipulated in the law, so that it is immediately examined and decided by a judge in court.

¹⁷Musahadi, *Mediasi dan Resolusi Konflik di Indonesia*, Walisongo Mediation Center, Semarang, 2007, hlm. 84

¹⁸M. Husein Harun, *Penyidik dan Penuntut dalam Proses Pidana*, PT. Rineka Cipta, Jakarta, 1991, hlm. 58.

¹⁹Nike K. Rumokoy, 2017, *Eksistensi "Afdoening Buiten Process" dalam Hukum Acara Pidana Indonesia* (online), *Jurnal Hukum Unsrat*, <https://ejournal.unsrat.ac.id/index.php/jurnalhukumunsrat/article/view/15067> (28 Januari 2021) Hlm 51



If the prosecutor receives a file from the investigator, the prosecutor as a public prosecutor studies and examines the file received. Penal mediation is carried out before the case file is transferred to the Court. The prosecutor's office brought together the two parties to conduct penal mediation. At this stage, if it fails, the case of both parties will proceed to the trial stage.

3. Trial Stage.

Furthermore, explaining the stages of the trial, in Indonesia there are several rules governing the role of judges in mediation, such as Law Number 11 of 2012 concerning SPPA and PERMA Number 4 of 2014 concerning Guidelines for Implementing Diversion in the Juvenile Criminal Justice System. The function of judges in penal mediation is not much different from that of investigators and prosecutors, which is the same as being a co-mediator. It can be used as the basis for the judge's role in penal mediation, where the justice in question is promoting Restorative Justice. That is a process where the parties involved in the crime come together to solve problems related to how to deal with post-crime problems and future consequences.²⁰This stage is carried out after the Chief Justice appoints a judge who will hear the case. Currently the judge can conduct a penal mediation by calling the parties to conduct a penal mediation. So here penal mediation is carried out before the start of an examination in court. Here, this stage is a last chance to resolve the case of insults in cyber media.

d. There is a duration of penal mediation.

The duration of the implementation of penal mediation can be applied in Indonesia so that there is a legal certainty for the grace period for the implementation of penal mediation. Judging from the realm of civil law regulated in PERMA Number 1 of 2016 concerning Mediation Procedures in Courts, penal mediation is carried out 30 days after the interlocutory decision. There are several details of the duration of penal medicine that can be carried out at several stages:

- At the Investigation Stage.

This stage is the implementation of penal mediation for a maximum of 30 days after the investigator has conducted a series of examinations and found the suspect. So with the discovery of the suspect, the investigator immediately summoned the suspect and the victim to resolve the problem through penal mediation. This process is carried out with a professional mediator and is accompanied by an investigator. If this 30-day mediation process does not produce results, then the penal mediation process with this stage is considered failed and the file is continued to the prosecution stage.

- At Prosecution Stage.

The prosecution stage is also not much different, the same applies for 30 days to carry out penal mediation. This duration is calculated from 7 days after receiving the dossier from the investigator. This is for the reason that prosecutors have time to study and research cases. After 7 days the prosecutor who has the results of the research on the case file, summons the parties to resolve the case through penal mediation. to court.

- At the Trial Stage.

This trial stage is the last stage to conduct penal mediation. This period is also given, namely 30 days from the time the head of the court appoints a judge to hear the case. This penal mediation is carried out before the judge sets the trial day. Here the judge calls the parties to resolve the case through penal mediation. The 30 day period if it does not produce results can be extended for another 10 days to give the parties a last chance. with this extension there is no further extension and the penal mediation is considered a failure. The failure of this penal mediation was marked by a determination of the day of the trial by the judge.

²⁰Ridwan Mansyur, *Mediasi Penal Terhadap Perkara Pidana KDRT (Kekerasan Dalam Rumah Tangga)*, Yayasan Gema Yustisia, Jakarta, 2010, hlm. 12



Here, after some of the explanations that have been explained, there will be an alternative arrangement for the settlement of penal mediation cases in not criminalizing insults on cyber media or social media.

The results and discussion of alternative arrangements for Penal Mediation for criminal acts of humiliation in social mediation in the form of law, the regulation must contain a related substance as follows:

1. There are conditions for the application of penal mediation, namely for criminal acts of humiliation in social mediation;
2. Penal mediation is carried out by law enforcers, namely the Police, Prosecutors, and Judges.
3. Implementation of the penal mediation procedure at the stage of investigation, prosecution, and examination in the trial;
4. The duration of penal mediation is 30 days each at each stage;
5. The purpose of this penal mediation;
 - Achieve a peace between the litigants;
 - Resolving a case outside the judicial process;
 - Prioritizing a Restorative Justice approach;
 - Maximizing a function of criminal law as an *Ultimum remedium* function.
6. It should be noted that the penal mediation process is as follows:
 - The interests of a victim;
 - Avoiding the stigma of negative thoughts;
 - Avoidance of retaliation;
 - The interests and harmony of society;
 - Public order.
7. In the form of responsibility, it can be carried out by an actor, and the presence of a responsible law enforcement officer who is authorized to have an agreement if it is not carried out by the parties is as follows not following up on the report no later than 7 (seven) days after the report is made.

CONCLUSION

It is necessary to make a detailed and specific legislation related to the existence of Penal Mediation to resolve the problem of the Crime of Humiliation in cyber media as well as to resolve this out of court case. In addition to forming this law, the government prepares a related institution as a form of government readiness to implement the law. This is to make a preparation to illustrate the seriousness of the government in carrying out a penal mediation.

Here the community also has an important role in the implementation of the Penal Mediation Act to resolve cases of criminal acts of humiliation on social media. This is a good opportunity given by the government to settle cases out of court as it has many advantages. The settlement of this penal mediation is one way to get justice that is felt by the parties who are litigating between the victim and the perpetrator.

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