

# Pancasila Conceptualization on Penal Mediation in Indonesia

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## Abstract

Penal mediation is not a new things in Indonesian culture. In fact, penal mediation is a reflection of Pancasila, Indonesian principle and ideology. It can be seen on the need of a meeting between the stakeholders (victim, offender, and the mediator) in resolving the case. In indigeneous perspective, we called these meeting with musyawarah mufakat. Stakeholders meet to resolve the case to seek an agreement, "mufakat". Democracy led by wisdom is the fourth principle of Pancasila, and it is reflected on musyawarah mufakat.

**Keywords:** Pancasila, penal mediation, victims, and offenders.

## 1. Introduction

Justice is the goal of the law that is currently on the public and the media spotlight. How people today crave justice on the law enforcement even though they have lost trust on it. The lost of social trust toward the law will be a boomerang to the law. People might ignoring the law, and start to use anarchy to solve the problem rather than bring it in to the court. Because of that, people start to find another way to solve the penal case. People start to look on penal mediation. People believed that penal mediation is a way to solve the case which is close to local wisdom and Pancasila, Indonesian principle.

People start to looking back to Pancasila and trying to apply the principle of Pancasila in daily life. These principle also believed can be apply in the process of law inforcement starting in the police institutions until the court.

## 2. Penal Mediation Theory

Penal mediation is often also referred to by various terms, such as: "*mediation in criminal cases*" or "*mediation in penal matters*" in the Netherlands the term referred *strafbemiddeling*, in German terms the terms referred "*Der Außergerichtliche Tataus-gleich*" (ATA) and in France the terms referred "*de mediation pénale*" (<http://bardanawawi.files.wordpress.com>, 8 January, 2012).

Penal mediation is one of depenalization models to avoid formal criminal proceedings as Langer said: *The depenalization model aims to take less serious offenses out of formal criminal proceedings and to avoid recourse to imprisonment, while at the same time maintaining a certain formal control over these cases; therefore, there is a multiplicity of procedures through which these aims can be achieved.* (Langer, Maximo, Harvard International Law Journal). As it is on depenalization aims, this penal mediation also has the same aims, to avoid formal proceedings, and to reduce backlog in court, as Robert said: *While this approach focuses primarily on less serious cases, these individuals can represent a significant proportion of the courts' caseload* (Julian. V Roberts, Judicial Studies Institute Journal).

The many benefits provided by the penal mediation makes penal mediation as an alternative that has been prevalent in some countries. among others in the United States, even in the state of Alabama penal mediation applies to all criminal cases, including murder (ABA Criminal Justice Section), however, in another U.S. states, mediation is only applicable to certain cases eg juvenile criminal cases. In European, penal mediation can be done with the agreement between the two parties (victims and perpetrators), it is in accordance with the recommendation of the European Council No.. R. (99) 19 on "Mediation in Penal Matters" as follows: *These guidelines apply to any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator).*

There is a possibility to solve the case out of court throught penal mediation, it can be seen From the provision in various state (*mediation within the framework of criminal law*). It can be placed in the Criminal Procedure Code (Austria, Belgium, Finland, France, and Poland), placed in the Criminal Code (Finland, Germany, and Poland), placed as part of the Juvenile Justice Act (Austria, Germany, Finland, and Poland), or regulated separately autonomously in Mediation Act (the Mediation Act), as in Norway, which is applied to children and adults (Lilik Mulyadi, gagasanhukum.wordpress.com).

Based on the recommendation of the Council of Europe No.. R. (99) 19 on "Mediation in Penal Matters", there are several forms of penal mediation, namely:

- **Informal Mediation**

This mediation is conducted by criminal justice personnel including prosecutors. Attorney advises both parties to resolve the problem through mediation to create an agreement between them. Prosecution will be terminated if a satisfactory agreement is reached. This mediation can be proposed by attorney, prison staff, police or judges.

- **Traditional Village or Tribal Moots**

This type of mediation is an agreement that has been long time running and include at customs, where all the people gathered to resolve the conflict on its members. Usually found in developing countries and rural areas.

- **Victim-Offender Mediation**

This kind of mediation involves a third party (the mediator). The process of mediating could be done with bringing the both party (victim and offender) or conducted separately with each party if the victim does not want to meet. Mediators can come from criminal justice personnel who received mediation training which is can come from the police, prosecutor, clerk supervisor inmate, judge, or an independent mediator who is not from law enforcement officials. This type of mediation also can be carried out by specialized agencies such as the police, juvenile justice, prosecutor, court or an independent community organization. In certain cases mediation also carried out by the combination of the above entity

- **Reparation Negotiation Programmes**

As a form of reparation, the offender has to pay an estimated amount as a compensation. Mediation can be done by the parties simultaneously or separately. This kind of Mediation only determines the value of the improvements to be paid by the offender to the victim and sometimes accompanied with programs that can be performed by offender in order to pay the cost of repairs but not including to discuss reconciliation between the victim with the offender.

- **Community Panels or Courts**

This program is an flexible and informal prosecution or court process diversion with the society procedures which is more.

- **Family and Community Group Conferences**

Developed in Australia and New Zealand, this mediation need the role of society, whereby the conflict solved by by the offender, the victim, the perpetrator's family, and also by supporting the victim. This mediation expected to create a comprehensive agreement covering remedial actions, sanctions, and liabilities that can satisfy the victim and perpetrator.

### **3. "Pancasila" The Indonesian Principle**

Pancasila is the Indonesian nation's way of life, Pancasila is the basic philosophy of the state, Pancasila is the Indonesian national identity, Pancasila is the nation ideology, there are various kinds of Pancasila position and function depend on its context , as Kaelan said. But pancasila as the basic philosophy of the state and Indonesian nation's way of life is the basic position and position of all is that (Kaelan, 2013: 39). Pancasila values existed before it was formulated on the assembly of the Indonesian Independence Preliminaries Efforts Agency (Badan Penyelidik Usaha Persiapan Kemerdekaan Indonesia (BPUPKI)/ Dokuritsu Junbi Cosakai). It was transformed from Indonesian culture and costum, Indonesian local wisdom which is filled with religious values. Pancasila is the moral idea of Indonesian people thereby it gives behavioral guidance.

Indonesian former president, Bung Karno calls Pancasila as Five Pillars of our Country. "Pancasila" consists of five principles, succinctly stated in Indonesian but often rather ambiguous when subjected to close analysis and certainly less suggestive when translated into English (Michel Morfit, 1981, 4). The first principle is the belief to the supreme being (Sila Ketuhanan Yang Maha Esa). This principle shows the importance moral precepts and religious spirituality as the foundation of integrity and sustainability of the nation state (Latif, 2011; 118). The second principle is just and civilized humanity (Sila Kemanusiaan yang Adil dan Beradab), by this principle the idea of humanity becomes the independence soul, and with this Indonesian nationalism fight for the human equality (Latif, 2011; 239). The third is the unity of Indonesia (Sila Persatuan Indonesia), which is laid the principle of nationality as Indonesian unity, unity in diversity, diversity in unity (bhineka tunggal ika) (Latif, 2011; 369). The fourth is people led or governed by wise policies arrived at through a process of consultation and consensus (Sila Kerakyatan yang dipimpin oleh hikmat kebijaksanaan), the basic of this principle is democracy within sovereignty and kinship (Latif, 2011; 476). The fifth is social justice for all the Indonesian people (Sila Keadilan Sosial bagi Seluruh Rakyat Indonesia), the last principle containing the equality of a welfare for all of citizens (Latif, 2011; 582).

Those five principle are the idea of Indonesia, and there is a people commitment to do those principle in daily life, although there is a deviation on the implementation of pancasila in daily life. It is frequent the practice of Pancasila being deviated, but along with that people trying to go back to Pancasila. Forgetting Pancasila is a

mistake, Pancasila belong to every citizens due to its position as a basic nationality and statehood, so it is very important to learn and continuously contextualize the Pancasila (Said Ali, 2009; 50-51).

#### 4. Pancasila Conceptualization on Penal Mediation

There is a private areas in the conflict settlement of penal mediation implementation regarding to its dependency to the agreement between the victim and the offender. Regardless to that private areas, the penal mediation is a concept that widely has been known in most countries.

European countries try to implement victim offender mediation to settle the case. In 2008 Citizen et Justice and European Commission tried to implement victim offender mediation in France, Bulgaria, Italy and Spain. Due to the penal mediation concept has existed long before in Bulgaria and France, that project was successfully done in both countries. But in other countries the penal mediation need to be socialized to make the greater possibility of the penal mediation implementation in the future.

Based on that project, the implementation of the mediation depend on several factors. Those factors include culture perspective, legal system and the commitment of the parties. Due to the success of the implementation of mediation and penal mediation model selection depends on specific local cultural values, it is necessary to identify the cultural values that exist in Indonesian society, it is important to be able to find a model that can be applied to penal mediation in Indonesia.

Although Indonesia consist of several races, cultures, and traditions, Indonesian culture is very strong with the suave, mutual cooperation, mutual respect and "musyawarah mufakat". Indonesian state is also known by the ethnic plurality and high tolerance, it can be seen from many tribes in Indonesia, such as Javanese, Sundanese, Batak, Dayak, etc. They are willing to maintain a commitment to a group even when their obligations to the group are personally disadvantageous. Norms, obligations and duties to groups are collectivists' primary concerns, and they tend to place a high value on group harmony and solidarity. Respectfulness and cooperation are common collectivist traits (Walter, A Wright, 23 September 2013).

Prioritizing the public interests rather than private interests are common traits in collective people. Furthermore, due to the Pancasila values is the Indonesian spirit and identity, the characteristics of Indonesian society is reflected in the Pancasila values (<http://www.jatengtime.com/2013/interaksi/nilai-nilai-pancasila-merupakan-watak-dan-ciri-masyarakat-serta-bangsa-indonesia/#.UmaSVnCj1Oc>, 22 October 2013). Pancasila values is life order which is considered to give complexion, character and community characteristics that distinguish Indonesia with other people or other nations. Unfortunately, Pancasila only a jargon after Indonesian bitter experience during new order (<http://politik.kompasiana.com/2012/04/27/indonesia-butuh-pancasila-453262.html>, 22 October 2013).

Today, Indonesia developed into a liberal society that emphasizes individual interests. The example of Pancasila values metamorphosis into liberalism is the existence of the law of market. ("the invisible hand of the market" Theory or free market). Rice import duty was removed (zero percent) with the reason securing the price even though Indonesian have a surplus production on it (<http://politik.kompasiana.com/2012/04/27/indonesia-butuh-pancasila-453262.html>, 22 October 2013).

Liberalism emphasized the maximization of the individual role in a free competition and minimum state role. It is the enactment of the jungle law in Indonesia, which is the strong will defeat the weak as a simple analogy. It is a disease that is being suffered by Indonesian (<http://politik.kompasiana.com/2012/04/27/indonesia-butuh-pancasila-453262.html>, 22 October 2013).

Regarding to our main theme, the metamorphosis also happened on the issue of punishment that is far from the justice values which is the fifth principles of Pancasila "Social Justice for All of Indonesian People". To overcome these problems we have to reapply the Pancasila values .

Will we in daily life implement Pancasila? In deliberations for examples, whether we want to give in to the collective decision and execute it? Pancasila needed because without it there would be no welfare distribution and social justice. Peoples will only think about themselves regardless the other interest. Without Pancasila Indonesia will be vulnerable to rupture and just become the part of the history books (<http://www.jatengtime.com/2013/interaksi/nilai-nilai-pancasila-merupakan-watak-dan-ciri-masyarakat-serta-bangsa-indonesia/#.UmaSVnCj1Oc>, 22 October 2013).

We can start to formulate mediation penal model that can be applied in Indonesia as a beginning to reapply the Pancasila values. Mediation penal bring Pancasila as the spirit to moved it. Penal mediation promoting humanitarian values and the values of the collectivity, prioritizing public interest rather than individual interest. Therefore penal mediation is a solution to the deterioration of the Pancasila values, so that that best suits of the penal mediation model to Indonesian society is penal mediation by promoting consensus agreement. Why musyawarah mufakat?

When we look at the fourth principle of the Pancasila, we will find that this principles is full of consensus agreement values. The consensus agreement value was basically in accordance with all of penal

mediation models. The following will be discussed thoroughly related penal mediation models that can be applied to the Indonesian society which is adapted to the Pancasila spirit

- ***Informal Mediation***

This mediation is done by law enforcement officers as a third party who will provide recommendations to the parties with the goal of an agreement between them. The sentencing process will be terminated if there is an agreement is the advantages of this model. The model involves only stakeholders, i.e law enforcement officers, victims and offenders. So the consensus agreement only done in a limited scope. This model can be applied in all of legal systems, including Indonesia.

- ***Traditional Village or Tribal Moots***

In contrary to the above models, this mediation involving the entire community to resolve the conflict that occurs in its members. It is a model that can be applied to a communal society. For the last few decades, Indonesia has been through a significant change, it is hard to say that Indonesia still has a communal society, to be the truth Indonesia has a tendency to be an individualistic society. So it is difficult to apply this model to the Indonesian community in the present.

- ***Victim-Offender Mediation***

There are three parties to the conflict resolution through this model, ie the victim, offender, and mediator. Mediators can come from law enforcement officer or independent mediator or a combination of both. The meetings to resolve the conflict could be done the victim together with the offender (and also the mediator), or done separately. This model can be applied to the Indonesian society. The advantages of this model is that the existence of an alternative mediator, which is not only limited to the law enforcement officer only, but also can be taken from an independent mediator which is more objective.

- ***Reparation Negotiation Programmes***

This model only focused on the remedial action done by the offenders to the victims. Remedial action can be formed in a compensation paid by the perpetrator to the victim in the form of money that can be accompanied by a work program. The weakness of this model is that the negotiations are not including reconciliation efforts between the victims with the offenders ([http://arifalfikri029.wordpress.com / session-3 /](http://arifalfikri029.wordpress.com/session-3/), 25 October 2013). Whereas reconciliation means restoring the offender and victim relations; actions to resolve differences (<http://www.artikata.com/arti-347394-rekonsiliasi.html>, 25 October 2013). So the meeting also should be aimed to seek reconciliation between the victims with the offenders.

- ***Community Panels or Courts***

This program is a prosecution diversion (court process) with the procedures in society which is more flexible. *Mediated sessions in which community members meet with offenders to discuss the impact of their offenses on the community* ([http://www.courtinnovation.org /research / community- impact-panels](http://www.courtinnovation.org/research/community-impact-panels), 25 October 2013). Community members meet offenders, discuss their cases and put in place sanctions, fines or community work ([http://www.stuff.co.nz/waikato-times/news/8946550/ Pilot-community- panel-tackles-low-level-crime](http://www.stuff.co.nz/waikato-times/news/8946550/Pilot-community-panel-tackles-low-level-crime), 25 October 2013). Some of these new models have been variously described as providing a focus on restorative justice, indigenous justice, and community justice (Gabrielle Maxwell, 1999:15).

Part of this process may also be that of bringing the offender back into the group and requiring that he/she accepts the decisions of the group and complies with the expectations the group has about his/her future behaviour including abstaining from bringing the community into further disrepute by future offending. Reintegration is often central to indigenous processes and responses to the needs of victims are also frequently, although not necessarily, part of the focus (Gabrielle Maxwell, 1999:15).

It can be concluded that this model panel is a settlement system involving community members in order to achieve community justice and indigenous justice. Indigenous justice has several characteristics, ie:

- Aiming to return the offender to the community
- Offenders must accept the community decision, associated with his actions
- Focus on the victim needs
- the existence of reconciliation efforts between the victims with the offenders

Further Community justice can be seen as a way of allowing local groups in particular geographical communities to manage justice matters in their own area and, in this way, respond to local issues and concerns (Gabrielle Maxwell, 1999:15).

- ***Family and Community Group Conferences***

Developed in Australia and New Zealand, this model takes the role of the community. This model solved the conflict by the offender and the victim also by the offender perpetrator's family, and the supporters of the victim. This mediation, is expected to create a comprehensive agreement covering remedial actions, sanctions, and liabilities that can satisfy the victim and offenders.

Musyawarah becomes a way taken to resolve the problem in restorative justice scope. Writers in this regard are more likely to use the community panels model to resolve the criminal case in Indonesia. This models choosed in order to bring back the Indonesian local wisdom in society daily life, especially to resolve the penal case. It is undeniable that people still respect and appreciate elder members of the society. This groups of people can be requested to help the victims and offenders to resolve their case through extrajudicial settlement. Their position as the elder members of society will prevent the protracted settlement, so that conflicts can be solved in a short time. In this way, the offender, the victim, and the community will do the “musyawarah” throught the meeting between them to resolve the case faced by the community members.

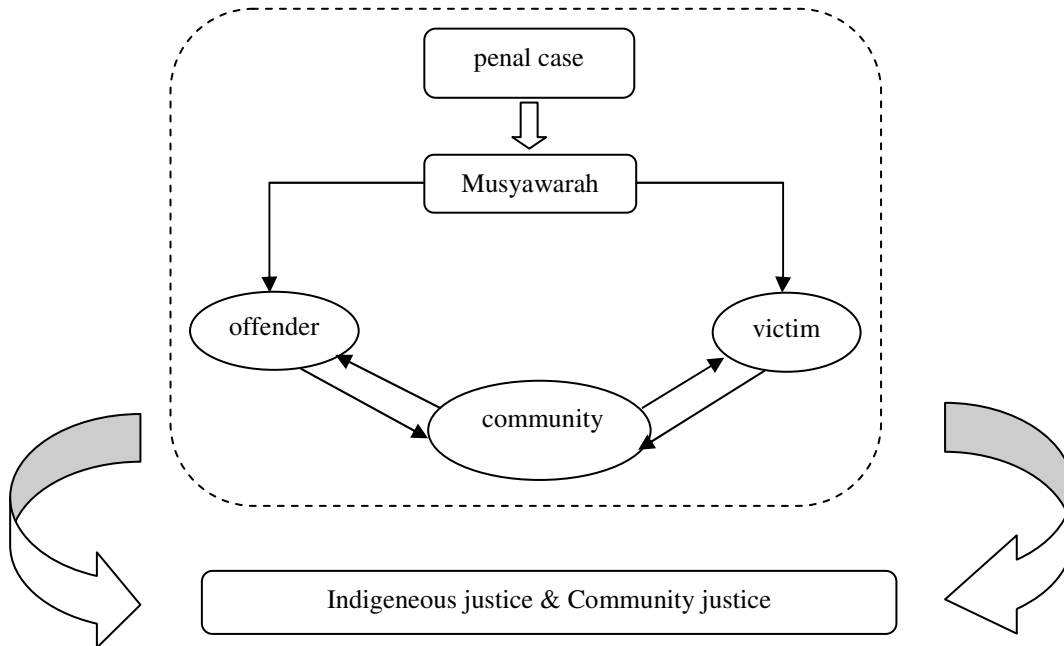


Figure 1. Community Panel Model

Using victim offender mediation models is the second choices. Legal officer can be a mediator to help the victim and offender case. In other hand, community or independent mediators also can be a mediator used in this models.

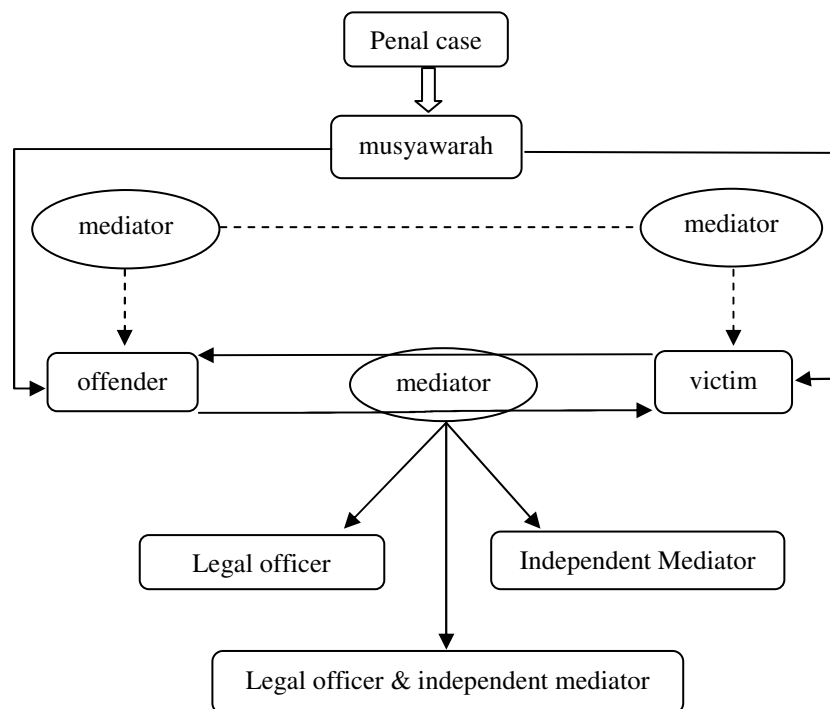


Figure 2. Victim Offender Mediation Models

Victim Offender mediation models can be done in two ways. First, mediation conducted separately between the mediator with the offender and the victim. In this case, the offender and the victim did not meet in person. The mediator will connecting the perpetrator and the victim wishes to find common ground, so that a decision can be taken to satisfy both parties. In this way the mediator role is very important. Second, deliberation conducted jointly between offender, victim and mediator. Pancasila values are more represented in the second way . When all of the parties meet each other, they can express their need.

## 5. Conclusion

Although penal mediation has been recognized in various countries, the implementation of penal mediation depends on the customs, culture, legal systems of each countries. In some countries the penal mediation has been known and used so that the penal mediation concept already has it patterns in each legal system. On the other hand the concept of penal mediation is a new thing for most countries, however, it does not close the possibility the implementation of penal mediation in those countries by trying to implement one of the penal mediation models. Some penal mediation models that can be applied includes:

1. *Informal Mediation*
2. *Traditional Village or Tribal Moots*
3. *Victim-Offender Mediation*
4. *Reparation Negotiation Programmes*
5. *Community Panels or Courts*
6. *Family and Community Group Conferences*

All of that models can be applied in Indonesia due to the existence of Pancasila which is full with the values of consensus agreement, tolerance, and mutual respect. These values are penal mediation principle. But community panel model and victim offender mediation panel are more suited models that can be applied in Indonesia. Community panels full with the values of Indonesian local wisdom while Offender Mediation Model chosen because this model is flexible so that it can be applied.

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