

Analysis of the Implementation of Penal Mediation in the Crime of Sexual Violence Against Children by Investigators

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ABSTRACT

The settlement of cases of sexual violence against children can be done through litigation, which in the process can be done through penal mediation. Penal mediation as a product of restorative justice is a means of giving the perpetrator rights granted by the investigator through his discretionary authority. However, the enforcement of justice for children as victims of sexual violence based on Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection through penal mediation with the perpetrators of criminal acts becomes a problem, both in terms of the application of penal mediation in criminal acts of sexual violence against children and the impact of the application of penal mediation. The purpose of this article is to analyze and find out the role of penal mediation and its impact on victims of sexual violence against children. The research method used by the author is to use a normative method based on books, journals, and legislation, that in this analysis the application of penal mediation in acts of sexual violence against children can be carried out based on the discretion and restorative justice efforts of the investigator as well as on the decision of the victim (in this case the family of a child victim of sexual violence) and a joint decision, without reducing the essence and integrity of child protection based on Law Number 35 of 2014. The impact of the application of penal mediation is divided into 4, namely from the side of the perpetrator of sexual violence, from the victim, the view of the community, and the regulation of legislation. This article is expected to provide knowledge and become a means to improve the integration of laws and regulations, especially on the implementation of penal mediation in criminal acts of sexual violence against children.

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I. INTRODUCTION

The crime of sexual violence is one of the cases that is of considerable concern to the public, especially cases of sexual violence against children that are rampant in Indonesia. Based on data presented by the Ministry of Women's Empowerment and Child Protection (KemenPPPA), Nahar said that the number of cases of child abuse reached 11,057 cases, in 2020 it reached 11,057 cases, in 2021 it reached 14,517 cases and until the end of 2022 it reached 16,106 cases, with cases of sexual violence against children reaching 9,588. This means that cases

of sexual violence against children are very high.¹ The high level of sexual violence against children can be committed by anyone from the family environment itself and or strangers who have a physical and psychological impact on children as victims of sexual violence. Reporting from SIMFONI-PPA (Online Information System for the Protection of Women and Children), the types of violence experienced by victims in the form of sexual violence reached 3,227 with resulting physical and psychological violence totaling 2,460 victims as of January 1, 2023 (data subject to change), with different ages, the highest being between the ages of 13-17 years. Then who is a child, based on Law Number 23 of 2002 as amended to Law Number 35 of 2014, Article 1 paragraph (1) concerning Child Protection, states that "a child is someone who is not yet 18 years old including those still in the womb".²

Legal protection for victims of sexual violence (in this case children) requires supervision, protection and strong regulations because children are the future and successors of the Indonesian State. However, the regulations and handling are still not in accordance with the goals of justice for victims, this is based on data from the types of services provided based on SIMFONI-PPA sources where law enforcement is only around 833 victims, while for complaints of victims around 7,223 which means that there are still many cases of sexual violence that have not been handled. Of the law enforcement carried out around 23.8% of sexual violence problem solving was carried out peacefully, while the settlement by paying a sum of money to the victim was around 39.9%. And only 19.2% of victims managed to escort sexual violence cases to legal channels with the justice they got in the form of punishment for the perpetrator through litigation.³

The settlement of criminal acts of sexual violence, especially against children through litigation is not a taboo, because litigation is one of the means for the community to obtain justice. However, today there is an alternative that is being pursued and used by victims and under the authority of the investigator in this case, namely the police through penal mediation. Penal mediation is a means of settlement in criminal law by bringing together the perpetrator and the victim and discussing the problem together which will then get a mutually agreed settlement. This agreement fosters the opinion and view of some people that penal mediation is the pinnacle of justice. Negotiated together to achieve a win-win solution, with low costs and fast compared to litigation media, are the advantages of penal mediation.⁴ Penal mediation is an alternative in resolving criminal cases outside the court channel which is commonly called alternative dispute resolution or appropriate dispute resolution which is then abbreviated as ADR.⁵

The implementation of penal mediation is carried out based on the discretionary authority by the investigator as restorative justice to the perpetrator of a criminal offense. Based on Priyo Santoso's research entitled "Police discretion through penal mediation (case study at Galur Police Station, Kulonprogo)", the implementation of fair criminal law enforcement can be carried out with penal mediation through discretion given by the police and also involving other parties such as community leaders.⁶ In addition, according to Wayan Didik Prayoga, and I Ketut Rai Setiabudi in their research entitled, "the relevance of penal mediation in Indonesia in the perspective of criminal law reform", said that penal mediation based on restorative justice, victims have an important role in tackling crime.⁷ Penal mediation in principle can be implemented and achieved if the parties between the victim and the perpetrator of the crime reach a mutual agreement. What distinguishes the author's research from other research is the implementation of penal mediation in the crime of sexual violence against children as victims. However, has the implementation of penal mediation been appropriate and achieved justice and protection for children as victims if it is based on Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection? Based on this, the author is interested in conducting further research on the Implementation of Penal Mediation in the Crime of Sexual Violence Against Children by Investigators with a statutory approach and conceptual approach. With the hope that readers will gain new insights and become suggestions for the government, especially investigators, in improving regulatory arrangements for criminal acts of sexual violence against children.

¹ Ronggo Astungkoro, Rizki Suryarandika, 2021, KemenPPA: Kasus Kekerasan Terhadap Anak Melonjak, dikutip dari laman, <https://www.republika.id/posts/36917/kemenppa-kasus-kekerasan-terhadap-anak-melonjak> pada tanggal 10 April 2023.

² Kementerian Pemberdayaan Perempuan dan Perlindungan Anak Republik Indonesia, 2023, SIMFONI PPA (Sistem Informasi Online Perlindungan Perempuan dan Anak), dikutip dari laman, <https://kekerasan.kemenpppa.go.id/register/login> pada tanggal 10 April 2023.

³ Yosepha Pusparisa, 2021, Penyelesaian Perkara Kekerasan Seksual, dikutip dari laman, <https://databoks.katadata.co.id/datapublish/2021/06/11/kasus-kekerasan-seksual-di-indonesia-mayoritas-tanpa-penyelesaian>, pada 11 April 2023.

⁴ Lilik Mulyadi, *Mediasi Penal dalam Sistem Peradilan Pidana Indonesia*, (Bandung: PT. Alumni, 2022), 6

⁵ Cahyono, *Model Mediasi Penal dalam Penanggulangan Konflik Kekerasan Carok Masyarakat Madura Berdasarkan Local Wisdom*, (Sleman: Deepublish, 2019), 17.

⁶ Priyo Santoso, Diskresi Kepolisian Melalui Mediasi Penal (Studi Kasus di Polsek Galur, Kulonprogo), *Jurnal Penegakan Hukum dan Keadilan* 1, No. 2 (2020): 114.

⁷ I Ketut Rai Setiabudi, I Wayan Didik Prayoga, Relevansi Mediasi Penal di Indonesia dalam Perspektif Pembaharuan Hukum Pidana, *Jurnal Magister Hukum Udayana* 10, No. 4 (2021): 854.

II. RESEARCH PROBLEMS

1. How is the implementation of penal mediation in the crime of sexual violence against children?
2. What are the impacts of the implementation of penal mediation in the settlement of criminal acts of sexual violence against children?

III. RESEARCH METHODS

The writing of this scientific article is carried out using the type of normative legal research, namely the method of writing scientific papers based on literature studies reviewed through books, articles, journals, theses and also laws and regulations. The type of research used is qualitative research with an understanding of the object by the author himself whose legal material is not taken from statistical, quantitative or other means in the form of numbers.⁸ The approach method used is a statute approach where researchers examine the appropriate problems in this article through legislation. Researchers also use the conceptual approach method, which analyzes the point of view in legal research and is seen from the legal concept behind and in terms of the values of the norms contained based on the concept to be used.

The collection of legal materials in the article by the author with bibliographic studies or called literature studies by tracing, collecting by reviewing legal materials to be taken. Legal materials used in analyzing this article are taken from legal materials sourced from theories, concepts, doctrines, which are manifested in books, articles, journals, theses, doctrines, laws and regulations and so on. This research is used with descriptive analysis which means describing a situation of the object to be studied, then further analyzed by combining legal concepts as well as positive legal practices and observations through observing data from books, journals, articles, and internet sources which are then drawn conclusions from the problems to be discussed. Descriptive method is one of the procedures in solving a problem by describing the object of the research situation based on de facto.⁹

IV. RESULT AND DISCUSSION

1. Implementation of penal mediation in the crime of sexual violence against children

The mechanism of enforcement of the criminal justice system in Indonesia based on Law Number 8 of 1981 concerning the Criminal Procedure Code or called KUHAP, related to criminal law enforcement procedures can briefly be concluded that the justice system procedures start from the investigation process by the police, then prosecution by the prosecutor's office, and finally the decision by the judge. The police as the first institution to handle criminal cases will later submit the investigation file to the prosecutor's office as a public prosecutor. However, the police have the authority based on Article 18 of Law Number 2 of 2002 concerning the Indonesian National Police which states that, in the public interest, police officers can act according to their own authority based on their duties and authority by taking into account the Code of Professional Ethics of the Indonesian National Police". Based on this Article 18, the police have the authority to assess whether a criminal offense is worthy of entering the criminal field or not and as a basis for police consideration to conduct diversion.

Diversion is a method of alternative dispute resolution outside the court by utilizing and seeking legitimacy in community traditions.¹⁰ Indigenous people usually participate in the process of implementing police diversion through penal mediation. This is done to maintain harmony between victims and perpetrators and their families in the community. Diversion through penal mediation is actually more emphasized on crimes committed by children and dealing with the law which is specifically regulated in Law Number 11 of 2022 concerning the Juvenile Criminal Justice System, however, it is currently being pursued for general criminal justice. The problem is if a criminal offense is committed against a child as a victim based on Law Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection, the protection of children's rights is still fulfilled or not if the perpetrator of the criminal offense gets diversion through penal mediation.

Article 1 paragraph (2) of Law No. 35/2014 on Child Protection states that children have protection in the form of guaranteeing their rights to live, grow, develop, and participate optimally and also receive protection from violence and discrimination. In this article, it is clear that children have received special legal protection so that their rights must be safeguarded. The rampant sexual violence against children has certainly violated the

⁸ Ajat Rukajat, *Pendekatan Penelitian Kualitatif*, (Yogyakarta: Deepublish, 2018), 4.

⁹ Hamid Darmadi, *Metode Penelitian Pendidikan dan Sosial*, (Bandung: Alfabeta, 2010), 185.

¹⁰ Dahlan Sinaga, *Penegakan Hukum dengan Pendekatan Diversi*, (Yogyakarta: Nusa Media Yogyakarta, 2016), 15.

provisions of this law, so the protection of children's rights must be optimized. For criminal acts of sexual violence against children, the victim's family or parents as guardians and representatives are the ones who act to assist and seek justice for the child by reporting to the police. In accordance with Article 287 of the Criminal Code (KUHP) paragraph (1) where it is stated that for a criminal act of intercourse committed against a woman who is less than 15 years old, a complaint from her parents is required in the criminal process, while in paragraph (2) for those committed against women under the age of less than 12 years old there is no need to wait for a complaint in the law enforcement process. However, here, whether they are less than 15 years old or less than 12 years old, they both need assistance from parents or guardians as well as child protection agencies to get protection of their rights.

The implementation of penal mediation as part of police diversion when referring to Article 287 paragraph (2), does look a little ambiguous because the implementation of criminal justice should continue because even without a complaint offense, the law has regulated that the judicial process is still carried out. However, it is not without reason that the police provide diversion to the perpetrator as an effort of restorative justice without overriding the rights of children as victims of sexual violence. The implementation of penal mediation can be carried out with several models, namely:

1). "Informal Mediation" Model

Penal mediation carried out by law enforcement officials by calling the parties (perpetrators and victims) so that it can be resolved without being submitted to the prosecution process only in informal cases.

2). "Traditional village or tribal moots" model

This penal mediation has similarities in terms of settlement procedures with customary law. That is, the community gathers to deliberate and make decisions.

3). "Victim-offender mediation" model

This penal mediation model is the most commonly used model because here not only the parties are brought together but also assisted by a mediator. It can be implemented at every stage of the criminal justice process, whether the police, prosecutor's office as a prosecutor, or at the punishment stage.

4). "Reparation negotiation programmes" model.

This model focuses more on improvements that must be made by the perpetrator such as the value of compensation to create equal justice.

5). Model of "Community panels of Courts"

Penal mediation with this method means that cases do not need to be processed using the judiciary or through prosecution but are more flexible when using negotiation and mediation.

6). "Family and community group conferences" model

This penal mediation model involves the families of victims and perpetrators, as well as the community and relevant officials to solve problems and find the best solution.¹¹

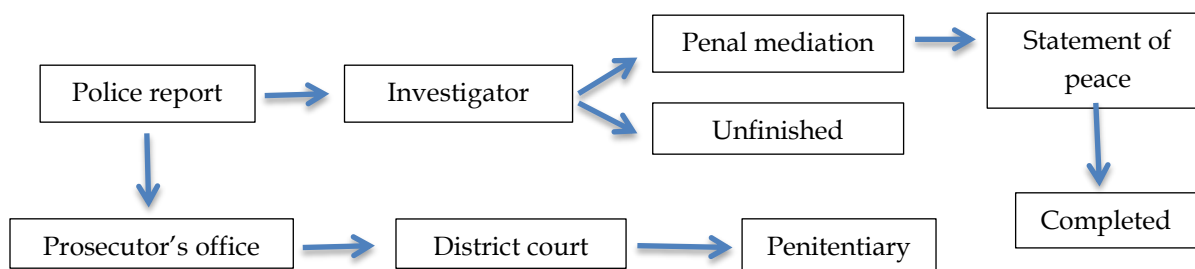
Based on these 6 models of penal mediation, those used in the application of criminal justice, especially in sexual violence against children, are the Victim-offender mediation model and the Family and Community Group Conferences model at the investigation level by the police by bringing together or involving victims and perpetrators and their families, community parties or representatives, and related institutions that are considered to have a stake in reducing the negative stigma of society in upholding justice against children.¹² In addition, placing the perpetrator, victim (represented by parents and/or guardians) and the community as stakeholders directly together can solve problems that are considered fair for all parties or "win-win solutions".¹³ However, because the victim of sexual violence is a child, in this mediation process, the child as a victim can be replaced by a guardian (the child does not need to be present) and receive legal assistance from related institutions considering the psychological condition of the victim because based on its implementation, penal mediation can be carried out directly and indirectly.

¹¹ Rian Prayudi Syahputra, Syahrial, "Analisis Yuridis Penyelesaian Tindak Pidana Ringan Melalui Mediasi Penal di Indonesia", *Jurnal Pahlawan* 4, No. 2 (2021): 26-27.

¹² Cacuk Sudarsono, "Pelaksanaan Mediasi Penal dalam Penyelesaian Tindak Pidana Penganiayaan", *Unnes Law Journal* 4, No. 1 (2015): 29.

¹³ Beniharmoni Harefa, "Mediasi Penal Sebagai Bentuk Diversi dalam Penyelesaian Perkara Pidana Anak Berbasis Keadilan Restoratif", *Jurnal Komunikasi Hukum (JKH)* 4, No. 1 (2018): 24.

The implementation of penal mediation by investigators in general, namely:



The flow of settlement of penal mediation cases by investigators based on the chart above, starting from the police report then it will be forwarded to the investigator who will then filter whether the case allows it to be resolved through penal mediation or not which is desired by the parties concerned and accompanied by mediators as well as related institutions and community representatives and if an agreement is reached then the mediation is written in a Statement of Peace (akte dading), which then the case is closed. For the technical implementation of penal mediation, the mechanism is:

1. Bringing together the parties (parents/guardians, perpetrators, victims, related institutions, community);
2. Make a statement of peace;
3. The perpetrator admits guilt and does not object to being responsible for carrying out compensation in accordance with the agreement of the parties
4. Received a letter of withdrawal of the case from the initial report;
5. The investigator makes an order to stop the investigation with the aim of restorative justice;
6. Investigators make a notification letter to the Prosecutor's Office that the case has been terminated by providing attachments to the police report, the statement of peace and the results of the case title.¹⁴

Penal mediation in the crime of sexual violence against children can be carried out at the suggestion of the investigator by looking at the material and formal requirements or because of the wishes of the victim's family. However, investigators still consider material requirements, including; no public unrest or rejection, no impact on social conflict, and the parties do not object. As well as formal requirements based on Article 12 of the Regulation of the Chief of Police of the Republic of Indonesia Number 6 of 2019 Regarding the Implementation of Restorative Justice, namely; a letter of request for peace, a statement of peace and settlement agreed upon by the parties accompanied by investigators and minutes of additional examination of the litigants.¹⁵ In addition to these material and formal requirements, the investigator also considers the condition of the perpetrator of the crime because it is not uncommon for the perpetrator of sexual violence to have mental retardation or the influence of other parties and the presence of witnesses who can provide information whether the perpetrator of sexual violence is fully guilty or not. However, monetary compensation or other responsibilities are not enough to provide law to children, there should be an effective principle by carrying out the applicable legal process, improving the condition of children, and improving policies or institutions for legal protection of children.

Referring to Law Number 35 of 2014 concerning Child Protection, penal mediation in the crime of sexual violence against children will provide space for second time crimes by perpetrators or opportunities for other perpetrators because the legislation seems weak. There are several important things so that child protection can be implemented, namely by improving; legislation, implementation of legislation, socio-culture and education.¹⁶ Penal mediation will be effectively implemented provided that the perpetrators of criminal acts meet the material requirements and due to certain conditions, however, for perpetrators of sexual violence who do not meet these conditions, the litigation process should be carried out in accordance with applicable law. This is because sexual violence against children is not a minor crime so that the law enforcement process must be carried out based on applicable regulations.

¹⁴ Nurul Widhanita Y. Badilla, Rudini Hasyim Rado, dkk. "Implementasi Mediasi Penal Sebagai Alternatif Penyelesaian Perkara di Kepolisian Resort Merauke", *Jurnal Ilmu Hukum* 6, No. 1 (2022): 100-101.

¹⁵ Ameilia Herpina Denovita, Hervina Puspitosari, "Efektivitas Mediasi Penal Pada Proses Penyidikan Kasus Kekerasan Perspektif Restorative Justice (Studi di Kepolisian Resor Bojonegoro)", *Yustisia Tirtayasa Jurnal Tugas Akhir* 2, No. 2 (2022): 97.

¹⁶ Laurensius Arliman S, "Reformasi Penegakan Hukum Kekerasan Seksual Terhadap Anak Sebagai Bentuk Perlindungan Anak Berkelanjutan", *Jurnal Ilmu Hukum* 19, No. 2 (2016): 316.

2. Impact of the implementation of penal mediation in the settlement of criminal acts of sexual violence against children

Penal mediation is an alternative sought by the community in handling criminal acts of sexual violence against children because penal mediation can be implemented quickly, at low cost, customary culture, is closed and confidential, prevents over capacity in correctional institutions, and in its resolution will provide justice for the parties to the case. However, there are also obstacles in the implementation of penal mediation, such as the absence of efforts by the victim and or his/her guardian to report, no corroborating evidence, the victim and or his/her family are reluctant to open their voices, no agreement between the litigants and the negative stigma of the community.¹⁷ Penal mediation in resolving criminal acts of sexual violence against children does achieve the goal of win-win solutions, but will have an impact on various elements, namely:

- a. The impact felt by the child and the victim's family
 1. The justice they get is in accordance with their wishes and with the consent of the perpetrator.
 2. Peace and tranquility between the families of the parties.
 3. A quick and low-cost settlement will shorten the suffering experienced by victims and their families.¹⁸
 4. The possibility of the child reuniting with the perpetrator will remind them of their injuries and trauma.
 5. The trust and confidence of the victim's family in Indonesia's legal regulations will change.
- b. Impact on the perpetrator
 1. Provide opportunities for justice for perpetrators through restorative justice.
 2. The perpetrator's accountability and apology in accordance with the wishes of the victim and his/her family.
 3. Repairing the relationship between the perpetrator and the victim's family.
 4. The benefits obtained against the cost of guidance through the criminalization process are not comparable so it is more effective through penal mediation.
 5. Penal mediation can prevent the negative effects of imprisonment.
 6. The possibility of the perpetrator committing a second crime in a similar criminal offense, because the previous regulatory process can free from legal bondage.
- c. Impact on society
 1. Alternative means of society.
 2. Maintain community peace and harmony.
 3. Changing people's stigma towards the law.
 4. Encourage traditional plea bargaining.
- d. Impact on regulation and law enforcement agencies.
 1. Penal mediation is a means of solving evidentiary difficulties encountered through judicial institutions.
 2. Reducing the accumulation of cases in court.
 3. As an effort to overcome over capacity in correctional institutions.
 4. Pros and cons of the community and also victims of legal regulations in the crime of sexual violence against children.
 5. Giving investigators freedom to carry out their own duties and authorities based on the law.
 6. Penal mediation can influence people's views on the implementation of police duties as investigators.¹⁹

Penal mediation in criminal acts of sexual violence against children has positive and negative impacts, especially when it comes to child protection that has been specifically regulated by law. However, the terms and conditions of penal mediation in cases involving children as victims by law have not been specifically regulated,

¹⁷ Rifaldi Ahmad, Muhamad Rusjana, dan Yudi Yusnandi, "Tinjauan Yuridis Penyelesaian Perkara Kekerasan Terhadap Anak Pada Tingkat Penyidikan", *Jurnal Ilmu Hukum dan Humaniora* 5, No. 2 (2022): 163.

¹⁸ Kustiwinarsih, Piatur Pangaribuan, dan Roziqin, "Penyelesaian Perkara Tindak Pidana Kekerasan Seksual Terhadap Anak Melalui Mediasi Penal Oleh Penyidik Pada Satuan Reserse Kriminal Polres Balikpapan", *Jurnal Projudice* 1, No. 1 (2019): 94.

¹⁹ Ibid, Kristiyadi, Vincentius Patria Setyawan, 26-28

therefore there is a stigma that arises so that to achieve the expected justice must be carefully considered. This justice must also include and achieve the goal of benefit for victims, and perpetrators without discrimination.

V. CONCLUSION

The penal mediation model used in the application of criminal justice in sexual violence against children uses Victim-offender mediation and Family and Community Group Conferences to obtain agreement and justice for the parties, especially children as victims by paying attention to material and formal requirements. However, in Law No. 35 of 2014 on Child Protection, penal mediation in the crime of sexual violence against children will provide space for a second crime by the perpetrator or opportunities for other perpetrators because the legislation seems weak. Penal mediation will be effectively implemented on the condition that the perpetrator of the crime meets the material requirements and due to certain conditions. However, for perpetrators of sexual violence who do not meet these conditions, the litigation process should be carried out in accordance with applicable law. This is because sexual violence against children is not a minor crime so that the law enforcement process must be carried out based on applicable regulations.

Penal mediation in the implementation of criminal acts of sexual violence against children has positive and negative impacts. From the side of the victim and his family, penal mediation reduces the suffering quickly and justice is obtained according to the agreement of the parties, negatively, the meeting of victims and perpetrators will open old wounds. For the perpetrator of the crime of sexual violence, penal mediation has a positive impact where the perpetrator gets the opportunity for restorative justice, is responsible according to the agreement of the parties and between the perpetrator and the victim can still establish peaceful and tranquil community relations. Negatively, there will be a possibility of repetition of the same criminal offense due to the implementation of this penal mediation. In terms of society, penal mediation is an alternative to open settlement, traditional plea bargaining, and efforts to maintain peace but will change the negative stigma for people who oppose it. In terms of legal regulation, penal mediation will reduce the accumulation of cases, over capacity punishment, and easy evidentiary solutions, as the authority of the investigator's freedom, and the pros and cons of the exercise of police authority as investigators and legal regulations.

Suggestion

Penal mediation as an alternative dispute resolution does have many positive impacts, but for the implementation of cases of sexual violence against children it needs more careful consideration. In addition, it is necessary to regulate the legal regulations for the implementation of penal mediation in cases of sexual violence involving children as victims specifically so that the requirements for perpetrators who receive restorative justice are clearer and do not cause negative stigma in the community. The justice produced in this penal mediation must also provide benefits for the parties, especially children as victims in accordance with Law Number 35 of 2014 concerning Child Protection.

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