

The Role of The National Police in Conducting Investigations through Reasoning Mediation against Property Offenses based on the Value of Justice

Dian Ayu Kusuma Dewi^{1*}, Teguh Prasetyo^{2,3}, Sri Endah Wahyuningsih²

¹Doctoral Student, Faculty of Law, Universitas Islam Sultan Agung, Semarang, Indonesia

²Faculty of Law, Universitas Islam Sultan Agung, Semarang, Indonesia

³Faculty of Law, Universitas Pelita Harapan, Karawaci, Indonesia

***Corresponding author**

Dian Ayu Kusuma Dewi

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Abstract: The existence of law enforcement agencies in the Republic is considered not as protectors and protectors, but often backfires and social problems because what is aspired are not by the reality. Nevertheless, the community continues to voice the law as what is desired even though sometimes it is ignored but still struggling. The law desired by society is necessarily a law that lives sociologically. At the level of investigation in the police, even if someone is suspected of having committed a minor criminal offense, the police will still apply the concept of the investigation by the prescribed criminal procedure law. In the current system of investigating criminal cases, the government continues to seek reasoning mediation against the background of thoughts that are associated with the ideas of renewal of criminal law (penal reform) and associated with the problem of pragmatism. The background of the ideas of "reforming reasoning" includes the idea of victim protection, technical ideas, the idea of restorative justice, the idea of overcoming rigidity/formality in the prevailing system, the idea of avoiding the adverse effects of the criminal justice system and the current criminal system, in particular in seeking other alternatives to imprisonment (alternative to imprisonment/alternative to custody). The problem that can be raised from this paper is how the position of a system of reasoning mediation in the police investigation system on objects and how the opportunities and prospects for the implementation of a penal mediation system as an effort to discuss criminal law in Indonesia. This research study is normative juridical research by looking at national criminal law as a rule or norm in the enforcement of criminal law. The researcher will see the principle of legality in national criminal provisions both in principle and in the application of law enforcement. In normative juridical research, the type of data used is secondary data obtained from library data.

Keywords: Education, penal mediation, justice values, law.

INTRODUCTION

Law is something that is seen and formed to meet the needs of the community to create order, but in its implementation, it is not as young as imagined. Laws that have been patterned and systemized in the form of a law book even though conflicts often occur in reality but are common and are considered normal things in the world of reality. When the community wants the law to apply well, sometimes what is desired is not by the formulation of the article by article in the law. If the conditions are like this where the legal function should be a reference in the social order of the community, then why do conflicts often occur between legal interests and the interests of the community, if this condition continues to be demonstrated whether the law must follow the community or the community who must follow the rule of law . Philosophical thinking is needed in dealing with the nature of legal positivism in Indonesia to analyze these urgent matters. Law can not only change (differ) in space but also in time; this

applies both to the sources of formal law, namely the forms of appearance of the rules of law and forms of law. In the book *Inleiding Tot de Rechtwetenschap*, Van Kan describes the purpose of the law, which concludes that law has a duty to guarantee legal certainty in society [1, 2].

Judging from the perspective of judicial practices in Indonesia and products of legislation, especially in the realm of criminal law, Pancasila values [3] contained in the concept of just and civilized humanity and social justice for all Indonesian people and correlated with popular principles led by wisdom in deliberation / the actual representation still does not provide a deep realization. Measures of the values of Pancasila in the law enforcement process in Indonesia both in the legislation stage (making legislation), the application/implementation stage (law enforcement carried out by law enforcement officials as regulated in the criminal justice system starting from police

institutions, prosecutors and court institutions), as well as in the administrative / criminal implementation phase (carried out by correctional institutions) have implications in their application.

Law, in reality, has three objectives, namely legal certainty, benefit, and justice. The achievement of these three objectives requires a process that takes place in the legal sub-systems which, among others, are mentioned by L.M. Friedman [4] namely legal substance, legal structure, and legal culture. The legal substance that is a reference in the Indonesian legal system includes the Criminal Code (hereinafter referred to as the Criminal Code) and the Criminal Procedure Code (hereinafter referred to as the Criminal Procedure Code) and other laws and regulations which are *lex specialis* from the Criminal Code, for example Law on Domestic Violence, Child Protection Act, Law on the Eradication of Corruption Crime and others.

The criminal law system in Indonesia implies that the implementation of criminal acts is substantially independent of the willingness of people so that in general, the provisions of criminal law remain violated even though there is agreement from the aggrieved party, this is, of course, different from the system in civil law [5-8]. The world of legal science knows that there is a separation between public law and private law, but in many legal relationships, many of them contain together public and private elements at the same time. Circumstances with a focus on one human being are then left to the individual to determine whether the legal relationship will be carried out or not, whereas for circumstances that focus on the collection of humans, then it must be determined by the collection of humans. It is what then distinguishes between public and private law. Criminal Law is one part of public law, and civil law is part of private law [4]. Business relations that are developing at this time, at a glance it can be said that the business relationship appears as a private relationship, but if examined further it turns out that it is not only a private matter but also a criminal problem. For example, if someone who agrees in the business sometimes has fraud in the agreement, then this fraud will be related to criminal matters while the relationship in the form of an agreement between the business people is a local problem.

Public law, in this case, is very different from a criminal matter. In criminal matters, all problems that arise will be handed over to the state for their resolution even though in the theory of criminal procedural law the submission of settlement to the country varies.

There are those who must be reported, others must be reported. One of the phenomena that need to be observed is the increasing prevalence of peaceful efforts when an alleged crime occurs. It often happens in big cities, especially in the business world that has a high

intensity, in line with the development of information and tele communications that narrows the distance so that inter-and inter-country relations can take place quickly and quickly which makes time very valuable. When there is a criminal case, the parties tend to take the path of peace because it is considered effective and efficient, compared to the judicial process which takes time and energy.

The existence of legal principles in a legal field is significant considering these legal principles are the basis and guidelines for the development of every legal field so as not to deviate. In the criminal law itself, the existence of this legal principle is emphasized as an effort so that its arbitrariness limits criminal justice in determining whether or not the acts are prohibited.

The principle of legality is one of the oldest legal principles in the history of human civilization. The existence of this principle is not difficult to find in various provisions of various national laws. The principle of legality is maintained as a protection against the potential for arbitrariness in the administration of criminal law. Roeslan Saleh emphasized the primary purpose of this legal principle to "normalize the supervisory function of the criminal law" so that it was not misused by the ruling Government (court). In Indonesia the principle of legality can be found in the formulation of Article 1 paragraph 1 of the Criminal Law Act in the Dutch language: "Geen feit is strafbaar and the uit kracht van eene da voorafgegane wettelijke strafbepaling" which means "no action can be punished, except based on criminal provisions according to existing laws first than the act itself.

In the framework of a legal state such as Indonesia, this existence is very crucial. This legality principle is expressly mentioned in the consideration of the Criminal Procedure Code in letter a which reads: That the Republic of Indonesia is a legal state based on Pancasila and the 1945 Constitution which upholds human rights and guarantees all citizens of the country together its position in law and government and must uphold the law and government with no exceptions. Understanding the principle of legality correctly determines whether or not the enforcement of criminal law starts the investigation process until a court ruling is given. The existence of such a fundamental principle of legality turns out to experience some important changes in its understanding along with the development of criminal law itself in the face of the development of society. The principle of legality is no longer understood as at the time of the formation of this principle which was at the background of the collapse of King absolutism but was understood by the present context in which the principle of legality applies.

Understanding of what is the principle of legality there is a similarity of opinion among criminal law experts which states that there is no single act that can be subject to criminal conduct without any prior criminal legislation governing before the act is committed. The problem that arises is how to interpret the word *lege in nullum delictum nulla poena sine praevia lege poenale*. Does it have to be understood formally as a law or legislation? Should it be understood materially as a living law by ignoring existing legislation because it does not provide a clear legal basis in one case? To answer this question it is very important to discuss the principle of legality historically philosophically, starting from the history of the principle of legality, the development of understanding the meaning of the principle of legality, the meaning of the principle of legality in Indonesian Criminal Law.

The Criminal Law was in the form of more rational principles, which on the one hand could limit the rights of the authorities to impose punishments, based on the thought that the personal freedom of citizens that as far as possible must be respected. It is especially in criminal law, a pre-existing criminal provision must be an absolute requirement to be used as a basis for judges in imposing a sentence, and on the other hand, can resolve the growth of criminal law as public law.

Handling the problem of alleged crime by using reason mediation does not yet have a juridical basis in the form of legislation but this phenomenon has been carried out in the police investigation process so that the issue that arises is the handling of criminal cases that can "practice" peace that eliminates the criminal element interested in further investigating the implementation of penal mediation by the Police.

RESEARCH METHODS

This research study is normative juridical research by looking at national criminal law as a rule or norm in the enforcement of criminal law. The researcher will see the principle of legality in national criminal provisions both in principle and in the application of law enforcement. In normative juridical research, the type of data used is secondary data, which is obtained from library data. The data collection method used in this study documents study. Data analysis cannot be separated from various interpretations. The interpretation used in this writing is historical interpretation, namely by reviewing the history of law or examining the making of a provision of national criminal law and international criminal law relating to the principle of legality.

RESULTS AND DISCUSSION

The position of the Penal Mediation System in the Police Level Investigation System against Object Problems

In handling criminal cases, at a glance, the reasoning mediation is almost the same as what we know of discretion held by our criminal justice systems institutions, such as the police and prosecutors to screen cases that enter not to carry out certain cases through the criminal justice process. However, there are different essences with the discretion system. Penal mediation prioritizes the interests of criminal offenders and at the same time the interests of victims, so that a win-win solution is achieved that benefits criminal offenders and victims. In the mediation of the victim, the victim is confronted directly with the perpetrator of the crime and can express his claim so that the peace of the parties is produced. The Police Agency has the authority to determine whether an action is continued or not forwarded in the criminal justice process for certain reasons. In traffic cases, for example in traffic accidents, if only cause a small loss or a small wound is usually resolved by mediation between the perpetrator and the victim, and the police as a witness of the agreement reached, the case is not forwarded on the basis of mutual agreement between the perpetrator and victim. However, if an accident due to negligence causes a large loss such as life, mediation cannot be done, while compensation payments in the form of hospital fees and burial of victims' bodies are only one consideration that will later be used by judges in making decisions to defendants [9]. Even though the reasoning of mediation here is only to lighten the demands, no law regulates the implementation of mediation along with the legal force of the deed of agreement based on the reasoning mediation. So the perpetrators are still convicted but the criminal is commuted.

Meanwhile in handling criminal cases that fall into the category of 'ordinary offenses', such as cases that contain elements of negligence as in Article 359 of the Criminal Code (because of negligence causing death of others), as well as in criminal acts against property such as Article 372 of the Criminal Code regarding embezzlement and Article 378 regarding fraud which usually between victims and perpetrators have known each other, then mediation can be carried out where the victim can ask for compensation to the perpetrator with a deed of agreement that compensation has been made to the victim. However, even though an agreement has been made to compensate the victim, the prosecution of the perpetrator of the crime is still carried out, on the grounds that the prosecutor works based on normative rules, as long as there are no rules governing the position of reasoning in the prosecution. Loss, the reason is only one reason for the Prosecutor's consideration to lighten the maximum of his demands. In criminal law there is no known reasoning mediation,

but there is an opportunity for victims to sue for compensation to the perpetrators through civil lawsuits and the criminal justice process is still carried out. But actually, if we question the mediation of reason in terms of determining substitute losses from the perpetrators to victims, this is possible, which can be used as the basis for judges' consideration in imposing conditional penalties. Compensation for victims in conditional punishment is one of the special conditions that have been carried out by the convicted person, in addition to the criminal provisions to be imposed by a judge no more than one year for imprisonment. If an agreement is reached in mediation, the mediator notifies the investigator that an agreement has been reached through mediation with payment of compensation from the perpetrator to the victim. The results of the mediation agreement are final decisions, so that is the reason for the removal of the prosecution.

In this mediation, reconciliation and payment of compensation to victims are held. If the reasoning mediation does not reach an agreement, then the criminal case will proceed with the process of examination in the court session by prosecuting the act of his speech. In this case, the mediator cannot testify that the mediation agreement has not been reached nor for everything that happened during the mediation process. If the mediation reaches a peace agreement accepted by all parties, then the deed of agreement applies as a final decision and prosecution cannot be held, so that it can serve as the reason for the removal of the prosecution. This mediation if an agreement is reached, the results can be used as an excuse to eliminate criminal conduct for perpetrators of criminal offenses.

Many things need to be reconstructed in the criminal justice system in Indonesia, because not all criminal cases lead to trials, especially minor crimes, small cases and minor crimes [10] where victims, perpetrators and the public can still be restored so that damaged conditions can be repaired return and a win-win solution arises in accordance with the penal mediation paradigm. Social justice for all Indonesian people in a popular system led by wisdom of wisdom based on deliberation can at least be reflected in the judiciary in Indonesia, without having to be resolved through retributive dimensions and leading to imprisonment, so that these values can be manifested in the criminal justice system "Humanize" in the form of the principle of monodualistic balance, namely the balance between social principles and individualistic principles. The dimension of the value of reasoning mediation is rooted in restorative justice from the local legal wisdom of Indonesia. In the social practices of the Indonesian people, reason mediation has long been known and has become a tradition such as the Papuan people (culture of grilled stone), Aceh (village court), Bali (traditional institutions in Awig-awig Village),

West Nusa Tenggara (Begundem institutions), and others [11]. Then in the juridical dimension, penal mediation is regulated partially, limited and its level is still under the law, as in the Presidential Instruction (Inpres) and the Chief of Police Regulation. In the practice of justice, it is found in the jurisprudence of the Supreme Court, the verdict of the District Court, then also occurs in the practice of the congregation and is also regulated in the Draft Law on Draft Law [12].

There are many positive implications if the implementation of penal mediation is carried out as an embodiment of values of justice. First, case accumulation does not occur in the court, so that economically the country's financial and economic expenditure does not occur and reduces the time needed to settle a criminal case. Correlation of this dimension, because case accumulation does not occur then, correctional institutions are relatively not overloaded. Second, from the perspective of the victim because it helps reduce the sense of revenge against the perpetrator so that the individuals are interwoven with the relationship. The perpetrators apologize, and the victims have forgiven to reduce the guilt of the perpetrators and create an atmosphere of reconciliation which is a reflection of the principle of deliberation and consensus so that the life of the nation and state becomes harmonious, harmonious and balanced. Then also the pressure on victims became relatively reduced compared to litigation in court, because there was no need to be a witness, bring witnesses, hire a lawyer, and get the opportunity to control the results. Third, from the perspective of non-criminal actors, they will avoid punishment, stigma or criminal records that have been made, fined or court fees as compensation, and so forth. Fourth, it is the media and the opportunity between victims and perpetrators to meet to discuss crimes committed by the perpetrators and has given a negative stigma in the lives of victims; then victims can express their attention, desires, and feelings about asking for restitution.

Opportunities and Prospects for the Implementation of the Penal Mediation System as an Effort to Discuss Criminal Law in Indonesia

The Supreme Court RI No. 1644K / Pid / 1988 decision dated 15/1991 was decided in ratification that if someone violates the law of later Head and Customary Leaders giving a customary reaction (sanction/customary medicine), then the concerned cannot be presented as a defendant in a State Court (District Court) hearing. 5 paragraph (3) sub-b of Drt Law Number 1 of 1951) so that the transfer of case files and the demands of the Prosecutor's Office in the District Court must be declared unacceptable (niet ontvankelijk Verklaard).

The basic conclusion of the jurisprudence is to acknowledge the existence of customary justice where

there is reasoning mediation between the perpetrator and the victim, then the imposition of "sanctions / customary medicine" is carried out as a balance between the practice of social and the balance between the natural cosmos and the cosmic cause. Then in the North-East Jakarta District Court Decision Number: 46 / Pid / 78 / UT / WAN dated June 17, 1978, in the case of "Ellya Dado", commonly abbreviated as "The Case of Mrs. Elda", the existence of a "peace settlement if the anticipated act does not constitute a crime or violation that can be punished in the past, and therefore release the accused from legal proceedings.

The formation of law is the creation of new laws in the general sense relating to the formulation of general rules, which can be in the form of additions or changes to existing rules. The formation of law can also be caused by concrete decisions (precedent law or jurisprudence). Actual action with an action that only occurs once (einmalig) carried out by the authorities or central organs based on the constitution (government and parliament), for example, which raises fundamental changes to the constitutional law without changes to the Act or Law - Basic Constitution

Cecero uses human reason as a method to be able to enter into transcendental legal phenomena. The nature of the law is the right mind, which by nature can be applied anywhere, unchanging and eternal can demand rights and obligations according to his orders and prevent wrongdoing through prohibitions.

The law is understood as a coercive order, namely as an order that applies sanctions in the form of forced action, then the provisions that explain the law in the Act will appear as a statement that under certain conditions the legal order is determined by the order. Forced action is action taken not on the wishes of individuals who are targeted, and if there is resistance, physical coercion will be used.

This opinion on the principle of legality is materially stated in Jan Rummelink by interpreting the "criminal law" or by referring to a legal structure concerning all legal provisions governing criminal acts by applicable law, both in writing and unwritten [13]. This opinion suggests a new understanding in the criminal law that the principle of legality must not only dwell on what is stated in the provisions of the written law but also impose a law not written also.

Forced actions constitute sanctions for this action, still as a reaction to actions or against the actions taken by the legal order. Law is a rule made by an authorized official, namely the legislature in a law. The law made by the legislative body is different from the phenomenon. Understanding the law in this material sense turned out to get the pros and cons responses from several Indonesian legal experts. Barda Nawawi Arief is

more supportive of understanding the law in this material meaning keeping in mind the rapid development of society on the one hand which is in dire need of criminal law protection. Barda Nawawi Arief proposed a change to adagium nullum delictum nulla poena sine lege which had been understood in the criminal law to be nullum delictum nulla poena sine ius. The replacement of the term lege to ius according to Barda Nawawi will broaden the understanding of legal experts and law enforcers in exploring the legal bases needed when facing a case with a new modus operandi. Understanding the principle of legality should not only be based on law (lege or lex) but is more fundamental than that based on law (ius). The scope of the term ius is also very broad, covering all the rules of criminal law, both written and unwritten and codified and uncoded legal regulations. If we pay close attention to the opinion of Barda Nawawi Arief, this is very much in line with the opinion of van Hattum, which emphasizes the scope of the regulation of criminal law broadly [14].

Muladi [15] explained that the importance of understanding legality is not only based on laws (formal sources) but also the source of material law (living law from the community) as an effort to protect existing legal interests of the community and anticipate legal needs that cannot be accommodated with both by law (source of legal formil). Muladi's opinion is based on several considerations both nationally and internationally as follows:

- The first form of softening / refinement is contained in the Criminal Code itself; that is with the existence of Article 1: 2 KUHP.
- In the practice of jurisprudence and the development of theory, it is known that there is a material teaching against the law.

It is caused, Indonesian legal science materially still applies the principles of foreign or colonial law and is not rooted in the views/concepts of fundamental values (grundnorm) and reality (socio-political, socio-economic and socio-cultural) that live in Indonesian society itself. The understanding of criminal law should be based on legal values that live within Indonesian society itself. Included also, the understanding of the principle of legality must be interpreted not solely based on laws or written laws but living laws and recognized by society.

By remembering the basic principles of legality as stated in Utrecht, namely the existence of personal independence and collectivist interests, Indonesian criminal law must be characterized by the interests of the Indonesian people themselves. Regarding this legality principle adage, Barda Nawawi Arief gives the proposal nullum delictum sine ius (underline of me) which means there is no offense and no criminal before the law regulates it. This opinion actually comes from legal material understanding which

not only recognizes law as the basis of criminal law but also customary law, customary law that has legal values in society. Regarding this matter, Zainal Abidin Farid proposed that the principle *nullum delictum* be with the Indonesian nation's *Weltanschauung*. The principle of legality must be understood according to the legal values of the Indonesian nation itself, sourced from the law that lives in the community and is formulated in the legal provisions clearly and strictly [16].

The implementation of a balanced understanding of the law will automatically bring legal protection and legal certainty to be guaranteed. In the understanding of the principle of formality-materiality which is the basis of the main concern is the Law itself. The basis of this understanding is so important considering that only through legal products in the form of laws, can any rights of the community be reduced or taken if there is a violation of the law. But this does not mean that the law is not recognized under the law. The legal provisions under the law are still recognized as long as the contents, and the material are based on the law and do not conflict with the law. Regarding the customary law that applies and lives in the community, in this view it is still recognized as long as the law is enforced and the contents are not subject to the law.

CONCLUSION

In positive law and its development the principle of legality is not merely interpreted as *nullum delictum sine lege* but also as *nullum delictum sine ius* or not merely seen as a principle of formal legality, but also material legality, namely by recognizing customary criminal law, living law or unwritten law as a source of law. Penal mediation at the police level has been practiced by community members in resolving certain criminal acts. However, the practice of penal mediation here does not abolish the authority of prosecution or criminal conduct for perpetrators of criminal acts. The construction of legal politics of penal mediation as an alternative to settling criminal cases in the future is the building of regulations concerning the implementation of reasoning mediation which consists of policy formulations and policies for the implementation of reasoning mediation.

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