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# The 2nd Proceeding "Indonesia Clean of Corruption in 2020"



"Comparative Law System of Procurement of Goods and Services around Countries in Asia, Australia and Europe"



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## IMPLEMENTATION OF PENAL MEDIATION IN CRIMINAL LAW

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### **ABSTRACT**

*Penal mediation is an alternative settlement of criminal cases emphasizing restorative justice approach, which is carried out between the victims and the offenders or his/her families with the purpose of restoring the balance in the society. The major problem in this research is, firstly, how is the penal mediation in criminal law enforcement implemented today? Secondly, how are the weaknesses of the implementation of the penal mediation in criminal law enforcement today? Thirdly, how is the penal mediation in criminal law enforcement based on Pancasila values of justice constructed today?*

*In order to answer the problems mentioned above is obtained by using social legal research method, conducted with case studies that have already been through the legal processes by law enforcement officials until the court makes the decision, this kind of legal processes is deemed to have injured sense of justice in the community by the society. Penal mediation provides the best way to resolve problems or conflicts between the perpetrator and the victims by engaging between them directly in order to solve the problems with peaceful means in accordance with Pancasila values of justice.*

*The conclusion in this study is the current formulation of the regulations has not accommodated penal mediation as a form of settling disputes outside the criminal justice processes. Penal mediation arrangements in the future must be included in the substantive criminal law, the formal criminal law and the implementation of criminal law.*

**Keywords:** *Construction, Penal Mediation, Pancasila Justice.*

## A. Introduction

The concept which has been running for this that does not provide protection and respect for the interests of the victims and the offenders. This is a conventional mechanism which was based on the establishment of a formal process penal (criminal justice system) without looking at the development of law and sense of justice.

Law reform and criminal justice system rest on socio-cultural values of Indonesian society, and thus reflect the values of Pancasila philosophy of life and global development that reflect respect for the values of local wisdom (local wisdom), is a necessity.<sup>1</sup>

The problems that can be raised in this paper are:

1. How is the implementation of penal mediation in criminal law enforcement at this time?
2. How are the shortcomings of the penal mediation in criminal law enforcement at this time?
3. How is the construction of penal mediation in criminal law enforcement based on Pancasila values of justice?

## 1. Research Methods

This study is a socio-legal (social legal research). Socio-legal studies (socio-legal research) is the study of law in the form of empirical studies are oriented towards the discovery of theories about the process and about the working of law in society.<sup>2</sup>

## 2. Results and Discussion

### a. Implementation of penal mediation in criminal law enforcement today

#### A. Ideas and Principles of the Penal Mediation.

Criminal Mediation that is developed based on the idea and working principles as follows:<sup>3</sup>

- a. Conflict Handling/on fliktbearbeitung.
- b. Process Orientation; Prozessorientierung).
- c. Informal Proceeding - Informalität.
- d. Active and Autonomous Participation - Partei autonomie/Subjektivierung.

#### B. The Comparison of Penal Mediation in Various Countries

<sup>1</sup> Natangsa Surbakti, 2015, *Peradilan Restoratif Dalam Bingkai Empiris, Teori Dan Kebijakan*, Genta Publishing, Yogyakarta, p. 210.

<sup>2</sup> Zaenudin Ali, 2009, *Metode Penelitian Hukum*, Sinar Grafika, Jakarta, p. 13.

<sup>3</sup> Barda Nawawi Arief, 2010, *Masalah Penegakan Hukum dan Kebijakan Hukum Pidana dalam Penanggulangan Kejahatan*, Kencana, Jakarta, p. 5.

Some countries that have implemented penal mediation as an alternative to the settlement of criminal cases:<sup>4</sup>

**Albania; Amerika; Argentina; Belanda; Norwegia; Portugal;**

Barda Nawawi Arief outlines the penal mediation in some countries, a comparative material can be put forward as follows :<sup>5</sup>**Austria; Belgia; Jerman; Perancis; Polandia.**

### C. Penal Mediation Based On Local And Cultural Wisdom Values of Indonesia With Pancasila Philosophy

Law state of Pancasila which is based on the principle of the kinship means that Indonesia prefers the common people, but the dignity of the human being as an individual remains respected, and our paradigm about the state of law to function aegis that is democracy enforcement including the democratization of law, social justice and human decency. The shape of the kinship principle is consensus.<sup>6</sup>

The implementation of the consensus which is based on the values of Pancasila is very important in everyday social life. Way of solving problems of criminal law with the consensus in the form of penal mediation can help people achieving the highest justice and also gain harmonious, secure and peaceful life.

### **b. The short coming sof the penal mediation in criminal law enforcement to day**

Weak nesses in the implementation of the penal mediation today, is: because the reisno legal framework for penal mediation, perception of law enforcemen tofficers that are not the same for penal mediation, still the law enforcemen tofficers who have not been willing to be a mediator, limited time, compensation that is not affordable, and yet the good intention of the perpetrator or sor the vic timsort heir families to settle criminal cases through penal mediation.

### **c. Construction of penal mediation in criminal law enforcement based on Pancasila values of justice**

#### 1. Construction value

Construction value of penal mediation in criminal law enforcement based on Pancasila values of justice is to achieve peace through mediation which protect the interests of the perpetrator and victim of crime in a balanced, fair and dignified way.

<sup>4</sup><https://core.ac.uk/download/files/379/11727763.pdf>, downloaded at 31-08-2016

<sup>5</sup>Barda Nawawi Arief, *op.cit.*, p. 26.

<sup>6</sup> Teguh Prasetyodan Ari Purnomosidi, 2014, *Membangun Hukum Berdasarkan Pancasila*, Nusa Media, Bandung, p. 52.



## 2. Construction law

### **Weakness**

Article 109 Paragraph (2) Criminal Procedure Code (KUHAP) and Article 140 Paragraph (2) a. Criminal Procedure Code (KUHAP).

In the article, the peace through mediation has not been a reason to stop the investigation and stop the prosecution.

### **after Construction**

- Article 109 Paragraph (2) Criminal Procedure Code (KUHAP)

In the case of investigation to stop the investigation because of **peace through mediation**, insufficient evidence, the incident that was not a criminal actor proceeding terminated by operation of law, the investigators notify the public prosecutors, the suspect or his/her families.

- Article 140 Paragraph (2) a. Criminal Procedure Code (KUHAP)

In terms of the public prosecutors decided to discontinue prosecution for their **peace through mediation**, insufficient evidence, the incident that was not a criminal actor the case was closed by law, the public prosecutors put in a decree

## 3. The Discovery of Legal Theory

The discovery of a new legal theory is: Theory of Penal Mediation of Pancasila, means a medium that puts the completion of the criminal case consensus between perpetrators and victims of crime or their families to seek peace that protects the interests of the perpetrators and victims of crime in a balanced, fair and dignified way.

## **D. Conclusion**

### **1. Conclusion**

After assessment, the conclusion can be drawn as follows:

- a. Implementation of penal mediation in criminal law enforcement today is:

1. At the level of the Advocate, a peace agreement through mediation between the offenders and the victims or his/her families is followed by creating a peace agreement letter, and the case is considered to have been completed.
2. At the level of investigation by police, a peace agreement through mediation between the offenders and the victims or his/her families:

After being made / published SPDP, and BAP, then they will be asked to create a revocation report and made advanced BAP both the victims and perpetrators of criminal acts whose contents revoke the description on the dossier before, so the proof is made /

deemed insufficient evidence, the investigation process is stopped by grounds of insufficient evidence. (Article 109 Paragraph (2) Criminal Procedure Code (KUHAP)), made / published SP3.

Diversion, made / published SP3.

3. At the level of prosecution by the prosecutors, even though there has been peace between the offenders and the victims or his/herfamilies, but the letter of the peace cannot be used as a basis to stop the prosecution, except to the Diversion and a waiver of the case in the public interest (Principle of Opportunity).
4. At the court level, although there has been peace between the offenders and the victims or his/herfamilies, but the letter of the peace cannot be used as a basis for stopping the trial, but it is only used to commute or state demands of the prosecutor not acceptable, except for Diversion. It remains decided with the decision / determination of judges.
5. At the level of the Correctional Institution (LP) Indonesia, mediation has not been implemented, because it has no "Legal Standing" regarding penal mediation.

b. Weaknesses of penal mediation in criminal law enforcement today are:

1. Absence of legal protection regarding penal mediation.
2. The perception of law enforcement officers are not the same on penal mediation.
3. There are still the law enforcement officers who have not been willing to be a mediator.
4. Limited time.
5. Unaffordable compensation.
6. The absence of good faith on the perpetrators or victims or their families to settle criminal cases through penal mediation.

c. Construction of penal mediation in criminal law enforcement based on Pancasila values of justice Pancasila:

1. Construction value:

Bringing peace through mediation which protects the interests of the perpetrators and victims of crime in a balanced, fair and dignified way.

2. Construction law:

- a. Article 109 Paragraph (2) Criminal Procedure Code (KUHAP)

In the case of investigators to stop the investigation because of **peace through mediation**, insufficient evidence, the incident that was not a criminal act or proceeding terminated by operation of law, the investigators notify the public prosecutors, the suspects or his/her families.

b. Article 140 Paragraph (2) a. Criminal Procedure Code (KUHAP)

In terms of the public prosecutors decided to discontinue prosecution for their **peace through mediation**, insufficient evidence, the incident that was not a criminal act or the case is closed by law, the public prosecutors pour it in a decree.

3. The discovery of a new legal theory is:

Penal Mediation Theory of Pancasila, means a medium that puts the completion of the criminal case consensus between perpetrators and victims of crime or their families to seek peace that protects the interests of the perpetrators and victims of crime in a balanced, fair and dignified way.

## 2. Recommendation

1. The government and the People's Representative Council of the Republic of Indonesia (DPR) should amend Article 109 Paragraph (2) and Article 140 Paragraph (2) a Criminal Procedure Code (KUHAP).
2. The Penal Code (KUHP), the Criminal Procedure Code (KUHAP) and Penal Execution Law should be made or revised to include provisions on penal mediation as a settlement of a criminal case outside the judicial processes.

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