

**IMPRISONMENT FOR DOMESTIC VIOLENCE OFFENDERS
WHO HAVE MEDIATED
(Review of Simalungun District Court Decision No. 19/PID.
SUS/2019/PN Sim)**

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ABSTRACT

Law No. 23 of 2004 on the Elimination of Domestic Violence provides a strong legal foundation that becomes domestic violence which was originally a domestic business into state affairs. For this reason, the thought arises of using penal mediation by seeking a win-win solution so that prison sentences must be avoided to the perpetrator so that the purpose of Article 4 letter d is achieved. The research methods used in this writing are normative juridical research methods or literature research methods. The results of the study showed that the imprisonment for 22 days to the perpetrator was very inappropriate, the opportunity to reconcile the domestic violence case in the District Court was open. Kuhap has provided an opportunity for judges to resuscitate offenders from prison. There are two provisions in the Kuhap that can be used as a legal basis for the implementation of penal mendiasi, namely Article 14A and Article 14 C, By using Article 14A, judges can prevent domestic offenders from prison sanctions by only giving a suspended sentence under one year until it does not need to be lived. And Article 14C to require perpetrators to cure violent behavior by undergoing counseling.

Keywords: Prison, Offender, Domestic Violence, Mediation

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INTRODUCTION

Until now criminal is still used and "relied upon" as one of the means of criminal politics. This can be seen from the existence of criminal threats of almost all statutory products issued by the legislative body of this State, although the product of the legislation does not regulate the specifics of a criminal act.¹ Prison criminals are used as mainstays

¹ Barda Nawawi Arief, *Beberapa Aspek Kebijakan Hukum Pidana* (Bandung: Citra Aditya Bakti, 1998).

in an effort to overcome the occurrence of criminal acts, resulting in more and more criminal offenders being placed in correctional institutions along with the increasing number of criminal offenders.

The prison sentence should not be used as a criminal that is threatened against almost all criminal acts (crimes), because each of these crimes when viewed from the legal interests that will be protected, it can attack or rape different legal interests, so that the criminal form that will be imposed needs to be adjusted to the protected legal interests and must also be in accordance with the purpose of prosecution.²

This condition can have consequences for the Indonesian Criminal Justice system in dealing with the whole always end up in prison. Even though the prison is the best solution in solving crimes, especially crimes with the "damage" it causes can still be restored, so that conditions that have been "damaged" can be returned to their original state. The restoration allows for the removal of stigma from individual perpetrators. The paradigm of punishment is as *restorative justice*, where the perpetrator repairs the harm he has caused to the victim, his family and also the community.³

Restorative justice can be implemented in the resolution of cases through *Alternative Dispute Resolution (ADR)*. The settlement of criminal cases through out-of-court mechanisms is increasingly prevalent and acceptable to the public because it is felt more able to reach a sense of justice. Although practitioners and jurists are of the view that *ADR* can only be applied in civil cases, not to resolve criminal cases because basically criminal cases cannot be resolved through out-of-court mechanisms. The settlement of criminal cases in *restorative justice* can be exemplified in the form of penal mediation, because the impact caused in penal mediation is very significant in the law enforcement process. One of the most appropriate criminal acts to implement penal mediation is the criminal act of domestic violence (hereinafter abbreviated as KDRT). Domestic violence is a type of violence that has typical traits that are carried out in the home, the perpetrator and victim are family members and are often considered not as a form of violence. Law No. 23 of 2004 on the Elimination of Domestic Violence (Selanjut called PKDRT Law provides a strong legal foundation that becomes domestic violence which was originally a domestic affair into state affairs. For this reason, the thought arises using penal mediation by seeking a *win-win solution* and trying to be a solution to problems in the criminal justice system.⁴

The concept of penal mediation is expected to be an alternative in resolving domestic violence cases. This discourse is taken from the settlement of cases in the civil field. Mediation is an intermediary to take an agreement between the perpetrator and the victim. The basis of this concept is taken from *restorative justice* who seeks to provide

² P.A.F. Lamintang, *Hukum Penetensier Indonesia* (Bandung: Armico, 1984).

³ I Ketut Widiarta, et.al. "Penyelesaian Perkara KDRT Melalui Mediasi Penal Pada Tingkat Penyidikan Di Polres Kapuas," *Program Magister Ilmu Hukum Universitas Brawijaya, Jawa Timur* (n.d.): 2.

⁴ *Ibid.*

justice with a balance between victims and domestic offenders. As the example found in the verdict Number 19 /PID. SUS/2019/PN Sim. However, although mediation between the victim and the perpetrator has been done, the judge still imposes a prison sentence on the perpetrator, so it is interesting to analyze the basis of the judge's consideration of imposing a prison sentence on the perpetrator even though between the victim and the perpetrator of domestic violence has been mediated.

METHOD

The methods used in this paper are normative or juridically normative legal research methods. Legal research has several approaches, with the approach researchers will get information from various aspects of the issue that will be sought answers. The approach used in this study is the⁵ *statute approach* and the *case approach* in conducting case analysis (*case study*) Decision No. 19 / PID. SUS/2019/PN Sim.

The source of legal materials used in this study is primary legal material and secondary legal material, primary legal material consists of binding legal materials that are laws and regulations related to the basis of consideration of judges imposing prison sentences for domestic offenders who have mediated with victims. Secondary legal material, i.e. all publications about the law that are official documents, such as books, dictionaries, journals, and comments on the judge's decision. Therefore the secondary legal materials used in this study are books, journals, magazines, and the internet related to research topics.

Furthermore, this study is analyzed qualitatively, namely analysis that describes legal materials obtained both primary legal materials and secondary legal materials.

DISCUSSION

Consideration Of The Judge Imposed A Prison Sentence On Domestic Violence Offenders Who Have Mediated In Decision No. 19 / PID. SUS/2019/PN Sim

The understanding of domestic violence (KDRT) can be found in the general provisions of Article 1 paragraph (1) of the PKDRT Law. Domestic violence is any act against a person, especially a woman, resulting in the onset of misery or suffering physically, sexually, psychologically, and/or neglect of the household including the threat to commit acts, coercion, or unlawful deprivation of independence within the scope of the household.

The 3 (three) principles referred to include the *lex superior de rogat lex inferior* principle, *lex specialist derogate lex generalis*, *lex posterior de rogat lex priori*. Jazim Hamidi further explained that based on the study of legal science 3 (three) principles as referred to are important pillars in understanding the construction of statutory law in Indonesia in detail, it can be explained that: a) The principle of *lex superior de rogat lex inferior*, higher regulations will override lower regulation when regulating the same and conflicting substances. b) As a *lex specialist derogat lex generalis* principle, more specific

⁵ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2011).

rules will override general rules when regulating the same and contradictory substances. c) The principle of *lex posterior de rogat lex priori*, the new regulation will override the old regulation.⁶

Domestic violence mediation has its own specificity that makes it different in other mediations. This is due to the environment as a criminal case, emotional relationships / feelings of married couples, and imbalances in the position / strength of the parties. Domestic violence cases are the cause of divorce, within the scope of religious courts divorce must be resolved first by mediation in accordance with Marriage Law No. 1 of 1974.⁷

Dale Bagshaw, a family mediation expert from Australia, insists there are several conditions that must be met in order for mediation to be effective in resolving domestic violence cases, namely when women have been spared violence, and the perpetrator has accepted responsibility for the violence, then mediation may be able to offer opportunities for women to negotiate for themselves. This significantly increases the self-confidence and self-empowerment of victims. Therefore, mediators in Australia can conduct mediation where domestic violence has been identified if the victim has chosen based on sufficient information.⁸

Mediation is an alternative to out-of-court dispute resolution. Based on the above explanation, penal mediation is a very appropriate method of dispute resolution to deal with domestic violence cases based on several reasons, namely:

1. Indonesian culture that prioritizes peaceful resolution of disputes based on consensus deliberation to maintain harmony in the community, especially in domestic conflicts. Although household couples must be separated but nevertheless maintain a long-term relationship, the problem is resolved peacefully, especially when the couple already has children. This still strong community culture can also put pressure on the perpetrator by providing moral sanctions in the form of exclusion or other forms;
2. Islamic customary law and law that are still alive and practiced by the community support and even prioritize the use of mediation in the peaceful resolution of disputes, including in cases of domestic violence.
3. The majority of people still consider domestic violence cases to be known to the public. This is in accordance with the basic nature of mediation that is obliged to maintain the confidentiality of the resolution of a dispute;
4. Victims get the opportunity to get an explanation of the violence that occurred, accept an apology, or be compensated for the suffering experienced that cannot be obtained from the court process.

⁶ Eka N.A.M Sihombing, Cynthia Hadita, Analisis Wacana Hukuman Pancung Di Provinsi Aceh, *Jurnal Legislasi Indonesia*, Vol. 6, No. 4, December (2019).

⁷ Rahmawati, "Rendahnya Komitmen Dalam Perkawinan Sebagai Sebab Perceraian," *Komunitas: Internasional Of Indonesia Society and culture* (2013): 208.

⁸ Yustriando, "Implementasi Mediasi Penal Sebagai Perwujudan Nilai Pancasila Guna Mendukung Supremasi Hukum Dalam Rangka Pembangunan Nasional," *Jurnal Pembaharuan Hukum* 1, no. 1 (2016): 23–46.

5. The perpetrator (husband) as one of the pillars of the household gets the opportunity to improve himself by avoiding prison to protect the future of the family, especially children.

There are several conditions to make penal mediation as an effective method of resolving domestic violence, there are two conditions, namely: substantive conditions that are the main consideration / basic terms and procedural conditions related to the continuity of the penal mediation process in order to run. Substantive requirements consist of:⁹

1. The perpetrator must be aware of his actions and be willing to take responsibility. On this basis, the perpetrator shows insyafan and is willing to improve himself until domestic neglect does not reoccur;
2. Penal mediation is better for novice offenders who have never been convicted by a court before;
3. The victim is willing to go through the process of penal mediation with sufficient information and be realistic about the possibility of results that can be achieved;
4. Both parties (victims and perpetrators) are present at the initial hearing to be asked their willingness to undergo a penal mediation process and are always present at every stage of the penal mediation process;
5. The perpetrator is required to follow counseling to cure violent behavior;
6. The perpetrator must pay compensation to the victim for the cost of recovering the suffering of violence experienced if the victim of domestic violence wants, especially if there is still a divorce. Thus penal mediation also provides justice to victims where during this time the perpetrator actually pays a fine to the state.

The procedural requirements consist of:

1. The mediator must have good mediation skills, sufficient experience and gender-mindedness in dealing with domestic violence cases;
2. Given that judges do not have the appropriate scientific background in mediating domestic violence cases, it is necessary to think about whether non-judge professionals who have undergone the justification of court mediators and have doctors, psychologists, social workers, and others), can be involved as mediators;
3. Mediator needs to be assisted by a co-mediator who has special skills in addition to serving as a mediator's assistant in dealing with the specificity of domestic violence cases, co-mediators who have special skills can also provide counseling for the perpetrator to change his attitude (curative) in order to prevent domestic violence in the future; At the request of the victim or mediator, the victim can be accompanied by someone from the family, social worker or psychologist who strengthens the psychological condition of the victim to negotiate constructively in the process of penal mediation.

⁹ Fatahillah A.Syukur, *Mediasi Perkara KDRT (Kekerasan Dalam Rumah Tangga) Teori Dan Praktek Di Pengadilan Indonesia* (Bandung: Mandar Maju, 2011).

Chronological Case, Monday February 19, 2018 at 16.00 Wib victim witness BETTY with her son named witness REHANA KHALIDAZIYAH conducted a cleanup located on medan km.10.5 sinaksask village district Tapian Dolok Simalungun district then the victim witness saw the items in his house had been reduced and the victim witness asked the ahmadi defendant who was the husband of the victim witness by saying " **why the items were lifted / moved to your parents' house when I was not at home**" then the defendant replied "**like me this is my property all I want to bring later, you jumped at the Bead you told him to report me**" then the victim witness replied "**wait for me to call**" then the victim witness tried to take his mobile phone that was on the table then the defendant immediately grabbed the phone and slammed the floor until Damaged and take back to be put in the bathtub then the victim witness tried to take his mobile phone from the hands of the accused so that currently the defendant violence to the victim witness by pushing the victim witness hard, so that the victim witness fell and hit the bathroom door then the defendant pinned the victim witness to the bathroom door made of zinc with a fringe with wooden broti. As a result of the defendant's actions resulted in betty victim witnesses experiencing back pain and bruising and chest next to the canam hurt and resulted in bruising, as a result of the incident the victim witness was disturbed to carry out daily activities and the victim witness also experienced trauma, according to Visum Et Repertum No: 35.1 / VER / 008 / VER / RSUD / TU / II / 2018 dated February 20, 2018 made and signed by Dr.Sahala Bungaran Silaen Doctor at Mr. Rondahaim-Pamatang Raya Hospital.

For this act, defendant Ahmadi was found guilty of committing criminal acts "having committed physical violence within the scope of the household" in violation of Article 44 paragraph (1) of Indonesian Law No.23 of 2004 concerning the elimination of domestic violence and sentenced to prison for 22 days.

Case Analysis, The judge's decision is very related to how the judge in fattening consideration based on the facts and evidence in court and the judge's belief in a case, therefore the judge has a central role in handing down the court's decision. In the court's decision there must be considerations regarding matters that are burdensome and alleviate the verdict. These considerations are used as an excuse by the judge in handing down his verdict, be it in the form of other verdicts.¹⁰

Consideration of matters that aggravate and relieve this defendant is regulated in Article 197 letter d and Article 197 letter f of the Criminal Code (KUHP) in Article 197 letter d reads "Considerations compiled briefly regarding facts and circumstances along with the means of proof obtained from the examination of the trial that became the basis of the defendant's guilt" while Article 197 letter f reads "Article of law that is the basis of the application or action and the laws and regulations on which the law is based on the verdict, accompanied by incriminating circumstances and disremining the accused."

¹⁰ Nurhafifah & Rahmiati, "Pertimbangan Hakim Dalam Menjatuhkan Pidana Terkait Hal Yang Memberatkan Dan Meringankan Putusan," *Kanun Jurnal Ilmu Hukum* XVII, no. 66 (2015): 344.

Soekanto in Hadita (2020) Power has a very important role because it can determine the fate of millions of people. Both the bad power must always be measured by its usefulness to achieve a goal that has been determined or realized by the community first.¹¹

Mitigating factors are a reflection of the good nature of the defendant at the time of the trial and aggravating factors are judged to be the evil nature of the accused. Such consideration of judges also refers to Article 5 paragraph (1) of Law No. 48 of 2009 concerning the Power of Justice i.e. judges and constitutional judges are obliged to explore, follow and understand the values of punishment and a sense of justice that live in society. And in Article 8 paragraph (2) also mentioned in considering the lightness of the criminal, the judge must also pay attention to the good and evil nature of the accused. There are 2 (two) categories of judge considerations in deciding a case, namely the consideration of juridical judges and non juridical considerations of judges.¹²

Juridical consideration is the judgment of the judge based on factors that have been revealed in the trial and by law has been established as things that must be contained in the verdict, the verdict of a juridical nature includes: a. The indictment of the public prosecutor, b. the testimony of the accused, c. witness testimony, d. evidence, e. articles of criminal regulation. While non juridical considerations consist of: a. the background of the defendant's actions, b. due to the actions of the accused, c. condition of the accused, d. socio-economic circumstances of the accused, and e. religious factors of the accused.¹³

While non juridical considerations consisting of the background of the defendant's actions, the economic condition of the accused, plus the judge must believe whether the defendant committed a criminal act or not as contained in the elements of the criminal act brought to him.

Based on the case of the position that occurred in Decision No. 19 / PID. SUS/2019/PN Sim the judge in sentencing the defendant considers incriminating matters and mitigating matters for the defendant, as follows, Incriminating things:

- a. The defendant's actions caused pain to the victim's witness
- b. Things that lighten up
 - a. The defendant was forthright so as to smooth the course of the trial.
 - b. The defendant was courteous in court and has never been convicted.
 - c. The defendant admitted his actions and regretted his actions.

¹¹ Cynthia Hadita, Regional Autonomy Political Politics Of Regional Liability Reports To Regional Representatives In The Implementation Of Local Government, *Nomoi Law Review*, Volume 1, Issue 1, May 2020, p. 92.

¹² D Indawati S, S, "Dasar Pertimbangan Hakim Menjatuhkan Putusan Lepas Dari Segala Tuntutan Hukum Terdakwa Dalam Perkara Penipuan (Studi Putusan Pengadilan Tinggi Denpasar Nomor : 24/Pid/2015/PT.DPS)," *Jurnal Verstek* 5, no. 2 (2016): 269.

¹³ Nagara P, R, "Pertimbangan Hukum Oleh Hakim Dalam Menjatuhkan Putusan Terhadap Anak Yang Melakukan Penyalahgunaan Narkotika," *Fakultas Hukum Universitas Atma Jaya Yogyakarta* (2014): 5.

Interestingly, the legal facts revealed at the trial, between the accused and the victim's witness there has been peace as stated in the Letter of Peace Agreement between Ahmadi (the accused) and BETTY (Victim witness). Actually the opportunity to reconcile the domestic violence case in the District Court is already open. The Criminal Procedure Law (hereinafter referred to as kuhap) has provided an opportunity for judges to resuscitate offenders from prison. Many judges have tried to reconcile the victim and the perpetrator with the aim of maintaining the integrity of the household as contained in Article 4 letter d of Indonesian Law No. 23 of 2004 concerning the elimination of violence in the household.

There are two provisions in the Kuhap that can be used as a legal basis for the implementation of penal mediation, namely Article 14A and Article 14C which read:

Article 14a

If the judge imposes a maximum prison term of a year or a criminal cage, excluding the criminal confinement in lieu of a fine, then in his ruling the judge can also order that the criminal should not be lived, unless at a later date there is a judge's decision that determines another because the convict committed a criminal offense before the probation specified in the above order is exhausted, or because the convict during probation does not meet the specific conditions that may be specified in the order.

Article 14 C

By the order referred to in Article 14a, unless the criminal fine is imposed, the judge, in addition to establishing the general condition that the convict will not commit a criminal offence, may establish a special condition that the convict within a certain time, which is shorter than his probation, shall reimburse any or part of the losses incurred by the crime.

By using Article 14A, judges can prevent defendants from prison sanctions by only giving a sentence of probation under one year until it does not need to be served. As a condition of evasion of the prison sentence, the judge can then use the provisions of Article 14C to require the accused to cure violent behavior by undergoing counseling. These two provisions are *senafas* with the spirit of restorative justice aimed at preventing offenders from prison, but also protecting victims from further violence this is done by requiring the perpetrator to undergo counseling to rehabilitate violent behavior so as not to repeat itself. Thus, it is expected that the integrity of the household is still maintained to protect the future interests of the family.

According to the author of the system that is in accordance with Indonesian conditions is penal mediation as a diversion from criminal courts. This system breathes restorative justice more than others. It is the parties who determine the value of justice they want. If using the first system then a successful agreement is possible and can be countered by the judge examining the case. But mediators play an important role in ensuring that the agreement is not unlawful and reflects justice for both sides. Do not let

the women as victims of domestic violence that moyoritas weaker and avoid divorce harmed their rights in the deal. To that end, the panel of judges can help by examining the resulting agreement because it will be issued in the form of a peace deed and included as a ruling.

Penal mediation would be better integrated with the court than outside the court so that the authority of the institution can pressure the perpetrator to be careful in his actions and not to overcome his acts of violence because there is a criminal threat. Integration with the court will also give legal force (execution) to the agreement resulting from penal mediation. The obligation of the court to reconcile the parties to the dispute and avoid this divorce is in accordance with the mandate of the marriage law which states that divorce can only be done before the court after the court cannot reconcile the two parties. The legal reasoning penal mediation is the best way. The arbitration for penal mediation in court will also be able to require the perpetrator to follow counseling in order to change his violent behavior. This is in accordance with Article 50 of the PKDRT Law which states that judges can impose additional sentences in the form of counseling. If counseling as a condition of this probation penalty is violated then the perpetrator will face a prison sentence. Counseling will be more effective in dealing with novice actors. In the implementation of penal mediation in court, the perpetrator should only be given one opportunity to avoid prison. if after undergoing counseling it turns out that the behavior does not change and repeats his violent acts, then the prison sanction is indeed the right sanction for the perpetrator.

CONCLUSION

The criminal imprisonment for 22 days to the accused defendant is considered inappropriate, this is based on the facts revealed by the trial that between the accused and the victim there has been peace as stated in the Letter of Peace Agreement, in the criminal proceedings to the accused the judge can be guided by Article 14A and Article 14C. By using Article 14A, judges can prevent defendants from prison sanctions by only giving a sentence of probation under one year until the prison sentence does not need to be served. As a condition of evasion of the prison sentence, the judge can then use the provisions of Article 14C to require the accused to cure violent behavior by undergoing counseling. This is in line with the provisions of Article 4 letter d of Law No. 23 of 2004 on the elimination of domestic violence which aims to maintain the integrity of a harmonious and prosperous household. In the case above penal mediation in court has not been applied by the judge, actually penal mediation in court can meet the expectations of the PKDRT Law which adheres to the principle of criminal balance. As reached by Guse Prayudi, according to him, the classification of the level of mild violence in the PKDRT Law is useful not only to balance the purpose of the prosecution of perpetrators, but also maintain household integrity.

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