Penal mediation policy toward the SARA conflict resolution of Kei Island in the national criminal law reform efforts

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Abstract. The research method used in this research is qualitative research with the empirical juridical and normative juridical which oriented to value approach and policy approach. Data used in this research are primary data obtained from interviews and secondary data from various literature. The result of research shows that the penal mediation implementation in Kei SARA conflict resolution is by using the alternative dispute resolution through the Sdov mechanism (negotiation/discussion), that is the negotiation done by the people in their own community then submitted to the custom structure as vhis bad (mediator) to reconcile and end the conflicts. While the penal mediation in the criminal law reform can be done through two forms, they are the penal mediation out of the criminal justice process (the village custom institution/the village community institution) used the negotitaion/discussion mechanism, the mediator elements are the custom structure/the village structure and the penal mediation form as the parts of criminal justice system (SPP) through the investigator, public prosecutor, judge, correctional facility as the mediator on their own steps.

1. Introduction

1.1. Background

Where there is society, there is justice, or at least where there is society, there is a dispute resolution mechanism. Therefore, it is not surprising when Hilman Hadikusuma, states that the adat justice in Indonesia has been existed since a long time ago, before Hinduism-Buddhism kingdom period in Indonesia [1].

Penal mediation is the alternative dispute resolution, in Indonesia Alternative Dispute Resolution (ADR) is indicated only used in civil cases [2], while the criminal cases are solved through the process in the court.

Barda Nawawi Arief, states that even though the alternative dispute resolution is only commonly used in civil cases, but practically there are many criminal cases are solved by the alternative dispute resolution through the various law enforcement agency discretions or through the conference mechanism or the forgiving institution in the society (family conferences, village conferences; customary conferences). During this time, the alternative dispute resolution practice has no formal law references, so it constantly happens a case that informally has its resolution (even though through the customary law mechanism), but it should be processed in the court based on the formal laws [3].

By the penal mediation based on the customary laws minimally gives hope toward the next criminal laws in order to concern more on the social values that grow and develop in the society. The
criminal law policy about the miscarriage of prosecution authority, one of whose causes is because of the alternative resolution out of the process, will give the chance for the institutions in adat society of Indonesia to be the alternative of criminal case resolutions.

Although the criminal case resolution by the adat institution has not been managed positively, but, at least in the next policy, in the criminal law reform in Indonesia through the discussion of a bill criminal code (R-KUHP) the alternative dispute resolution process will be considered. In R-KUHP of 2015 in 152 articles, one of them manages that, “the authority of prosecution miscarries if: (d) there has been the alternative dispute resolution”.

1.2. Formulation of Problem
Based on the background above, it is presented the formulation of the problem namely:
1. How is the implementation of penal mediation toward the SARA conflict resolution in Kei Island in this time?
2. It How is the contribution of penal mediation in the national criminal law reform efforts in the upcoming time?

1.3. Research Method
This research used qualitative research by using empiric juridic approach and normative juridic approach which oriented to the value-oriented approach and the policy-oriented approach. The data used in this research is the primary data got from the interview and the secondary data from some literature.

1.4. Review of Related Literature
*Ubi societas ibi ius* (where there is society, there is law). It is stated by Cicero, a very famous philosopher who lived more than 2000 years ago [1].

Von Savigny from the historical and cultural stated that the relation between law and society is inseparable because law is the mirror of society soul. According to Puchta, all of the laws is the symbol of common awareness. Raharjo (2014) [4] Law develops together with the development and strengthens together with the strength of society, and finally, it will disappear when the nation loses their nationality.

Herowati Poesoko and Dominikus Rato state about *Volksgeist*, during there, is society, it is absolutely needed a dispute resolution that gives justice and benefit for the people who have cases. Therefore, it is better to solve the cases by conference [5] as the soul of Indonesian nationality. Surely, those cases need a simple resolution, the cheap cost and the short time to solve [6].

Martin Wright stated that mediation is the process where the victim and the criminal meet and communicate each other, by using the third side’s assistance, directly or indirectly, make the victims easy to express what they need and feel, and it is possible for the criminals to accept and be responsible for their act [7].

The research started from the idea of criminal law reform in making the national criminal law system that has been stated since the Indonesian independence in 1945 till now. But those can not be stated as the total law reform according to Gustav Radbruch.

Especially in criminal law reform, Jerome Hall ever stated [8]: Improvement/reform or development of criminal law is a continuous permanent effort and the various detail of its notes and documents should be saved and kept. In the criminal law policy reform related to the penal mediation Barda Nawawi Arief, in his book describes that [9]: The background of some of his mindsets are related to the ideas of criminal law reform (*penal reform*), and some other mindsets related to the pragmatic problem. The ideas of ”*penal reform*” are the victim protection idea, the harmonization idea, the *restorative justice* idea, the idea of formality system resolution, the idea of negative effect prevention from the criminal justice system nowadays, especially in finding the alternative to imprisonment/alternative to custody and so on. The background of pragmatic is to decrease the stagnation or the problems of court case overload to simplify the justice process and so on.
Talking about the penal mediation process related to the criminal law reform, it is needed to think of rekindling and strengthening the adat justice anymore as the local wisdom in the customary law of Indonesia based on the cosmic mindset, magic, and religious.

2. Results and discussion

2.1. The Policy of Penal Mediation Implementation toward SARA Conflict Resolution in Kei Island in This Time

In society, mediation is not a new thing. It is proved by the conferences held. It is stated by Marc Levin that the approach that was told as the old, ancient and traditional approach is considered as the progressive approach [10].

The culture of Indonesia that is identical with compromise and cooperative rises everywhere in the various society structure. It is needed to be aware that culturally the Indonesian society considers the consensus approach as the priority. According to Muladi, the dialogue between the arguing people to solve their problem is the positive step. Based on this concept, it utters the name “ADR” that is in specific things is more efficient to meet the demand. ADR is the part of restorative justice concepts [11], that places justice in the mediator position [12].

The mediator in the national law context commonly is the law bachelors that have already got the definite training and education, while in customary law, the mediator position is taken by the adat structure like the king, the adat elders or the public figure. Von Savigny, states that even though some of the laws belong to the law bachelors, but some of them is still the law of society [1]. This law is named as the live law (customary law) that is controlled by the adat structure to rebuild from this complicated condition.

The local historical searching, the Kei society is never devoid from the conflicts, even in the past, it ever happened the war between customary are based on the main idea and law explained before. But, the conflict history or war finally can be solved by the conferences, reconciliation and forgiving each other without being in a hurry to submit the cases to the country justice [13].

In Kei island, every criminal conflict or other criminal cases are the custom violation, so the role of the leader of the indigenous stakeholder who is responsible for the resolution process as the law structure according to Friedman. According to V. A. Rahail, he states that: The kings can not be inseparable from their society. Uud entauk na atvunad (the head resting on the shoulder). [14]. Every “head” of human has a brain, eyes, ears, nose, and mouth that have their own functions. The heart is the parts of the human body. It means that a leader (head) of the Kei customary society in running his functions must listen, see, protect, and understand the conscience of his society, and speak according to his society’s willing because the voice that is uttered encouraged by the breath from the chest or stomach. All of them are difficult to do by someone who does not understand about the Kei’s customary law.

The Kei society is very lucky of having the local wisdom that is able to handle the SARA conflicts of Kei. Those SARA conflicts are handled by the custom structure (Rat, Orang Kai/Soa) as the leader of the custom and the custom reconciliation judge similar to the mediator who is willing to have the more flexible communication in order to be easy to solve the conflicts [15].

The position of king as the “mediator” of Kei’s SARA conflicts in order to reconcile the warring people with the requirements that they must refuse the intervention from police and army in the reconciliation that has been planned before. They have the effort to solve it by themselves by using "the way and the Kei’s custom language". J. P. Rahail, states that [16]: They (read: government, researcher) that truly cause the conflicts happened, so it will be so awkward that they want to be the mediator and conciliator. They can help but not to be the initiator and the main actor.

The case resolution in the Kei island emphasizes on the local wisdom and discussion recorded in the Sdov mechanism or negotiations/conferences (the true value of Indonesian) and the reconciliation. Sdov means sitting together to discuss and negotiate (dok Tasdov). Sdov (negotiation) done by the people in their own community or group, the result of negotiation is proposed to the custom structure
as *vhis bad* (mediator) that will carry out the discussion by inviting or coming to the people in that community to end the conflicts. All the people are met and invited to make dialogue based on the philosophy “*Ain ni ain*” (we are one), dan “*Manut ain mehe ni tilur, fuut ain mehe ni ngifun*” (all Kei people are coming from the same ancestor), completed by the spirit of *fangnanan* (affection), this solidarity shows the harmonic and peaceful situation of life. Including the Kei’s SARA conflict resolution by using *Sdov* mechanism (negotiation/discussion/mediation).

It can be stated that the king or other custom structures have a role as the king’s assistance in running the government system in the village, about social stability or customary as well. And if it happened the conflicts, the leader of the custom is obligated to solve by involving the society that has the conflicts. One of the ways to solve the conflicts is by presenting the people who have the conflicts in the custom negotiation/conference by discussing about the problem that becomes “complaint offence” from the people who have the conflicts then the law structure that is led by the king reconcile them by declaration in a custom ceremony in the form of violations and sanctions no to repeat the conflicts. The restriction is by instilling the sasi (*hawear*), as the prohibition to start the conflict.

According to Muladi, the resolution of conflicts by reconciliation have the same degree as the judge’s decision. If we look up the regulation of civil law especially 1338 article of the civil code, ”all the agreements are made according to the act for the people who made” [17].

It can be said that the Kei society already has the local wisdom to solve the conflicts by *Sdov* mechanism (negotiation) among the people in their group to solve the conflicts, then that case is proposed to the custom structure to solve.

It has been stated that criminal justice is not the best institution to solve conflicts. The resolution through criminal justice will break the family relationship and the peaceful harmonic relationship. Based on those weaknesses, the conflict resolution process is not only on the hand of criminal justice but by streamlining the mediation’s existence by the custom or village structure, because of having the advantages that do not belong to the criminal justice. Firstly, the mediation will decrease the feeling of revenge from the victims, more flexible and economical, and the process is faster than the litigation process.

Secondly, criminal justice has the overloaded cases so the resolution process spends so much time and it can be decreased by the mediation between the criminal and victim. Thirdly, the mediation gives the chance for the victims to meet the criminals to talk about the crime that harms their life, express their attention and feeling, ask the restitution as well. The fourth, the mediation recreates the harmonic relationship between the victim and the criminal. This condition is not found in conflict resolution through the criminal justice system. Forgiving from the victims to the criminals decrease the guilty feeling of the criminals and creates the reconciliation between both of them.

### 2.2. The Policy of Penal Mediation in the Criminal Law Reform Efforts in the Upcoming Time

Finally, a bill criminal code 2015 (R-KUHP 2015) at least gives the hope toward the policy of criminal law in the upcoming time that it will give more attention toward the social values that grow and develop in the society. The policy of the criminal law about the miscarriage of prosecution authority, one of whose causes is because of the alternative resolution or reconciliation (penal mediation), that way of resolution appropriates with the Kei society’s SARA conflict resolution through *Sdov* (negotiation) among the people (group) of their own community then submitted to the Kei’s custom structure as the *vhis bad* (mediator) then carry out the conferences by inviting or coming to the people in the community directly in order to make reconciliation to end the conflicts. By considering the alternative resolution, definitely gives the chance for other custom society foundations /other social or village community institutions in Indonesia to be the alternative dispute resolution.

**Article 152**

The authority of prosecution miscarries, if:

a. there has been the permanent legal decision;

b. the defendant passes away;
c. expired;
d. there has been the alternative dispute resolution.

The alternative resolution through the custom mechanism toward the custom crime is solved/mediated by the custom structures like the king, the chief of the village, the public figure and so on by meeting and reconciliation the people who have conflicts. The priority of mediation is the dialog process, all of the people are encouraged to forgive each other, eliminating the resentment and finding the best solution (*win-win solution*). By using the alternative dispute resolution, hopefully, it can give the justice of the law, the expediency of law and the determination of law for the people who have conflicts. Therefore, the penal mediation can be the reference in abolition the prosecution and criminalization.

Toward the criminal offense, the penal mediation can be the contribution in the criminal law reform, through two forms and ways, such as:

1. The penal mediation out of the criminal justice process is run through the custom village institution/village community institution. It is needed the law references like policy or law regulation that determines about:
   a. The criminal offense can be mediated out of the criminal justice process;
   b. The penal mediation which is done by the criminal and victim out of the justice is approved if it is done voluntarily;
   c. The penal mediation is facilitated by the mediator (the custom structures/village);
   d. The law power as the agreement reached by the criminals and victims, as the legal and final decision can not be bent and do not need to be strengthened through the decision of the court, only legalized by the stamp and signature. It can be known that the penal mediation is done voluntarily;
   e. The result of an agreement reached in the penal mediation as the reason for the miscarriage of criminal prosecution authority that has been mediated.

2. The penal mediation as the parts of the criminal justice system (SPP), such as:
   a. The penal mediation in the criminal investigation step, the investigation step is the first step from the criminal justice process. In this step, it would be possible for the investigator to continue the criminal offense in the criminal justice process or not. The mediation in this investigation step is the model combination of *informal mediation, victim-offender mediation, and reparation negotiation programs*.
   b. The penal mediation in the prosecution step, after devolution from investigator to the public prosecutor. In this step, the public prosecutor should not continue the criminal offense to the court but the public prosecutor should encourage them to make reconciliation. The model combination of *informal mediation, victim-offender mediation, and reparation negotiation programs*. Or the public prosecutor can directly stop the prosecution if there has been the alternative resolution or the resolution through the custom/village institution.
   c. The penal mediation in the trial step, the penal mediation is done in this step is after the devolution of the case to the court by the public prosecutor. In this step of mediation as in the civil cases, the judge offers the alternative of criminal resolution by reconciliation before trial by considering the criminal criteria done by the defendant. If this mediation comes to the agreement, the result can be used as the reason to miscarry the process for the criminal offense. In this step, the judge can be the mediator or can be done by the other mediator out of the court. This mediation is the model combination of *victim-offender mediation and reparation negotiation programs*. 
   d. The penal mediation in the step of the criminal get the imprisonment sanctions, in this step, the penal mediation is done by *reparation negotiation program* that emphasizes on the payment of compensation from the criminal to the victim or *victim offender-mediation* as well that emphasizes on the reconciliation concept or in the agreement of compensation paid to the victim. The mediation done in the step of the criminal gets the punishment. The function is as
the reason for miscarrying the authority of getting some criminal punishements if the criminal has got some of the criminal punishments.

3. Closing

3.1. Conclusion
The discussion of the problems presented in the research finding and discussion show some conclusions:
1. The implementation of penal mediation in solving the Kei SARA conflict, the resolution is out of the criminal justice process through Sdov mechanism (negotiation/conferences), by the negotiation that is done by the people in their own community/group, the result of negotiation submitted to the custom structure as the vhis bad (mediator) that will carry out the discussion by inviting or coming to the people in that community to solve and end the conflicts.
2. The penal mediation policy in the criminal law reform can be contributed through two ways or forms, those are the form of penal mediation out of the criminal justice process (the village custom institution/the village community institution) through the negotiation mechanism/conferences, the mediator consists of the custom structure/village structure and the form of penal mediation as the parts of the criminal justice system process (SPP) can be mediated from the investigation step by the investigator, the prosecution by the public prosecutor, the court by the judge or the criminal runs the punishment by the correctional facility.

3.2. Suggestion
Based on the result of the research and discussion above, it is suggested:
1. It is suggested that even though the resolution is processed by using the alternative dispute resolution through the village custom institution/the village community institution, but if the criminal got the sanction/the criminal sentences/penalties, that criminal sentence refers to the criminal code.
2. It is suggested to the custom structure/the village structure and the investigator law enforcement components, the judge and the correctional facility as well can be a mediator in the penal mediation out of the criminal justice process or penal mediation as the parts of the criminal justice system.

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