



RESEARCH ARTICLE

PENAL MEDIATION AS AN ALTERNATIVE SETTLEMENT OF CRIMINAL CASES IN BALINESE CUSTOMARY COMMUNITY TRADITION

*Diah Ratna Sari Hariyanto

Student of Doctoral Program at Faculty of Law Udayana University, Bali, Indonesia

ARTICLE INFO

Article History:

Received 20th November, 2017
Received in revised form
23rd December, 2017
Accepted 09th January, 2018
Published online 18th February, 2018

Key words:

Penal Mediation,
Alternative Settlement of Criminal Cases,
Balinese Customary
Community Tradition.

ABSTRACT

Penal mediation as an alternative to settlement of criminal cases in Indonesia has not been regulated in the Law. However, such concept actually has existed long time ago along with the existence of customary court in Indonesia. In addition to its natural beauty, Bali also has a steady and unique tradition in solving its community's problems. Hence, philosophically, it is very interesting to study the existence of penal mediation in Balinese customary community tradition in order to see their ways to solve criminal cases thus leads to an ideal concept of penal mediation which can be applied in Indonesian positive Laws. This study employs normative legal research by starting its analyses from the existence of empty norm. Based on the analyses it is noted that the penal mediation concept in Bali can be found in *awig-awig* or *pararem* (Balinese customary law) of the Balinese customary village (*desa adat pakraman*). It is carried out by deliberation of consensus in a village meeting (*sangkepan* or *paruman*) which results in peaceful settlement and can also be sanctioned as an attempt to restore balance or correction due to the crime. In this regard, the mediator may be in the form of trusted individual or Village Official (the Head of Village/*Perbekel*, *kepala dusun*) or Customary Village Officials (customary village administrators (*Prajuru Desa Pakraman: Bendesa, Klian Banjar*)). Therefore, the applicable principles in customary law need to be adopted to achieve ideal applicable future concept of penal mediation in Indonesian positive Laws.

Copyright © 2018, Diah Ratna Sari Hariyanto. This is an open access article distributed under the Creative Commons Attribution License, which permits unrestricted use, distribution, and reproduction in any medium, provided the original work is properly cited.

Citation: Diah Ratna Sari Hariyanto. 2018. "Penal mediation as an alternative settlement of criminal cases in balinese customary community tradition", *International Journal of Current Research*, 10, (02), 65164-65170.

INTRODUCTION

Penal mediation is known term which use is directed in the development of criminal law in the world. However, although it is not a new term, it has no formal existence in Indonesia. Various terms used to refer penal mediation are as follow: mediation in criminal cases or mediation in penal matters, *strafbemiddeling* (in Dutch), *Der Außergerichtliche Tatausgleich* (or abbreviated as ATA in German), and *de mediation pénale* (in French). In addition it is also known as Victim Offender Mediation (VOM), *Täter-Opfer-Ausgleich* (TOA) or Offender-Victim Arrangement (OVA) (Barda Nawawi Arief, 2008, p.1). According to Umi Rozah, by referring to various international instruments, it is noted that penal mediation is a process that brings together victims and perpetrators of crime if they freely want to actively participate in resolving issues arising from crime through the assistance of an impartial third party called as a mediator (Umi Rozah, 2012, p.321). In Barda Nawawi Arief's point of view, penal mediation is one form of alternative dispute settlement outside the court which commonly known as Alternative Dispute Resolution (ADR) that is often used in civil law (Barda Nawawi Arief,

Op.Cit., p.3). It is noted that on the criminal law scope, penal mediation is one form of criminal cases settlement outside the court. Criminal law in Indonesia does not recognize the peaceful settlement as in the civil law, however practically; the settlement outside the court is often done in solving certain cases. This indicates that non-court settlement in its development is also applied in the realm of criminal law, known as "penal mediation". Penal mediation becomes a faster, simpler, and cheaper case-settlement mechanism that can ease the judicature burden (reducing the accumulation of cases). Mediation also benefits the litigants due to the effectiveness and efficiency as well as a much faster indemnity can be provided to victims. Penal mediation is also useful for restoring relationships between parties so there is no hostility or protracted hatred. Penal mediation places victim in as a stronger party to the case in order to obtain restoration and fulfilment of his rights as a victim. Penal mediation also prevents the use of adverse penalization (labelling) for the offender. In the context of justice, penal mediation provides justice for both parties. Since there are many benefits can be obtained by applying penal mediation, thus the existence penal mediation needs to be legitimized. Penal mediation has not been regulated in Indonesian Laws which leads to the existence of empty norm. However, the existence of such concept can be traced and found even long time ago in

*Corresponding author: Diah Ratna Sari Hariyanto
Student of Doctoral Program at Faculty of Law Udayana University,
Bali, Indonesia

Indonesian customary law. Soepomo refers to Savigny's view states that customary law is a non-statutory law that is largely consisted of customary law and a small part of Islamic law. Customary law is rooted in traditional culture. Customary law is a living law that embodies the living feeling of the people, it grows and continues to develop (R. Soepomo, 2013, p.3). This view shows that customary law in Indonesia is the original law of the Indonesian nation and is regarded as a living law. The power of its enforcement is even greater than the law established by the state because customary law is a reflection of the legal feeling of society. Customary law as a traditional law becomes the root of the nation's culture and a guide to community life, one of which is a culture in the criminal cases settlement. *Masyarakat adat* (hereinafter referred to as customary community) in Indonesia, including Balinese customary community (which has strong tradition, custom, religious, art, and culture), have their own characteristics and uniqueness in solving the problems that occur in their communities. In addition to its natural beauty, Bali also has a steady tradition. The existence of Balinese customary village (*desa pakraman*) that plays role in solving the problems that occur in the community still can be seen nowadays. This Balinese customary village as a unity of tradition and manners of Balinese Hindu people's social life is alive as stipulated in Bali Provincial Regional Regulation No. 3 of 2001 on *Desa Pakraman*. It has an important role in achieving harmony, peace and order in the society.

Compared to this penal mediation concept, any crime in the formal judicial system will be processed through the Criminal Judicial System. Through this formal judicial system, there are a lot of disadvantages to be found: longer period of time will be consumed, big cost and long process will need to be faced, and it is not always successfully solve the problem so that the problem is prolonged and can cause hatred or resentment among the parties. Those are the reasons why the customary communities prefer to settle their problems through traditional mechanism in the form of consensus with a family approach that is assisted by an impartial third party, mediator, which is called as *Prajuru Desa Pakraman* (the Balinese customary village administrators). Given that customary law has strong enforcement powers, study on Balinese community tradition in settling non-court criminal cases is necessary to be done. The existence of penal mediation in Balinese customary community tradition indicates that penal mediation can be applied in Indonesia as it is in accordance with the culture and values that live in society. Tradition of customary communities in solving problems through consensus can encourage penal mediation to be able to grow and develop in Indonesian national Law. Establishment of Law on penal mediation in Indonesia is very important thus penal mediation can be applied formally and has its legality. From the above explanation, such matter requires further research in order to establish the ideal penal mediation concept that is applicable in Indonesian criminal law. In this study, two legal issues are raised, namely: 1. the existence of the penal mediation concept in Balinese customary community tradition; and 2. the ideal future penal mediation concept to be applied in Indonesian positive Law.

Those two legal issued are discussed and analyzed by using normative legal research that employs case, statute, conceptual, historical and comparative approaches. The sources of legal material of this study consisted of the primary (Laws and Regulations), secondary (doctrine, legal text book) and tertiary (law dictionary and *Indonesian* dictionary) legal materials. The

primary legal materials are collected systematically whereas the secondary legal materials are collected and traced by using snow ball method. After all, the collected legal materials are analyzed by descriptive, comparative, evaluative, interpretative, constructive and argumentative legal analysis techniques. Based on the explained background, a depth-research on "Penal Mediation as an Alternative Settlement of Criminal Cases in Balinese Customary Community Tradition" is very interested to be conducted.

RESULTS AND ANALYSIS

The existence of the Penal Mediation Concept in Balinese Customary Community Tradition

The existence of penal mediation as an alternative to settle criminal cases by using mediator outside the court can be found through the practice, culture and the customary of communities in Indonesia although formally it is nowhere to be found in Indonesian Laws. *Adat* (hereinafter referred to as custom) is different in every part of the world. Soerojo Wignjodiporo states that is a reflection of the nation's personality and the incarnation of the nation's soul (Soerojo Wignjodiporo, 1995, 13). Custom can be a picture of the culture or customs of a society, and can give identity to a nation. Custom is not only about religion but also covers various areas of life including in terms of solving problems that occur in the community. Issues of conflict, dispute or case will always occur in a society. This problem must certainly be settled to restore harmony and to achieve order, security, peace, and happiness for the people. Unlike the national law that distinguishes cases in the realm of civil and criminal law, *hukum adat* (hereinafter referred to as customary law) does not distinguish between the two. Wayan P. Windia and Ketut Sudantra state that customary law is specific. It is comprehensive and unified, it has open provisions, distinguishes problems, trial by request and its actions of reactions or sanctions are different from the western criminal law. Comprehensive and unified mean that customary law does not distinguish between criminal and civil offenses and does not distinguish what is customary, religious, moral or decency violations. Those all will be judged and tried by customary judges as a whole matter. Customary law's provisions are open mean that those are uncertain and are always open to all possible deeds and the measurement is based on justice. Furthermore, distinguishes the problems mean the doer also determines the legal consequences.

Trial by request means the new customary law officer intervenes in the settlement of the case if there is a request from the interested parties, except which directly harms and disturbs the public balance. Reaction actions (customary correction or sanction) mean it is not only addressed to the offender but it can also be imposed on the perpetrator's family or relative or the whole community (Wayan P. Windia, *et al*, p.139-140). This indicates that customary law is a unique law and adheres to the religious social life of customary community. Each customary community has a unique culture or custom in solving the problems that occur, including in Bali. The penal mediation concept in Bali can be found in customary community applied through *awig-awig* or *pararem* (Balinese customary law). Bali has a traditional village called *Desa Pakraman* (Balinese customary village). Article 1 of the Regional Regulation of Bali Province No. 3 of 2001 on *Desa Pakraman* stipulates that, "*Desa Pakraman* is a unity of tradition and manners of social intercourse of Hindu people in

hereditary in the bonds of *Kahyangan Tiga* or *Kahyangan Desa* (Such temple consisted of *Pura Dalem*, *Pura Desa* or *Pura Puseh* and *Pura Segara*) which have certain territory and own property and also have the right take care of his own household". Wayan P. Windia *et al* state that the Balinese customary village becomes Balinese Hindu community organization based on religious dwellings and spiritual that are important in the relations between customary community in Bali (*Ibid.*, p.3). I Nyoman Sirtha also explains that Balinese customary village is a traditional social religious institution (I Nyoman Sirtha, 2008, p.1). Balinese customary village has an important position in customary community and has its existence to this day. Balinese customary village has a joint task with the government in developing all fields, fostering, and developing Balinese cultural values based on *paros paras*, *sigilik saguluk*, *salunglung sabayantaka* (deliberation of consensus). Balinese customary village is also authorized to settle traditional and religious disputes in its area by fostering harmony and tolerance in accordance with *awig-awig* and custom (*Ibid.*, p.14-15). This shows that Balinese customary village has a big role in solving the problems that occur in customary community.

Balinese customary village is organized by *Prajuru Desa*. Such *Prajuru Desa* is consisted of *Bendesa* as the Head, *Penyarikan* as the secretary, *Patengen* as the treasurer and *Kasinoman* as the general auxiliary or the supplier of information. The *prajuru* of Balinese customary village is chosen and established by the Balinese customary village (*Ibid.*, p.15). Tjok Istri Putra Astiti states that the title for the Balinese customary village leadership is different, a village with transitional custom which government system is simpler generally led by people who is referred to as *Bendesa Adat* or *Klian adat* (Tjok Istri Putra Astiti, 2005, p.7). According to I Nyoman Sirtha, the *Prajuru* of Balinese customary village has the authority to settle and determine decision on customary conflict by applying customary sanction to restore the balance resulting from the occurrence of an aberration (I Nyoman Sirtha, *Op.Cit.*,p.74). Article 8 of Regional Regulation of Bali Province No. 3 of 2001 regulates that one of the tasks of the *Prajuru* of Balinese customary village is to seek peaceful settlement and settlement of customary disputes. The role of *Prajuru* of Balinese customary village in the settlement of customary matters is very important. It is because the *Prajuru* of Balinese customary village is the spearhead of every problem that occurred in the Balinese customary village (Wayan P. Windia and Ketut Sudantra, 2006, p.99). Based on this, it can be seen that the *Prajuru* of Balinese customary village has the authority to be a judge and a mediator in solving cases that occur among customary community. It also shows the existence of the penal mediation concept in Balinese tradition which prioritizes peace in solving the problems that occur.

Customary case in Bali which is known as *wicara* can be interpreted as problem or case. Problem or case (*wicara*) can be distinguished by the object, namely:

- Pure customary case: customary case, for example violating the *awig-awig* and others;
- Non-customary case: case that has nothing to do with customary matters, such as stealing people's property, fighting, etc;
- Mixed case between customary and non-customary cases for example on one hand a case is a matter of customary but on the other hand it is also regulated by

the law of the country. For example, the stealing of sacred objects in the temple, murder in the sacred area, and so forth (*Ibid.*, p.100-101).

The types of customary cases (*wicara*) determine the procedure for the settlement. Customary cases should be resolved customarily based on *awig-awig*. Non-customary cases are resolved by the authorities but for the non-customary cases in the form of disputes can be resolved peacefully with kinship and can also be settled on a formal basis (Court). A kinship settlement out of the court may be conducted by direct negotiation or with the assistance of a third party as a mediator. Parties who may be the mediator in this regard may be a trusted individual or Village Official (the Head of Village/*Perbekel*, *kepala dusun*) or Customary Village Officials (customary village administrators (*Prajuru Desa Pakraman: Bendesa, Klian Banjar*)). This form of dispute resolution outside the court is called peaceful settlement. As for the mixed case, it can use two mechanisms namely customary and formal mechanism (Court) (*Ibid.*, h.101-102).

In contrast to the case settlement in the court that seeks right or wrong, the customary case settlement is not merely looking for right or wrong, but seeks the goodness that is the goodness for all. The principles used in the customary case settlement are *paras-paros* (deliberation), *rasa menyama braya* (brotherhood and neighbourhood), *saling asah saling asih* (mutual acceptance and giving), *pang pada payu* (equally fortunate), and *ngulati village kasukertan sekala niskala* (reaching inner peace). These principles can bring about peace, for prioritizing the common good without the principle of win-lose that can nurture vengeful and prolonged animosity (*Ibid.*,p.106-107). These basic principles are very different with the principles applicable in the case settlement through formal judiciary.

I Ketut Sudantra and Wayan P. Windia state that basically, the highest authority in Balinese customary village or in *Banjar Pakraman* (*Banjar* is the unity of the legal community which has the boundaries of the territory authorized to organize and manage the interests of the local community based on local origins and customs that are recognized and respected within the system of Government of the Unitary State of the Republic of Indonesia) is the institution of *paruman* (meeting) or also known as *sangkepan*, *pesamuan* and others. *Peruman* or *sangkepan* or *pensamuan* is a consultative institution of the members or community of Balinese customary village. Important matters of mutual interest are decided in *paruman* (I Ketut Sudantra and Wayan P. Windia, 2012, p.34). The customary conflict settlement is done by deliberation of consensus in a Balinese customary village meeting which leads to peaceful settlement. Such peace generated from the meeting shows that the conflict is done and the harmony in society is realized (I Nyoman Sirtha, *Op.Cit.*, p.74-75). This indicates that Bali has a tradition of solving problems through deliberative consultation by holding meetings (*sangkepan* or *paruman*) which essentially resembles the penal mediation concept which is now developing in various countries of the world in line with the emergence of restorative justice. In its implementation, the Balinese customary village establishes self-established rules and serve as guidelines for behaviour called as *awig-awig*. Such *awig-awig* are compiled based on the philosophy of *Tri Hita Karana*, the harmony relationship between humans with God Almighty, humans with fellow human beings, humans with nature or environment (I Nyoman Sirtha, *Loc.Cit.*, p.74-75). *Awig-awig* becomes the reflection of the soul of society which is religious social in pattern. This

indicates that *awig-awig* of Balinese customary village become the laws and guide the life of Balinese customary community. *Awig-awig(s)* of Balinese customary village are generally not written. However, nowadays, *awig-awig* strives to be compiled in written form. *Awig-awig* in written form are organized systematically and established in a village meeting (*paruman*) and registered at the Regent's Office (I Nyoman Sirtha, *Op.Cit*, p.31). Nyoman Serikat Putra Jaya mentions that based on the research of Purwati, *et al* (1988), regarding the existence of customary crime in Badung regency, there are classes of prohibited acts specified in *awig-awig* as follow: moral deed, deed related to possessions, deed of personal honor and other deeds (Nyoman Serikat putra Jaya, 2005, p.15).

Deviation of *awig-awig* is considered a disgraceful act and is considered as disturbing the magical balance. If there is a violation of *awig-awig* then the offender will be subject to customary sanction which can be in the form of *mengaksama* (apology), *dedosan* (penalty of money), *kerampag* (confiscated property), *kesepekan* (not invited to speak within a certain time), *kanorayang* (removed from the village), *keselong* (expelled from the village) and *prayascita* ceremony (religious ceremony to clean the bad environment). If the offenders of *awig-awig* who are subject to sanctions or torture are aware of their guilt and are willing to comply with the customary sanctions imposed, they can be re-admitted to the villagers. This customary sanction is carried out by the Head of Balinese customary village through the meeting (*paruman*) (I Nyoman Sirtha, *Op.Cit*, h. 30-31). This indicates that the occurrence of irregularities or offenses will cause a magical imbalance, so it needs a restoration of balance or harmony that includes the real world (*sekala*) and the unreal world (*niskala*). This recovery can be done by the imposition of customary sanctions (*pamidanda* or punishment) which by I Made Suasthawa Dharmayuda grouped into 3 (three) types, namely: *sangaskara danda* (religious ceremony), *artha danda* (payment of money or possessions), and *jiwa danda* (physical and psychic punishment) (I Made Suasthawa Dharmayuda, 2001, p.111).

Wayan P. Windia and Sudantra state that in a broad sense, *awig-awig* is equated with *pararem* which is the village regulations born from the decision of the customary village meeting (*sangkepan*) which must be followed by all members of Balinese customary village. In a special sense, *pararem* is defined as the Balinese customary village regulations which are still in the form of decision of the customary village meeting. Substantially, in a specific sense, *pararem* is divided into 3 (three) types, namely:

1. *Paramem penyahcah awig*: the implementation regulation of *pawos-pawos* (Articles) in *awig-awig*. Example of this *pararem* is as follow: *Pawos* 3 of the *awig-awig* of Kedonganan customary village stipulates that “*Prade drati krama, paradana, mitra ngalang san kabawos ngawinan cemar jagat Desa Adat Kedonganan, wenang kasisipan tur keni danda manut pararem*”. Such Article (*pawos*) does not mention the form of fines or sanctions to be imposed to people who commit *drati krama*, *paradara* (rape) or *ngalang mitra* (adultery). In practice, the sanction form is made in *pararem* which may change at any time, at the time of the customary village meeting. The *pararem* of Kedonganan customary village on the above *pawos* states that “*Prade dratikrama, paradara, mitrangalang...wenang kasisipan tur kadanda untuk nglaksanayang ring sor: (ha) ngelaysanayang upakara pamarisuda ring Bale Agung sanistan prayascita durmanagala; (na) Naur pamidanda antuk artha brana*

mageng 200 kilogram beras miwah Rp. 500.000 (limangatus tali rupiah).”;

2. *Pararem ngele* or *lepas*: a new regulation made through customary village meeting for example the *pararem* of Kedonganan customary village on *Pecalang* (Balinese customary police);

3. *Pararem penepas wicara*. *Wicara* is a problem that occurs in Balinese customary village, both on the violation of law (violation of *awig-awig*) and dispute. Settlement of law violation (*awig-awig* violation) as well as dispute settlement through the customary village meeting will result in *pararem penepas wicara* as the decision of the customary village meeting (*sangkepan*) (Wayan P. Windia and Ketut Sudantra, *Op.Cit.*, p.57-58).

An example of *awig-awig* that shows the existence of the penal mediation concept on Balinese customary community tradition can be found in *Pawos* 66 of the *awig-awig* of Tanah Aron Balinese customary village in Karangasem regency. It states that the authority to settle the case in the village is the *Prajuru* of Balinese customary village, as the judge in the customary village judiciary judge is *Kelian Banjar* and *Bendesa* if the litigants all come from the same village (Lilik Mulyadi, 2015, p.9-11). Another example can be found in the Tenganan Pagringsing village, Karangasem regency. The villagers who violate the local *awig-awig* will be confronted with *Klian Desa* (consists of 6 (six) *Klian Desa*). The case is tried to be reconciled by the *Klian Desa*. If the *Klian Desa* cannot successfully settle it in peace, then such case is heard before the customary village meeting (*sangkepan*) in *Balai Agung* attended by local elders called *Luanan* (consists of 5 people) and other villagers (Tjok Istri Putra Astiti, 1997, p.5-6). In such forum, deliberation to reach consensus is conducted. In this forum, *Klian Desa* will firstly ask the *Luanan* for advice and then continues to ask for the other villagers' opinion. Based on such advice or opinion then the decisions that are considered appropriate as mutual will manifestation are taken. The offending citizen is then given advice by *Klian Desa* that his actions are wrong and violate public order thus do not repeat them again. The offender will be given sanctions in accordance with such mutual agreement with reference to the *awig-awig* terms (*Ibid.*, p.6).

In addition to the above examples, there are actually a lot of others *awig-awig* or *perarem* that contain the penal mediation concept. Hence, it can be said that the penal mediation concept has existed long time ago in line with the existence of the customary judiciary or customary community tradition in solving the problems. The way or mechanism of customary community in solving a case shows that penal mediation is a socially inherent religious tradition of customary community in Indonesia, including in Bali. The values or philosophy that can be found in the presence of penal mediation concept in Balinese customary community tradition is culture of deliberations for consensus with kinship approach to the customary community in solving the problem. The imposition of sanctions as form of punishment or in the Balinese term is called *pamidanda* whose aim is to restore balance in the real world (*sekala*) and unreal world (*niskala*) (the unreal world) is also in accordance with the concept of restorative justice which is the soul of penal mediation. Problem solving through deliberation of consensus has long been recognized and is a tradition in various regions in Indonesia. It can be said that the penal mediation concept has become the culture of the

Indonesian nation because essentially penal mediation is a reflection of the ideology of the nation and local wisdom that incarnate in deliberation of consensus based on the kinship principle. Penal mediation has become a reflection of the ideology of the Indonesian nation as mandated in the legal basis of Indonesia namely "*Pancasila*" (the five basic principles of Indonesia). The fourth precepts of *Pancasila* states that, "Democratic life led by wisdom of thoughts in deliberation amongst representatives of the people". Deliberation of consensus with kinship approach becomes a problem-solving method that reflects Indonesia's national identity and is applied to this day especially to customary community.

The Ideal Future Concept of Penal Mediation to be Applied in Indonesian Positive Laws

The ideal law is law that can be applied by society and is enforceable. The ideal law should be a "responsive law" that can answer the demands and needs of society and the "progressive law" that progress moves towards the ideal law. Philippe Nonet and Philip Selznick in their book entitled "Law and Society in Transition: Toward Responsive Law" states that (Philippe Nonet dan Philip Selznick, 1978, p.116):

"Our thesis is that responsive law brings larger institutional competencies to the quest for justice. This evaluation, however, does not entail an unambiguous prescription or counsel. In our view responsive law is a precarious ideal whose achievement and desirability are historically contingent and depend especially on the urgencies to be met and the resources that can be tapped."

Philippe Nonet and Philip Selznick in the above quotation state that responsive law is ideal. Inspired by the responsive theories of Philippe Nonet and Philip Selznick, Satjipto Rahardjo developed a progressive legal theory which holds that law is for man, not the other way around. Satjipto Rahardjo also states that law is an institution that aims to lead people to a fair and prosperity life as well as to make people happy. Law is a continuous process in which it builds itself up to the ideal one. Progressive law can be called as a "pro-people law" and a law of pro-justice (Satjipto Rahardjo, 2009, p.1-2). The law must be in accordance with the legal feelings of the community in order for the law to be effective. The legal feelings of society can be found in the prevailing customary in society. Customary law is one of the legal sources in the Indonesian applicable laws (*ius constitutum*). Soerojo Wignjodipoero states that customary law is a living law because customary law is the embodiment of real people's legal sense (*Ibid.*, p.17). That is in relation to Eugen Ehrlich's thoughts on "The Living Law." According to the Sociological Jurisprudence, a good law is a law that is in accordance with the laws that live in society. Eugen Ehrlich states that, "'That the investigation of the living law is concerned only with "customary law" or with "business usage" (Eugen Ehrlich, 1936, p.501). Based on that, it can be seen that living law can be known from the existence of "customary law" or by the "business usage" prevailing in the community or in other words living law in the community can be found in customary law. There are many varieties of customary law in Indonesia. It is because the State of Indonesia is very rich in customs and culture. However, despite of such differences, the unity of the Unitary State of the Republic of Indonesia is still maintained through the motto of "*Bhineka Tunggal Ika*" and *Pancasila*. The laws that live in the community can be seen in the prevailing customary law which

incarnate through the principles of customary law as mentioned by Soetandyo Wignjosebroto. He presents that the moral principles (customary law principles) in people's lives are often referred to as the principles that living in the hearts of the members of community as part of the living law (Soetandyo Wignjosebroto, 2013, p.23-24). As explained previously, in this diversity, the culture of deliberation of consensus with kinship approach remains a culture or tradition of communities in Indonesia in solving problems that occur in their communities. The creation of the ideal concept of penal mediation should take into account the customary or customs of the Indonesian people in solving the problem since customary law is a living law, the law in accordance with the soul of the nation, the law in accordance with the feelings of the law of the people and even has greater enforcement power than the national law itself. The ideal concept of penal mediation needs to adopt the prevailing principles in the customary law. As already exist, for example, the tradition of Balinese customary community to implement deliberation of consensus with kinship approach in solving problems that occur in the community, including solving certain criminal acts. Party who can be mediator can also be elected or appointed which can be official or the trusted person. The existence of sanctions is also important to be established or agreed upon by the parties to restore the balance or to the recovery resulting from the committed crimes. Peaceful settlement also takes precedence by holding on to the Balinese principle of *paras-paros* (deliberation), *rasa menyama braya* (brotherhood and neighborhood), *saling asah saling asih* (mutual acceptance and giving), *pang pada payu* (equally fortunate), and *ngulati village kasukertan sekala niskala* (reaching inner peace). These are the things that need to be considered in order to create the ideal penal mediation concept to be applied in Indonesia.

Several things that need to be considered in the ideal future penal mediation concept creation to be applied in Indonesian positive law are as follow:

The use of term

Penal mediation has various names. Thus, it is important for such penal mediation concept to has uniform name so it will be easier to be regulated in the Indonesian positive law. Currently the mechanism of settling criminal cases outside the court involving mediators is known as "penal mediation", so the term is appropriate to be used in Indonesia.

The Meaning of Penal Mediation

- Legal Dictionary: mediation is, "A process of peaceful settlement of a dispute involving the assistance of a third party to provide acceptable solutions to the disputing parties; Third party participation in dispute resolution between two parties" (M. Marwan and Jimmy P., 2009, p.426).
- Rachmadi Usman states that mediation means dispute settlement by involving a third party as mediator or mediated dispute settlement. Mediate in this sense is a mediator (Rachmadi Usman, 2013, p.95).
- Fatahillah A. Syukur concludes that mediation has several characteristics:
 - The existence of third parties who mediate;
 - The third party has no authority to decide;
 - The third party must be neutral and impartial;

- Based on the volunteerism and the goodwill of the parties (Fatahillah A. Syukur, 2011, p.53).
- Barda Nawawi Arief states that penal mediation is often expressed as the third way or the third path in the effort of crime control and the criminal justice system and has been used in several countries. The peaceful settlement and mediation in the field of criminal law is basically already known in customary law and in everyday life (Barda Nawawi Arief, *Op.Cit.*, p.50-51).
- Mark S. Umbreit states that “Victim offender mediation is one process of striving for restorative justice and, by far, the most widespread in North America. It has most often been used to address property crimes and minor assaults, and it is most prominently used in juvenile justice systems. However, it has also been used with victims and offenders in serious and violent crimes” (Mark S. Umbreit, 2001, p.xvi).

Based on some understanding it can be understood that the meaning or essence of penal mediation is an alternative settlement of criminal cases outside the court by involving the mediator as a neutral or impartial party.

The Penal Mediation Basis

The basis of the penal mediation existence which guiding the implementation of penal mediation in Indonesia are as follow: deliberation of consensus (joint discussion to reach a decision or agreement upon the problem), kinship (relationship as a family with a sense of brotherhood), judicial trilogy (simple, fast, and low cost judiciary), justice and expediency, *saling asah saling asih* (mutual acceptance and giving), harmony, appropriateness and peace.

The Penal Mediation Principles

- Penal Mediation is an alternative to settle criminal cases outside the court by involving mediators.
- Mediator is a neutral and impartial third party which acting as a facilitator. In the penal mediation process, the decision to reach an agreement remains to be taken by the Parties themselves. Mediator serves only to mediate or as the facilitator.
- Penal Mediation as a “transfer” mechanism or process of from criminal justice to the process of settling criminal case outside the court.
- Penal mediation is applicable for all types of offenders (all ages, beginners, and recidivists). However, in Indonesia, it is better not to apply penal mediation to the recidivist and children. It is because repetition of crime is a criminal offense while a child facing the law (in Indonesian language abbreviated as *ABH*) already has a valid restorative justice mechanism known as a diversion.
- Penal mediation may be applied to certain offenses. As a first step towards the development of penal mediation in Indonesia, it is very relevant to apply penal mediation in the settlement of minor criminal cases and other relevant criminal offenses.
- Penal Mediation is made on the consent of the victim and the perpetrator voluntarily, with good faith and no coercion.
- The victim receives indemnity or compensation or restitution in addition to the apology from the perpetrator.

- The offender receives recovery through the apology and forgiveness of the victim as well as through the awarding of such indemnity or compensation or restitution as a form of responsibility.
- The consensus of the settlement in penal mediation can be set forth in the form of an agreement and signed by the parties.
- If penal mediation fails to reach an agreement, then the case may proceed to the criminal court.
- Penal mediation may be applied in the form of direct penal mediation (facilitating face-to-face meetings between victim and perpetrator) or indirect penal mediation (mediator meets both parties separately. The mediator does not facilitate the face-to-face meeting sessions directly between victim and perpetrator). The main principle in penal mediation is communication.
- When comparisons are made in various countries of the world, the ideal penal mediation model to be applied in Indonesia is the victim-offender mediation model that involves various parties with the aim of restoring or improving conditions such as the original state before the crime.

Conclusion

The concept of penal mediation in Bali can be found in Balinese customary law which is applied through the *awig-awig* or *pararem*. In Balinese customary community, the case settlement outside the court may be conducted by direct meeting or with the help of a third party as a mediator. The settlement of customary conflict is carried out by deliberation of consensus in a customary village meeting (*sangkepan* or *paruman*) which produces peace or can also be subjected to customary sanction (*pamidanda*) as an effort to restore balance. Mediator in this regard may be in the form of a trusted individual or Village Official (the Head of Village/*Perbekel*, *kepala dusun*) or Customary Village Officials (customary village administrators (*Prajuru Desa Pakraman: Bendesa, Klijan Banjar*)). The ideal penal mediation concept should adopt the basis and principles prevailing in customary law. Among them is applying deliberation of consensus with kinship approach in solving the problem. The agreed-types of sanction are also important for the parties in order to restore the balance or to the recovery resulting from the crimes. Peaceful settlement is also prioritized by holding on to the principle of deliberation, fraternity, mutual acceptance and giving, equally fortunate and achieving inner peace or known as the principle of deliberation, harmony and appropriateness.

REFERENCES

- _____. 2005. *Pemberdayaan Awig-Awig Menuju Ajeg Bali*. Lembaga Dokumentasi dan Publikasi Fakultas Hukum Universitas Udayana: Bali.
- Barda Nawawi Arief. 2008. *Mediasi Penal: Penyelesaian Perkara Pidana di Luar Pengadilan*. Pustaka Magister: Semarang.
- Darji Darmodiharjo dan Sidartha. 2006. *Pokok-Pokok Filsafat Hukum (Apa dan Bagaimana Filsafat Hukum Indonesia)*. PT Gramedia Pustaka Utama: Jakarta.
- Eugen Ehrlich. 1936. *The Fundamental Principles of the Sociology of Law*. Harvard University Press.
- Fatahillah A. Syukur. 2011. *Mediasi Perkara KDRT (Kekerasan Dalam Rumah Tangga) Teori dan Praktek di Pengadilan Indonesia*. Mandar Maju: Bandung.

- I Nyoman Sirtha. 2008. *Aspek Hukum Dalam Konflik Adat di Bali*. Udayana University Press: Bali.
- Ketut Sudantra and Wayan P. Windia. 2012. *Sesana Prajuru Desa; Tatalaksana Pimpinan Desa Adat di Bali*. Udayana University Press: Bali.
- Lilik Mulyadi. 2015. *Mediasi Penal Dalam Sistem Peradilan Pidana Indonesia*. Alumni: Bandung.
- Made Suasthawa Dharmayuda. I 2001. *Desa Adat Kesatuan Masyarakat Hukum Adat di Provinsi Bali*. PT. Upada Sastra: Bali.
- Mark S. Umbreit. 2001. *The Handbook of Victim Offender Mediation (An Essential Guide to Practice and Research)*. 1st edition. Jossey-Bass: San Francisco, California.
- Marwan M. and Jimmy P. 2009. *Kamus Hukum; Dictionary of Law Complete Edition*. Reality Publisher: Surabaya.
- Nyoman Serikat putra Jaya. 2005. *Relevansi Hukum Pidana Adat dalam Pembaruan Hukum Pidana Nasional*. PT. Citra Aditya Bakti: Bandung.
- Philippe Nonet dan Philip Selznick. 1978. *Law and Society in Transition : Toward Responsive Law*. Harper & Row: London.
- Rachmadi Usman. 2013. *Pilihan Penyelesaian Sengketa di Luar Pengadilan*. PT. Citra Aditya Bakti: Bandung.
- Satjipto Rahardjo. 2009. *Hukum Progresif*. Genta Publising: Yogyakarta.
- Soepomo, R. 2013. *Bab-Bab Tentang Hukum Adat*. PT Balai Pustaka: Jakarta Timur.
- Soerojo Wignjodipoero. 1995. *Pengantar dan Asas-Asas Hukum Adat*. PT Toko Gunung Agung: Jakarta.
- Soetandyo Wignjosoebroto. 2013. *Hukum: Konsep dan Metode*. Stara Press: Malang.
- Tjok Istri Putra Astiti. 1997. *Pidato Pengenalan Jabatan Guru Besar/Pidato Pengukuhan Guru Besar*. Fakultas Hukum Universitas Udayana. Bali.
- Umi Rozah. 2012. "Konstruksi Politik Hukum Mediasi Penal Sebagai Alternatif Penyelesaian Perkara Pidana" dalam Agustinus Pohan. Topo Santoso. dan Martin Moerings (ed). *Hukum Pidana Dalam Perspektif*. Pustaka Larasan: Denpasar Bali.
- Wayan P. Windia dan Ketut Sudantra, 2006, *Pengantar Hukum Adat Bali*, Lembaga Dokumentasi dan Publikasi Fakultas Hukum Universitas Udayana, Bali.
- Wayan P. Windia, Ida Ayu Indra Kondi S. Wananjaya, I Gusti Agung Mas Rwa Jayantari, I Gusti Ngurah Dharma Laksana, dan Anak Agung Istri Atu Dewi, 2013, *Kompilasi Aturan Tentang Desa Adat di Bali*, Udayana University Press, Bali.
