

PENAL MEDIATION AS AN ALTERNATIVE MODEL OF RESTORATIVE JUSTICE IN THE CRIMINAL JUSTICE SYSTEM OF CHILDREN

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ABSTRACT

Penal Mediation is a form of alternative dispute resolution outside the court commonly known as ADR or Alternative Dispute Resolution. Although in general the settlement of disputes out of court only in civil disputes, but in practice often also criminal case settled out of court with the discretion of law enforcement agencies or through consultation mechanisms / peace or remission institutions that exist in society. In the Criminal Justice System of Children for mediation has been regulated in Article 18 of Law Number 11 of 2012 on Criminal Justice System of Children. The provisions of this article is expected to result in a decision that is fair and reflects the restorative justice. Penal mediation is more oriented to the quality of the process rather than the result that would rely criminal guilt, needs unresolved conflict, peace of victims of fear. Penal mediation as an alternative to the criminal justice system today is very necessary because it is expected to reduce the accumulation of the case, is one of the dispute resolution process that is considered to be faster, cheaper and simpler, can provide the widest possible access to the parties to the conflict to obtain justice, and strengthen and maximize the function of the courts in resolving disputes in addition to the process of dropping criminal prosecution. Penal mediation is a breakthrough as an instrument of restorative justice can be performed by judges, prosecutors and investigators. The success of the deliberations in the penal mediation as an instrument of restorative justice does not result in termination of proceedings for a child, only affect the demands of the public prosecutor and the judge's decision in the form of action. Judges can only make a breakthrough penal mediation in court after the examination of the defendant, if the judges believe such actions proved, the defendant admitted his actions (as the main requirement), the victim was willing to forgive and qualifications mild case. If all these conditions are met, the judge postponed the hearing before the hearing demands and continued with the approach of restorative justice in the court mediation.

Keywords: Penal Mediation, Restorative Justice, Criminal Justice System of Children.

Introduction

Child is a mandate from God Almighty that in her inherent dignity and worth as human beings. Every child has the dignity that should be upheld and every child born should get their rights without the child asks. This is in accordance with the provisions of the CRC (Convention on the Rights of the Child), which was ratified by the Indonesian government through Presidential Decree No. 36 of 1990, then also set forth in Act No. 4 of 1979 on Child Welfare and the Law No. 23 of 2002 on the Protection of Children, all of which put forward general principles of child protection, namely non-discrimination, the best interests of the child, survival and growth and appreciate the participation of children.

See the principle of the protection of children, especially the principle of non-discrimination that promotes the best interests of the child and the right to life, survival and development of the child so that the required tribute of respect for children, including against children who committed the crime. Therefore, we need a juvenile criminal justice system in which there are children in the process of settling disputes outside the conventional criminal mechanism.

Appears a thought or idea for this by shifting or called Diversion, because prisons are not the way to solve the problems of children and even in prisons prone to violations of children's rights. This has encouraged the idea of diversion, especially through the concept of Restorative Justice becomes a very important consideration in solving criminal cases committed by children.

Juvenile criminal justice system, as a concept and philosophy that prioritizes the protection and rehabilitation of child offenders (emphasized the rehabilitation of youthful Offender) as a person who still has some limitations compared to adults, therefore pursued minimal intervention of the criminal justice system, but often time settling disputes child through the criminal justice system is not able to relieve the tension. The main cause is the criminal justice system itself can not satisfy the parties, but it also has resulted in the imprisonment of the costs incurred by the state is so large and not balanced attention to the needs of victims of crime.

In the current paradigm that is both repressive juvenile justice has begun to be abandoned and replaced by the concept of the completion of the criminal case with the concept of restorative child who sees all the perpetrators, victims and society have equal opportunity to resolve conflicts caused by a criminal act. The restorative concept corresponds to the convention agreed by the countries in the world in the CRC (Convention on the Rights of the Child) in 1990 by the International Instrument equipped, among others: the Beijing Rules on 29 November 1985. The concept of restorative justice can be seen from some good perspective and the perspective of Indigenous Culture and Islamic Law perspective.

Model and Completion of the Restoration of Practice

According Muladi, in detail restorative model has several characteristics, namely:

1. Crime is defined as a violation of the others and recognized as a conflict.
2. The focus on solving the problem of accountability and liability in future
3. The nature of normative built on the basis of dialogue and negotiation
4. Restitution as a means of improving the parties, reconciliation and restoration as the primary goal.
5. Justice formulated as relations rights, assessed on the basis of the results
6. Target attention to the improvement of social disadvantage
7. Community is a facilitator in the process of restorative
8. The role of the victim and the perpetrator is recognized, both in the problem as well as the completion of the rights and needs of victims. Criminals are encouraged to be responsible
9. Accountability offender is defined as understanding the impact of the action and to help decide the best.
10. Crime thoroughly understood in the context of the moral, social and economic, and
11. Stigma can be removed through a restorative action.

There are 4 types of application of restorative justice means known in some countries which is regarded as a pioneer application of restorative justice, namely:

- a. Victim Offender Mediation (VOM)
- b. Family Group Conferencing (FGC)
- c. Circles
- d. Reparative Board / Youth Panel

Fourth restorative justice models mentioned above offer the best solution in solving crimes by giving primacy to the heart of the matter of a crime. Settling disputes with restorative justice focuses on the damage that resulted in the victim or victims and nearby communities emphasize the importance of the core in the process of restorative justice is that the victim, the community and actively build curative responses as a result of the crime.

The concept of justice restorative application well in a society of a country must be built according to the roots of their culture, because one of the parties who are executing is the community itself.

Mediation As An Alternative Penal Restorative Justice

Penal Mediation is a form of alternative dispute resolution outside the court (commonly known as Alternative Dispute Resolution or ADR, there is gathering the call appropriate Dispute Resolution). ADR is generally used in the civil cases, not criminal cases. Under the laws in force in Indonesia today (positive law) is in principle a criminal case cannot be settled out of court. Although in general the settlement of disputes out of court only in civil disputes, but in practice often be solved criminal cases out of court through the discretion of law enforcement agencies or through consultation mechanisms / peace or remission of existing institutions in society (family council meetings and consultation, deliberation customs). The existence of the penal mediation as an alternative for settling disputes in the field of criminal law through restitution in criminal proceedings shows that the difference between criminal and civil law, and the difference is not so big it does not function.

Penal mediation can be assessed from the perspective of philosophical, sociological and legal. In the philosophical perspective existence penal mediation principle applied solution containing "a win win" (win-win) and not end up with a situation of "lose-lose" (lost-lost) or "win-lose" (win-lost) as to achieve justice to the achievement of the formal justice through the legal process litigatif (law enforcement process). Through the mediation process penal justice then obtained the highest peak since the agreement of the parties involved in the criminal case that is between the perpetrator and the victim. The victims and perpetrators are expected to seek and achieve a solution as well as the best alternative to solve the case. The implication of this is that the perpetrator and the victim can file a compensation offered, agreed and negotiated between them together so that the solution reached is "win-win" (win-win). In addition, through this penal mediation will have positive implications for the achievement of justice which is philosophically done fast, simple and inexpensive because the parties involved are relatively less than through the judicial process with the components of the criminal justice system. Penal mediation can be studied from a sociological perspective, in accordance with the local knowledge of Indonesian society. From the juridical perspective, leading to the selection of essential issue of dispute settlement pattern of criminal, the domain associated with the superiority of the state with society superiorities legal wisdom. Other than the above dimensions other implications actual existence can be said penal mediation between "there and" no ". Said that because the provisions of the law are not recognized in the criminal justice system but at the level under legislation known as limited through law enforcement discretion and only partial. Penal mediation practice has been carried out by the Indonesian people and the completion is done outside the court as the mechanism of traditional institutions.

Purpose of Criminal Justice Child

Juvenile criminal justice aims to provide the best for the child, without sacrificing the interests of society and justice. The purpose of criminal justice is no different with the children of other courts, as provided for in Article 25 paragraph (1) of Law No. 48 Year 2009 on Judicial Power, determines that the Judicial Board under the Supreme Court include the judiciary in general courts, religious courts, military courts, and administrative courts. The trial court that the child may also be referred as the meeting of the Child, duty and authority to examine, decide and resolve cases of children as defined in legislation applicable.

Article 1 paragraph 1 of Law No. 11 of 2012 on the Criminal Justice System Child (hereinafter referred to as Law SPPA) determine the "Son of the Criminal Justice System is the whole process of resolving cases of children in conflict with the law, from the stage of the investigation up to the stage after a sentence of supervision"

One of the law enforcement effort is through the Juvenile Justice, in an effort to educate children on child protection without neglecting justice. Juvenile justice organized with the aim to re-educate and improve the attitude and behavior of the child so that he can leave the bad behavior that had he had done. Child protection afforded by providing guidance/ education within the framework of rehabilitation and resocialization the basis juvenile criminal justice.

Juvenile criminal justice should provide shelter, counseling, education through the decision handed down. Aspects of child protection in juvenile criminal justice in terms of psychological aims to prevent children from violence, neglect, abuse, depressed, ill-treatment, anxiety and so on. Realize it is necessary to have an underlying law, a guide and a means of achieving prosperity and the rule of law in order to ensure treatment and the action taken against the child. In realizing the welfare of the child, the child needs to be tried by a tribunal of its own. Efforts towards the welfare of children is part of improving training for all members of society cannot be separated from the continuation and preservation of civilization, which is important for the future of the nation, and the state.

The welfare of children is important because:

- a. Child is a potential successor to the ideals of a nation whose foundations had been laid by the previous generation
- b. So that every child is able to take responsibility, he gets a chance to grow and develop naturally
- c. In society there are children who experience barriers to spiritual well-being, physical, social and economic
- d. Children have not been able to maintain both himself
- e. Remove these barriers can only be obtained if implemented and child welfare is assured.

Principles of Criminal Justice Child

Article 2 of Law SPPA determines that the juvenile criminal justice system is implemented based on the principle:

1. Protection
2. Justice
3. Non-Discrimination
4. The best interests of the child
5. Respect for the views of the child
6. Survival and development of the child
7. Coaching and mentoring children
8. Proportional
9. Deprivation of liberty and punishment as a last resort and
10. Avoidance of retaliation

Absolute competence juvenile justice exist in the Courts general, it means that the court that the child is part of the General Courts, namely the District Court and the High Court to hear cases brat and lead to the Supreme Court as the Supreme Court Institute. In terms of connectivity, for example, a child with a criminal offense with an adult who is a military, the trial of his case should be separated. That child was tried in Juvenile Court hearings and criminal grown military status was tried by the military court.

Relative competence is in accordance with the juvenile court delinquency scene, meaning a court with jurisdiction over the case, is a court whose jurisdiction covers the scene of a crime that happened. Juvenile Justice Act in its articles embrace some of the principles that distinguish the trial of criminal matters for adults. The principles are as follows:

1. Restrictions Age
2. The scope of the problem is limited
3. Treated specific officials
4. The role of the supervising social
5. Examination and familial atmosphere
6. Mandatory splitsinng
7. The event closed hearing
8. Review by a single judge
9. Shorter period of detention
10. Punishment lighter.

Device Penal Mediation in Criminal Justice Child

Although the penal mediation as the embodiment of restorative justice has not been known in the Indonesian criminal justice system, but implicitly has no provisions that encourage the use of this mechanism in the settlement children in conflict with the law. The legal basis of the authority of the judge to mediate penal provisions contained in Article 16 paragraph (3) of Act No. 23 of 2002 on the Protection of Children which confirms that the arrest, detention, and the imposition of a sentence of imprisonment for a child is the last (the last resort).

In addition, the Juvenile Court Act also specifies under judge may impose penalties in the form of action other than imprisonment that is, in the form of refundable child or children handed over to the state. This action is done by considering the principles and objectives of the protection of children and the basic principles of child rights convention, one of which is "in the best interests of the child". the best interests of the child is that all actions concerning children undertaken by the government, society, body legislative, and judiciary must make the best interests of the child as a primary consideration.

Law on Criminal Justice System Children's umbrella law to implement restorative justice and diversion for children in conflict with the law. Penal mediation is a breakthrough as an instrument of restorative justice can be performed by judges, prosecutors and investigators. The success of the deliberations in the penal mediation as an instrument of restorative justice does not result in termination of proceedings for a child, only affect the demands of the public prosecutor and the judge's decision in the form of action. Judges can only make a breakthrough penal mediation in court after the examination of the defendant, namely if:

- a. Judge sure the act was proven
- b. The defendant confessed (as the main requirement)
- c. Victims willing to forgive
- d. Qualifications mild case

Unlike mediation in civil cases in the district court or the court of religion that requires mediators (especially among non-judges) to attend training prior mediator, mediators who handle cases of children in conflict with the law, not to be certified first. Although it is not necessary to follow the certification training, the mediator should have a skill (skill) are inadequate in handling cases of children in conflict with the law on Penal Mediation Forum include:

1. Having insight about children
2. Contribute to neutral
3. Be Sabbath
4. Not easily provoked emotions
5. Can build the confidence of the parties
6. Can build stakeholder communication
7. Can explore the hidden interests of both perpetrators and victims
8. Can give a discourse related to the case at hand
9. Can provide alternative solutions to the perpetrator, the victim and the community, with the purpose of recovering the perpetrator, the victim and the community.

Active mediator role in the mediation cases children in conflict with the law, in Indonesia's many mediators lead to dominant participation in all stages of the mediation process since the start of the mediation to the design of the deal, this is caused by several factors:

1. Type of mediated cases are more or less criminal case requires the intervention of a mediator.
2. Position attached to the mediator as a child in court judges as representatives of the state in helping to reach an agreement in accordance with the criminal law of positive
3. Habits judges decide (to adjudicate) in each case in the court to not accustomed to simply facilitate the mediation process
4. Expectations of the parties who are expecting a mediator as a person who has *wibaya*, authority, knowledge, and experience more to help provide advice or even the best decision and satisfy all parties.

In accordance with the nature of penal mediation as the embodiment of restorative justice, mediation model used is a transformative approach, where the parties involved actively to determine the dispute resolution that can achieve justice in their favor towards changing attitudes and living conditions of the victim and the offender into a better direction transformation, people are expected to participate in the transformation of this mediation model.

Child Protection in Mediation Penal

Son of a mandate and the grace of the Almighty God who in his inherent dignity and worth as whole human beings. Every child has the dignity of a long cherished and every child born should get their rights without the child asks.

The increasing volume of cases with various kinds are brought to court, of course, be a burden for the court to examine and judge. The court limited the ability of organizations both technical and human resources in the court itself, in turn often lead to accumulation of cases in the courts and the effect on the quality of a judge's decision. This is of course contrary to the principle of justice is simple, fast and inexpensive. This issue is also another reason to impose the concept of penal mediation in addition to the basic issue of fairness.

Reason for the use of penal mediation is court must be an institution which can be a means distributive justice, to provide sufficient opportunity for the will of the individual to recognize and realize the justice they need. Criminal proceedings are expected to be common sense laboratory, to test the truth of the facts and the law with legal glasses deepest of human conscience, resulting in righteousness and justice for perpetrators and victims, furthermore can satisfy the justice for the community at large, also for the sake of good fortune complete justice in the order of a society. In connection with the criminal justice mediation penal as contained in Article 18 of the Law SPPA is important to remember that children are the future generation, which although never committed a crime still considered his rights for his future. Maximum protection against future children because it contains principles:

1. The best interests of the child is a priority
2. Criminal justice as much as possible be avoided
3. All forms of minimal intervention performed
4. Police, prosecutors, judges and other law enforcement officers as much as possibly, using the policy / *diskres* in dealing with children
5. The criminalization and punishment of children should be avoided unless there is serious damage to the child or others.

Results of mediation can provide access to justice for the perpetrators, victims and the community and is an instrument of restorative justice, so that later can be taken into consideration for the judge to make a decision in the form of action that not only contains legal justice, moral justice, and social justice. With the decision containing three justice is a balance in the community after the judge read out the verdict, the balance in the society can be achieved.

Conclusion

Penal mediation can be a spearhead in law reform in Indonesia because of harmony, according to the Indonesian culture, which prioritizes deliberation and consensus to resolve all the issues that benefit both the perpetrators and victims. Penal mediation in terms of the victim and the accused can resolve conflicts that still exist between them, the two parties are able to forgive and therefore can forget the victims of crime that ever happened to him and the actors become self-introspection and can realize the responsibility for the crimes committed and the subsequent beneficial to court so that it can provide a more realistic decision freely and can assist the reintegration of victims and perpetrators. Completion by consensus in resolving criminal cases children, considered although it is known that the child committed the crime. problems faced by law enforcement is the absence of a container settlement of criminal cases through mediation, which is still valid legal doctrine is a criminal case cannot be mediated, but the completion of criminal cases through institutional mechanisms of restorative justice is an effort that needs to be responded positively by all elements of law enforcement and lover justice. Restorative justice or judicial process that can reduce the burden of restoring the social and economic state, and energy law enforcement in providing justice for the people. The existence of restorative justice agencies need to be included in the criminal justice system.

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