

‘PENAL MEDIATION AS AN ALTERNATIVE DISPUTE RESOLUTION OF SOCIAL CONFLICT’

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ABSTRACT

Mediation penal is one part of the alternative dispute settlements outside the court or an alternative dispute the resolution (ADR) who customarily applied to the matter of private law. On this dimension alternative dispute the resolution (ADR) outside the court has been regulated in Act Number 30 Year 1999 About Arbitrage And Alternative Dispute Settlement. In the completion of the correlation is there are several institutions the driving force behind a method of ADR, among others of Indonesia National Arbitrage Board with a focus on the world trade and ADR in the settlement of disputes construction services (Act Number 18 / 1999 Jo Act Number 29 Years 2000 Jo Act Number 29 Years 2000) with the jurisdiction of the field of ADR private law. So did known also concerning Intellectual property rights, labor, business competition, consumer protection the environment and etc. On the principle of positive law Indonesia criminal cases could not be solved outside the court, although in certain things possible the existence of solving the problem outside the court. However, practices law enforcement in Indonesia criminal cases often also resolved outside the court through discretion law enforcement officials, peace mechanism, customary and institutions. Implication the completion of a proceeding in practice out the court so far there is no formal legal base, so that customarily also occurred a case informally has been done the peace settlement by the mechanisms of customary law, still processed to the court in accordance positive laws and regulations. Samin in a tribal society, the law is in the heart of his teachings each anyone. In they had always thought brother fellow indigenous Samin tribe. So if fellow brother, do not have to waste time to dealing with problems law. If can there was anyone in the Samin tribe perform an action against the law, such as stealing should not given punishment to fit as there are in the Penal Code. Better they warned in a fellow or by giving advice to not repeating the reprehensible deed. So that we will give sanction if anyone commits theft is gonna come to mind themselves each. Based on the background above, problems in the formulation of this research is how:

- 1). perception of Samin tribe on the existence of the national law ?
- 2). how their model handling of the law conflict in a Samin tribe ?

A special purpose in this research was assessing perception of a tribal society Samin against social conflicts that led to legal conflict that occurred in a tribal society Samin and find the right model penal mediation as an effort to conflict resolution laws on Samin of a tribal society. The outer covering of this research is it as a model of conflict resolution efforts mediation penal law. While urgency in this research was remember the characteristic of indigenous people Samin all people are considered as brothers, because all are in the heart of man sincerity each. Everyone given the gift of a miracle by the higher authority and given on the trait of being benevolent. Basically the community Samin thought everyone that always good. So in their minds no one wants to do evil. Despite in era had entered modern times is much and lots of people love doing evil and vile practices. This study using methods the qualitative study. Data collection techniques of observation, interview, a method of documentation. The validity of the data used a technique of triangulation data. The method of analysis of the data used in this research using the method of analysis from miles indigenous people of the Samin tribe remain subject to national criminal law, if the offender theft comes from outside of their group and those in families could no longer have done it can be given the sanctions existing in the penal code in accordance with rules that apply to investors of the theft. Samin basically of the related or hold fast against brother. Most precedence is the togetherness a fraternity. If there is a problem better discussed beforehand. Habits like this and by the enactment of the fraternal attitude Samin will never lost and will always be more tightly, so they can live with peace, safety and welfare. The model penal mediation applied if theft crimes or crimes mild else happens (crimes did not generate an extensive impact in the community) is on the model penal mediation victim-offenders mediation because the model penal mediation this only involved several parties that met in the process of mediation penal namely the victims of theft and theft and offender families of both parties who enter into judgment and a mediator, in this case a mediator chosen is the head of Samin. Mediation victim-offenders mediation is the model penal moving in the form of agreement of the parties, the form of an alternative in the process of litigation not to lead to criminal verdict prison.

Key Words: Mediation Penal, Social Conflict, Tribal Society

A. Introduction

1.1. Background of the Study

Samina tribe is a unique cultural phenomenon which is loaded with messages. The behavior of “wong Samin” (Samin people) reflects their disregard for the existence of the state in their daily life. Samin people are well-known for their simple, straightforward, and unpretentious manner that they are often regarded as nitwitted. The Samin tribe is identically referred to resistance. Members of the Samin tribe are the descendants of *Samin Surosentiko*'s adherents who taught “*sedulur sikep*” when they fired resistance against the Dutch through nonviolence form of actions. The Samin's teaching spread in the area of Central Java and East Java. Even though the dissemination is quite widespread, it is still difficult to find the existing Samin teachings that also become Samin people's life philosophy. Few people who are still upholding this teaching are spread in the area of Blora and Pati, particularly in Klopodhuwur, Blora.

The two most prominent places for Saminist movement are in Desa Klopodhuwur (Klopodhuwur Village) in Blora and Desa Tapelan (Tapelan Village) in Ngraho sub district, Bojonegoro which are inhabited by the largest number of Samin people. The Saminist custom is marked by their attitude, behavior and deeds which refuse to come after the legal courtesy and rules prevailing in the village or the society they live in. *Wong sikep* is derived from Javanese which means "Sikep People". This expression is an appellation for the adherents of Saminist teaching as the alternative of Wong Samin. *Wong Sikep* is a community group consisting of the adherents of Saminist teaching propagated by *Samin Surosentiko*.

The prevailing law is based on the inner heart of Samin people themselves. Thus if the member of Samin society is caught right-handed in committing improper deed (for example, stealing), he or she will be advised by the other members of the society. If the advice does not work, prayers will be sent for the offender to repent and forswear over his or her crime. It shows that mediation is a simple, easy and efficient solution used by Indonesian people in resolving dispute including those of criminal lawsuit through penal mediation. In Minangkabau, there is *Kerapatan Nagari*, presided by *Wali Nagari*, as the conflict settlement mechanism (Keebet Von Benda Beckman, 2000:73). Indonesian National Police has conducted socialization as well as long-term breakthrough in Penal Mediation. In 2005, Indonesian National Police manifested this idea in Chief of National Police's Decree No. 737/X/2005 on Community Policing Policy and Strategy (Jakstra Polmas). The decree contains the settlement of particular criminal cases in the society by means of conflict settlement alternatives. In 2008, Jakstra Polmas perfectly modified "Penal Mediation" by means of Chief of National Police's Decree No. Pol.: B/3022/XII/2009/Sdeops on 14 December 2009 on Case Handling through Alternative Dispute Resolution (ADR). The ADR works on the minor criminal cases compromised by relevant parties by means of conciliation involving the neighborhood and being recognized by the society as well as respecting the legal norms and giving priority to justice for all the relevant parties. Therefore, based on the cultural-social condition in the society of Samin Tribe, penal mediation is considered as suitable for dispute resolution in the society.

1.2. Research Problems

Based on the background of the study, the writer has formulated the research problems as follows:

- 1.2.1. How is the Samin people's perception towards the existence of the state law?
- 1.2.2. How is the relevant model of dispute resolution in Samin tribe?

1.3. Specific Objectives of the Study

The objectives of this study are:

- 1.3.1. To find out the Samin people's perception towards the existence of the state law
- 1.3.2. To find out the appropriate penal mediation model as an alternative dispute resolution in Samin society

1.4. Significance of the Study

The importance of this research is based on the consideration of the unique characteristics of Samin people. Basically, they acknowledge the existence of the state law as long it does not contradict the principles of their inner heart because all laws prevailed upon them are derived from their inner heart. Thus, the findings in this research also serve as the alternative dispute resolution among Samin people who never delivered the cases before the court.

B. Review Of The Related Literature

2.1. Penal Mediation as an Alternative Dispute Resolution of Social Conflict

Penal mediation is a typical alternative dispute resolution (ADR) implemented to resolve the civil suits. In this dimension, out-of-court ADR has been regulated in Law No 30/1999 on Arbitration and Alternatives for Dispute Resolution. In this correlation, there are some supporting institutions of ADR method, such as Indonesian Arbitration Center (BANI) whose focus is on trade and construction dispute resolution (Law No. 18/1999 jo Law No. 29/200 jo Governmental Regulation No. 29/2000) with civil jurisdiction. Basically, in Indonesian positive law, criminal cases cannot be resolved outside the court, although in extraordinary cases, out-of-court resolution might be considered. The practical implication of out-of-court dispute resolution has not so far possess formal legal foundation. The consequence of the implementation of penal mediation as one of the alternatives in resolving criminal cases by means of restitution in criminal tribunal shows that there is no significant gap between the criminal and civil law and therefore, the difference between both laws is considered not influential (Mulyadi, 2007:2).

Mudzakir (in Mulyadi, 2007:2) stated several categorization as a standard and range of out-of-court resolved cases through penal mediation as follows:

1. The relevant criminal cases were categorized as either absolute or relative crime by accusation
2. The relevant criminal cases were charged with criminal penalty and the defendant had paid the penalty (Article 80 of Criminal Law)
3. The relevant criminal cases were categorized as "violation" instead of "crime", which would only be charged with criminal penalty.

Studied in the area of regulation under partial and definite law, penal mediation has been outlined in the Chief of National Police's Decree No. Pol.: B/3022/XII/2009/SDEOPS on 14 December 2009 on Case Handling through Alternative Dispute Resolution (ADR) and Chief of Police's Ordinance No. 7/2008 on Standard Procedure of Community Policing Strategy and Implementation in Indonesian National Police's Duty Performance.

2.2. Law Selection as A Social Action

The selection of norm and forum (formal and informal) is excessively determined by the relevant necessity and situation system. The most obvious fact is that the preference of the selected norm or legal institution hardly finds a position to settle the dispute resolution both in traditional and modern society. Substantially, the institutions and procedures of dispute resolution appear in

multiple diverse forms in the cross-cultural context. Either formal or informal public and private institutions blend in a complex system. Aside from the cultural consideration, in Indonesia, the reason of avoiding conflict is that the only sides standing on the dispute are those who win and lose. The adjudication often triggers the proceeding conflict instead of terminate it.

The legal policy required for plural country like Indonesia is a policy which fairly and equally reckons Indonesian unity of diversity because a whole ranged policy will not thoroughly represents the plurality and heterogeneity of its parts.

2.3. Review of the Previous Study

In his research on “*Political Recognition in Local Regulation on Dispute Resolution in Multicultural society (Case Study of the Formulation and Implementation of Kotawaringin Timur Local Regulation No. 5/2004 on the Treatment for Ethnical Conflict Impacted People in Sampit, Kotawaringin Timur, Central Borneo Province)*”, Suharno stated that the recognition principles had been constructed in the Kotim Local Regulation No. 5/2004 by acknowledging the rights and positions in each conflicting party. The rights of Madura Ethnic as a minor and less benefited ethnic were acknowledged as the local citizen and were allowed to return to Sampit and live there as long as they performed obedience to the prevailing customs and willingly upheld the *belom bahadat* or a saying “when in Rome, do as the Romans do”. Dayak Ethnic was acknowledged as the native ethnic which had the authority on the preserved and prevailing social order and customs. They obliged every newcomer to respect and uphold the customs as long as it was related to social matters and not to religious rituals. The rules outlined had met the demand of resolving the remaining problems of the blood-shedding turmoil in 2001. It had encouraged the parties in the refugees to return to Sampit and live in harmony just as they did before the conflict arouse.

Siswono (2008) stated that the practices of natural resources exploitation without considering the environmental impact were still occurring in many areas. For examples were the practices of destructive fishing, illegal logging of tropical forests and mangrove forests, etc. The indistinct law enforcement and environmental damage had effected on the battle of exploiting the fishery resources which led to the conflict among the fishermen.

C. Research Method

3.1. Research Approach

This research uses qualitative research method. According to Bogdan and Taylor, qualitative method is a research procedure which produces descriptive data, either written or spoken, from the observed person and behavior (in Moloeng, 2004:4).

Qualitative method is applied because in this research, the form of descriptive is used to present the result of the research. The research method used in this research is adjusted to the basic objectives of this study to describe the findings on the appropriate penal mediation to be implemented in handling the conflict in Samin Tribe in Klopodhuwur Village, Blora.

3.2. Research Location

This research was conducted in Samin Tribe in Klopodhuwur Village, Blora, Central Java. This location was selected because the existence of the Samin people was an interesting object of study, especially on the penal mediation which is appropriate to be used in conflict handling in Samin Tribe in Klopodhuwur Village, Blora.

3.3. Technique of Data Collection

a. Observation

This research was conducted directly at the research location to systematically observe and record the data on the object of the study by referring to the research instruments. The observation was conducted on socio-cultural condition of Samin people, interaction pattern, occurring conflicts, and social mechanism in conflict resolution.

b. Interview

Interview is an intended conversation for particular means. The interview was conducted to the research object and informants, i.e. social leaders, spokesperson from each of the tribe under Samin tribe in Klopodhuwur Village, Blora.

c. Documentation

Documentation is a method of collecting the data relevant to variables in the form of inscription, transcript, newspaper, magazine, agenda, etc (Arikunto, 2006:236). The reviewed documents including the profile document of Samin Tribe in Klopodhuwur Village, Blora, data of the disputes occurred in Samin Tribe in Klopodhuwur Village, Blora as well as printed and electronic media which reported the conflict.

3.4. Data Validity

The data in this research was validated using the technique of triangulation. Triangulation is a technique to examine the data validity by utilizing the factors outside the data itself as the examination or comparison to the data (Moloeng, 2004:330).

Triangulation technique used in this research is the technique of investigation by source utilizing. Moleong (2004:331) explained that triangulation by source utilizing could be conducted through several steps: (1) comparing the data from the observation result to the data resulted from the interview; (2) comparing the people’s public statements to their individual statements; (3) comparing someone’s condition and perspectives to the people’s multiple diverse opinions and views, such as common people, middle and high educated people, rich people, civil servants, etc; (4) comparing data from the interview to the relevant documents.

3.5. Method of Data Analysis

The data in this research is analyzed using Miles' method of data analysis including data collection, data reduction, data presentation, data verification and conclusion.

D. Research Result And Discussion

4.1. Samin People's Perception on the Existence of the State Criminal Law

4.1.1. a. The Definition of Stealing According to Samin People

God has blessed everyone with gift by giving them the nature of kindness. Samin "*Sedulur Sikep*" people assumed that every person was naturally kind. They believed that there was no one who intended to do the wrongdoings.

People of this tribe acknowledged no stealing in their environment because a family did not acknowledge stealing done by the other member of the family. If, by any chance, there was a member of the tribe who took the other member's stuff without permission, the victim would not consider the stuff being stolen. Instead, the stuff was considered as being taken by his or her siblings. They could not help if the stuff was being wanted by their family members and would just let it go because they considered each other as family.

b. The Reaction of Samin People towards Stealing

Samín people did not have specific punishments for those who committed stealing. The punishments implemented by Samín people was tractable in disposition based on their sense of justice. According to Samín people, justice existed inside the heart of each people. In Samínist teachings, members of the tribe were considered as family or relatives. Therefore, they saw no point of taking hand on legal issues if it dealt with the members of the family. If there was any possibility a member of the tribe was caught red-handed doing any wrongdoings, for example stealing, it would be better not to punish the offender as outlined in the criminal law.

The offender would only get advised by the other members of the tribe if the case occurred for the second times. Penal mediation model suitable for the case of stealing which did not cause wide impact to the society is Victim-Offenders Mediation model because this model only involved several restricted parties during the process of penal mediation, namely the victim, the offender, the family of the conflicting parties and the mediator. In this case, the leader of Samín tribe was selected as the mediator

4.1.2. a. Adultery in the Perspective of State Criminal Law

According to Article 284 of the Criminal Law, adultery was only possible if there was any sexual intercourse between a married person and any man or woman other than her husband or his wife. It would not be considered as adultery if it was done compulsively (vide Article 285 of Criminal Law), it was done when the woman was unconscious or in vulnerable condition (vide Article 286 of Criminal Law), and it was done to a girl under fifteen years old (vide Article 287 of Criminal Law). Whereas without considering the circumstances of the offenders, Islamic Criminal Law judged every pre-nuptial intercourse as an adultery. The law regarded sex intercourse in the condition where the woman was unconscious or vulnerable as an excuse for abolition for women as the victims whereas the men were still considered as adulterer. According to the stipulation in the Criminal Law, adultery was only possible if each of both offenders had already married while unmarried people involved in this deed belonged to the party who had a share on doing the adultery (medepleger).

The penalty for adultery as outlined in Article 284 (1) of Criminal Law was nine months in prison for both the adulterer and the party who joined on committing the adultery. The stipulation related to the witnessing had not been specifically ruled under the delict of adultery in the Criminal Law. Therefore, the system of evidence verification of the adultery delict was equal to that of the other delicts. In other words, the evidence provided to prove the adultery case was the evidence as outlined in Article 184 of Criminal Law. Furthermore, Article 185 (3) stated that the official statement of a witness was enough to prove that the defendant was declared guilty of the charged crime if it was attached with the other evidence.

b. Adultery in the Islamic Criminal Law Perspective

Adultery in the Islamic Criminal Law comprised wider area than the delimitation in the Criminal Law. Islamic Criminal Law paid less attention to whom with the adultery was committed. If the adultery was done by married people, the offenders were called *muhsan* offenders whereas if it was done by unmarried people, the offenders were called *ghairu muhsan* offenders.

Based on the Islamic Criminal Law, the penalty for the adultery was adjusted to the offenders. If the offenders were *Muhsan* or already married people, they would be stoned to death (*rajam*) and if it was done by unmarried people, the offenders will be scourged for as much as eighty times.

c. Adultery in the Perspective of *Sedulur Sikep* Samin Society

Professing monogamy as the nuptial system in the society, Samín people prohibited polygamy although the majority members of the tribe were Moslem (according to some sources, they professed Adam's religion). Samín people viewed marriage as a sacred bound which happened once in a lifetime (*wong rabi iku sepisan kanggo selawase*) and therefore, should be preserved in the same manner as the concept of *sedulur sikep*. Even according to SuaraMerdeka.com (2010), Samín people considered divorce as a taboo. Therefore, there had not yet so far a case of divorce except of those caused by fatality.

The concept of adultery followed by Samín people was similar to that of the legal constitution. The society defined adultery as a sex intercourse committed by people who were already bound in different marriages or one of both people were already married. It was also not considered as adultery if it was intentionally done by both offenders (if it happened in *ngawulo* bound). This concept could be explained if we traced the step-by-step process of marriage. According to the research conducted by Ratrie

Devi A (2012:5), the stages of marriage in Samin society began with the *gumen* or *nyuwuk* (asking), that was a process where the man and his family came to the women's family to ask whether or not the woman was still *legan*, which means that the woman was not yet married and hence the parents of the man was about to propose.

To resolve the adultery case, the first thing first was to recognize adulterer. If both of the adulterers were nuptial, they were advised not to repeat the same mistake for the second time. Besides, the parties being betrayed, in this case the wife or husband of the adulterers, had the right to determine the intended dispute resolution. If both of the adulterers had not married, they were supposed to conduct a marriage. The marriage was considered as the abolition of the adultery guilt. It was implied in the statement that the adultery on unmarried couple was an expression of the overflowing desire and thus the society would acknowledge it.

d. The Elements of Adultery in Samin Perspective

According to the custom, the existence of adultery was determined by several factors:

1. Adultery or *overspel* was an *opzettelijk delict* or intentionally committed crime. In other words, the deliberateness factor had to be proven on the adulterers in order to prove that the adulterers were intentionally committing one of the adultery crimes.
2. The condition of the existence of adultery was that it was committed by both or one of the adulterers who had married or both are unmarried but it was done outside the process of *ngawulo*.

According to the explanation about adultery above, it could be concluded that:

1. The concept of adultery followed by Samin people was almost similar to the concept outlined on the state law that the society is considers adultery as a sex intercourse conducted either by two people with each of them had already married or one of those was already married. The sex intercourse was not considered as adultery if it was done intentionally by both offenders (under *ngawulo* bound). Otherwise, it would be regarded as adultery.
2. The adultery was considered as a crime if it was conducted intentionally by two people with each of them had already married, one of those had already married, or both of them were unmarried and were not done under the *ngawulo* process.

According to the researchers, the society should no longer isolate themselves from the influences and culture outside the tribe. The customs in Samin Tribe were still ineffective to be applied in recent era because there had been a number of modus operandi operated by the villains. Related to the law, Samin people had better begin to become widely open and trust the government by means of the law upholder to resolve the dispute.

4.2. Dispute Resolution Model in Samin People

Based on Restorative Justice Approach, justice could only be achieved through the involvement of many parties in resolving the emerging conflict caused by a crime instead of only justice fulfillment as outlined in the law. The purpose of this concept in dispute resolution was for condition recovery. The main principle of this concept was to search for an appropriate effort to ethically and properly deal with the conflicts in order to encourage the disputing parties to reach an agreement as the establishment of the values of compromise. It would later create recovering communication between the disputing parties for the sake of loss and damage recovery. Penal mediation had the offender and the victim met and therefore, was often recognized as Victim-Offender Mediation (VOM), *Tater-Opfer-Ausgleich* (TAO), or Offender-Victim Arrangement (OVA) (<http://bardanawawi.wordpress.com/2009/12/27/mediasi-penal-di-luar-pengadilan/>). Martin Wright (quoted form Suseno and Nella Sumika Putri, 2013: 44) defined penal mediation as a process where the victim(s) and the offender(s) communicated by means of the neutral third party, either directly or through the third party, and agreed or made it possible for the victims to express their necessity and feelings and the offender to accept and be responsible (Suseno and Nella Sumika Putri, 2p13:44).

Penal mediation was a terminology used to define the dispute resolution outside the court as a legal breakthrough implemented by the law upholder. Penal mediation was a novelty to which Indonesian jurisdiction was familiar. It was a solution to resolve the dispute outside the court in order to reduce the lawsuit accumulation in the court as well as to reduce the state administration expenses in resolving the dispute. Generally, penal mediation was used in police investigation process as the gate for the cases before proceeding to the next processes. Regarding to Samin people's reaction towards stealing, the possible reaction of the tribe had already reflected on their perspectives of stealing. They never considered a deed as stealing if it was committed by the members of the tribe and therefore, they did not have any particular law dealing with the offender.

In this case, Samin people set out reconciliation approaches for the offenders. If an offender was questioned by the leader of the tribe, he or she had to speak the truth because Samin people appreciated honest people even though they had committed wrongdoings. Penal mediation model implemented if the stealing caused a wide impact to the society's loss was the Victim-Offenders Mediation model. The model was appropriate because it only involved restricted parties in its resolution where the leader of the tribe was selected as the mediator. Victim-Offenders Mediation was a penal mediation in the form of agreement between the victims and the offenders, an alternative in litigation process to avoid imprisonment sentence.

E. Conclusion And Suggestion

5.1 Conclusion

5.1.1 Samin People's Perspectives of the Existence of the State Criminal Law

- a. Samin people set out reconciliation approaches for the offenders. If an offender was questioned by the leader of the tribe, he or she had to speak the truth. The offender would only be advised by the leader and other members of the tribe.

- b. Samin people kept on being subject unto the state criminal law. If the offenders were not a member of the tribe and the reconciliation approaches did not work on them, they would be charged as outlined in the Criminal Law.
- c. Samin people also accommodated the existence of the state criminal law if one of the disputing party suffered a loss and wanted to bring the case before the state law. However, the state criminal law implemented in the case of adultery had never occurred in Samin society. If the adultery was committed by two already married people, the very first conflict resolution taken would be negotiation. The offenders would be advised not to repeat the wrongdoings by their family. In addition, the party who suffered the loss in the case of adultery (the offenders' wife and husband who were innocent) had the right to propose a divorce.

5.1.2 Dispute Resolution Model in Samin Tribe

The appropriate penal mediation model if the stealing or other minor crimes occurred was Victim-Offenders Mediation model because this model only involved restricted number of parties in the mediation, namely both the offender and the victims along with their family and the leader of the tribe as the mediator.

5.2 Suggestion

Based on the results of this research, penal mediation model is suitable to be implemented in resolving the social conflicts which lead to criminal law in Samin Tribe. The government must facilitate it by enacting the penal mediation model into a law which clearly regulate the types of crimes could be resolved by means of the penal mediation in the police.

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