

December 9<sup>th</sup> 2016



# 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"



**IMAM AS SYAFEI BUILDING**  
Faculty of Law, Sultan Agung Islamic University  
Jalan Raya Kaligawe, KM. 4 Semarang, Indonesia

**UNISSULA PRESS**

ISBN. 978-602-1145-41-8

## TABLE OF CONTENTS

---

Front Page .....	i
Information of the International Seminar .....	ii
Committee Composition .....	iii
Preface.....	iv
Greeting From The Dean Faculty of Law .....	vi
<b>INDONESIA’S KPK AND NSW’S ICAC: COMPARISONS AND CONTRASTS</b>	
Prof. Simon Butt .....	1
<b>CAN INDONESIA FREE ITSELF FROM CORRUPTION IN 2020?</b>	
Prof. Dr. Hikmahanto.,S.H.,LLM .....	4
<b>AN ACT TO ESTABLISH THE ANTI-CORRUPTION AGENCY, TO VEST POWERS ON OFFICERS OF THE AGENCY AND TO MAKE PROVISIONS CONNECTED THEREWITH.</b>	
Rohimi Shapiee.....	7
<b>STRATEGY TO CREATE INDONESIA FREE CORRUPTION IN 2020</b>	
Dr. Jawade Hafidz, S.H., M.H .....	11
<b>THE NETHERLANDS INGLOBAL CORRUPTION</b>	
Siti Malifah Marlou Feer, M.A. ....	28
<b>ROBUST YET FRAGILE: EFFORTS IN COMBATING CORRUPTION IN INDONESIA</b>	
Laras Susanti.,S.H., LLM.....	33
<b>LEGAL STATUS OF AKTOR’S FOR CORRUPTION (In the Perspective of Islamic Law)</b>	
Sumarwoto Umar .....	37
<b>THE ROLE OF LAW IN THE POVERTY REDUCTION STRATEGY</b>	
Lantik Kusuma Aji .....	46
<b>THE INDEPENDENCY OF THE INSTITUTION FOR THE PROTECTION AND THE ESTABLISHMENT OF HUMAN RIGHTS TOWARDS THE GLOBALIZATION ERA 2020</b>	
Khalid .....	55
<b>THE URGENCY OF ANTI CORRUPTION EDUCATION FOR COLLEGES IN INDONESIA</b>	
Siska Diana Sari.....	62
<b>THE PROBLEMS OF DIVORCE IN CUMULATION AT THE RELIGIOUS COURTS BASED ON THE PRINCIPLES OF SIMPLE, FAST AND LOW COST</b>	
Elis Rahmahwati.....	78
<b>DISPARITIES DECISION RELATED TO INTERPRETATION OF ARTICLE 2 AND 3 CORRUPTION ERADICATION ACT</b>	
Agung Widodo.....	87
<b>DIVERSITY ADULT AGE LIMITS POSITIVE LAW IN INDONESIA (Studies in Multidisciplinary Perspective)</b>	
Muhammad Andri .....	102

<b>THE APPLICATION OF BALANCE IDEA IN SETTLEMENT OF DOCTOR MALPRACTICE CASE THROUGH PENAL MEDIATION</b> Yati Nurhayati.....	111
<b>MODERNIZATION LAW AS A CRIME CORRUPTION VERY EXCEPTIONAL THROUGH ENFORCEMENT OF ETHICS</b> Dr. Sukresno, SH, M.Hum .....	118
<b>CORRUPTION POTENCIES IN LAND USE POLICY (A Case Study in Kuningan Regency)</b> Haris Budiman .....	126
<b>CORRUPTION PREVENTION AND CONTROLS</b> INP Budiarta .....	133
<b>ISLAMIC LAW VALUES TRANSFORMATION IN THE RECONSTRUCTION OF THE LEGALITY PRINCIPLE OF INDONESIAN CRIMINAL CODE</b> Sri EndahWahyuningsih .....	145
<b>JUSTICE AND CHARITY IN JAKARTA’S NORTH COAST RECLAMATION PROCESS THAT WILL LEAD TO INDONESIA CLEAN OF CORRUPTION</b> Untoro .....	155
<b>CORRUPTION CRIMINAL SANCTIONS WITH VALUES OF JUSTICE-BASED</b> Zulfiani.....	162
<b>THE REFLECTION OF ISLAMIC BANKING IN THEORY AND PRACTICE</b> Anis Mashdurohatun .....	171
<b>THE IMPLEMENTATION OF LOCAL WISDOM SIRI’NA PACCE AS AN EFFORT OF CORRUPTION ERADICATION IN INDONESIA</b> Muh. Afif Mahfud .....	181
<b>DISCOURSE POLITICAL LAW IN INDONESIA ON A COMPLETION OF PLATO PHILOSOPHY</b> Adrianus M. Nggoro,SH.,M.Pd.....	189
<b>STUDY OF INDONESIA’S PARTICIPATION IN ICSID</b> Agus Saiful Abib.....	202
<b>NOTARY ROLE IN THE IMPLEMENTATION OF EXECUTION PROCUREMENT OF GOODS AND SERVICES ARE FREE OF CORRUPTION BASED ON THE PRINCIPLE OF GOOD GOVERNANCE</b> Aris Yulia .....	211
<b>ANALYSIS WIRETAPPING AUTHORITY UPPER KPK LAW ENFORCEMENT IN THE PERSPECTIVE OF HUMAN RIGHTS</b> Ariyanto,SH.,MH.....	221
<b>SOCIAL WORKING PENALTY AS SOLUTION IN ERADICATING CORRUPTION IN INDONESIA</b> Desy Maryani.....	232
<b>LEGAL POLITICSOF EMPLOYMENT IN TERM OF PART OF TASK HANDOVER TO OTHER COMPANIES IN INDONESIA</b> Endah Pujiastuti.....	244

<b>RESOLUTION OF DISPUTES OF OUTSOURCING WORK FORCE IN THE COMPANY EMPLOYING OUTSOURCING SERVICE</b> Pupu Sriwulan Sumaya .....	256
<b>THE APPLICATION OF CORRUPTION LAW TOWARD CRIMINAL ACT IN THE FIELD OF FORESTRY</b> Ifrani .....	267
<b>THE EFFORTS OF ERADICATION OF CORRUPTION THROUGH INSTRUMENTS OF MONEY LAUNDERING LAW AND RETURN ACTORS' ASSETS</b> Yasmirah Mandasari Saragih.....	276
<b>AFFIRM ROLE OF EXISTENCE <i>RECHTSVERWERKING</i> TO ACHIEVING LEGAL CERTAINTY IN LAND REGISTRATION</b> Rofiq Iksamana, Setiono, I Gusti Ayu Ketut Rachmi Handayani, Oloan Sitorus.....	287
<b>ANTI-CORRUPTION EDUCATION AT AN EARLY AGE AS A STRATEGIC MOVE TO PREVENT CORRUPTION IN INDONESIA</b> Ida Musofiana.....	304
<b>FREED INDONESIA'S CORRUPTION BETWEEN HOPE AND REALITY</b> Dr. Tongat, SH., M.Hum., Said Noor Prasetyo, SH., MH.....	313
<b>UTILIZATION OF INDONESIA MARINE RESOURCES IN AN EFFORT TO REALIZE INDONESIA TOWARDS THE SHAFT OF THE MARITIME WORLD</b> Dr.Lathifah Hanim, SH.M.Hum., M.Kn. and Letkol (mar) MS.Noorman, S. Sos., M.Opsla.....	319
<b>POTENTIAL CORRUPTION IN THE VALIDATION POLICIES ON ACQUISITION TAX OF LAND AND OR BUILDING</b> Lilik Warsito.....	325
<b>THE EFFORT OF LAW ENFORCEMENT IN COMBATING CORRUPTION IN SOUTH SUMATERA</b> Sri Suatmiati.....	334
<b>ETHICAL PERSPECTIVE AND THE MAPPING OF NORM IN CORRUPTION ACT</b> Siti Zulaekha.....	344
<b>AN EXPANSION OF CONCEPT THE STATE ECONOMIC LOSS IN CORRUPTION IN INDONESIA</b> Supriyanto, Hartiwiningsih, Supanto.....	354
<b>JURIDICAL STUDIES ON SUBSTANCE AND PROCEDURE OF THE DISMISSAL OF THE PRESIDENT AND/OR VICE-PRESIDENT AFTER THE REFORMATION</b> Siti Rodhiyah Dwi Istinah.....	364
<b>THE ROLE OF THE SHARIA SUPERVISORY BOARD IN THE FRAMEWORK ENFORCING SHARIA PRINCIPLES AT THE INSTITUTE OF ISLAMIC BANKING IN SEMARANG</b> Aryani Witasari.....	376
<b>SEMARANG CITY GOVERNMENT ROLE IN CONSERVATION AND ENVIRONMENTAL PROTECTION TO THE CAPITAL OF THE NATIONAL HERITAGE IN INDONESIA</b> Achmad J Pamungkas ( <i>Indonesia</i> ), Carlito Da Costa ( <i>Timor Leste</i> ) .....	390

<b>STUDYING THE WISDOM OF ZAKAT</b> Moch. Gatot Koco (Indonesia), Basuki R Suratno (Australia) .....	398
<b>HOMOLOGATION RECONSTRUCTION IN BANKRUPTCY THAT IS BASED ON DIGNIFIED JUSTICE</b> Agus Winoto .....	410
<b>RECONSTRUCTION OF EXECUTIVE AND LEGISLATIVE AUTHORITY IN MAKING GOOD GOVERNANCE (GOOD GOVERNANCE) VALUES BASED ON WELFARE</b> Mohamad Khamim .....	420
<b>THE TASK RECONSTRUCTION AND BPKP'S AUTHORITY IN THE CASE OF JUSTICE VAUE BASED CORRUPTION</b> Sarbudin Panjaitan .....	429
<b>THE RECONSTRUCTION OF MADLIYAH AND IDDAH MAINTENANCE AND MUT'AH IN DIVORCE CASE FOR JUSTICE AND WELFARE</b> Mustar .....	438
<b>JURIDICAL ANALYSIS OF THE ALLEGED CRIMINAL OFFENSE TO MANUFACTURE A NOTARY DEED</b> Subiyanto .....	446
<b>REVITALIZATION DEAL IN AKAD HYBRIDS IN SHARIA BANKING VALUE BASED ISLAMIC JUSTICE</b> Masduqi .....	452
<b>RECONSTRUCTION OF LEGAL PROTECTION DISTRICT HEAD IN THE ELECTION IMPLEMENTATION OF VALUE-BASED JUSTICE</b> Kukuh Sudarmanto Alugoro .....	462
<b>ABUSE OF AUTHORITY OFFENSE THEOLOGICAL RECONSTRUCTION LAW ERADICATION OF CORRUPTION (LAW NUMBER 31 OF 1999 JO. LAW NUMBER 20 OF 2001) BASED ON VALUE OF JUSTICE</b> As'adi M. Al-ma'ruf .....	472
<b>RECONSTRUCTION OF THE DAILY PAID WORK AGREEMENT IN THE EMPLOYMENT LAW BASED ON JUSTICE</b> Christina N M Tobing .....	479
<b>THE LAW AND THE IMPACT OF MARRIAGE SIRRI</b> Sahal Afhami .....	489
<b>CRIMES AGAINST CHILDREN AS ACTORS</b> Muhammad Cholil .....	503
<b>RECONSTRUCTION OF CRIMINAL PROCEDURAL LAW (KUHP) ABOUT THE DETENTION</b> Muhammad Khambali .....	512

<b>BASED ON JUSTICE PROBLEMS OF DISPUTE RESOLUTION REGIONAL CHIEF ELECTION (GOVERNOR, REGENTS AND MAYOR)</b>	
Esti Ningrum .....	520
<b>RECONSTRUCTION REGIONAL MINIMUM WAGE (UMR) IN RENEWAL OF EMPLOYMENT LEGAL REMEDIES BASED INDONESIA THE VALUE JUSTICE PANCASILA</b>	
Urip Giyono .....	531
<b>IMPLEMENTATION OF LAW AS TO MAINTAIN SECURITY IN THE CONTEXT OF PROFESSIONAL POLICE POLMAS (CASE STUDY IN LAMPUNG POLICE)</b>	
Muhammad Yaman .....	539
<b>RECONSTRUCTION OF CRIMINAL SANCTIONS PENAL CODE ACTORS ON ABORTION CRIME BASED ON THE VALUE OF JUSTICE</b>	
Hanuring Ayu Ardhani Putri .....	549
<b>REGISTRATION FIDUCIARY GUARANTEE REALIZE LEGAL PROTECTION OF CREDITORS AND DEBTOR</b>	
Ansharullah Ida .....	556
<b>RECONSTRUCTION OF LEGAL DISPUTES MEDIATION IN HEALTH CARE FOR PATIENTS HOSPITAL BASED ON THE VALUE OF JUSTICE</b>	
Teguh Anindito .....	569
<b>RECONSTRUCTION OF CRIMINAL SANCTIONS AGAINST CRIME OF ACTORS AND MURDER MURDER IN PLAN BASED ON VALUE OF JUSTICE CRIMINAL CODE</b>	
Maria Marghareta Titiek Pudji Angesti Rahayu Teguh Anindito .....	579
<b>IMPLEMENTATION OF PENAL MEDIATION IN CRIMINAL LAW</b>	
Aji Sudarmaji .....	587
<b>FAIR SETTLEMENT RECONSTRUCTION OF PROBLEMATIC CREDIT DISPUTE AT BANK RAKYAT INDONESIA (STUDY CASE AT MEDAN-SINGAMANGARAJA BRI BRANCH OFFICE)</b>	
Bachtiar Simatupang .....	594
<b>RECONSTRUCTION OF THE WASTE MANAGEMENT LAW BASED ON WELFARE VALUE</b>	
M. Hasyim Muallim .....	616
<b>RECONSTRUCTION LAW OF PUNISHMENT AGAINST CHILDREN NARCOTICS ABUSE-BASED PROGRESSIVE LAW</b>	
Salomo Ginting .....	625
<b>LEGAL PROTECTION PROBLEM OF WIFE AND CHILDREN OF POLYGAMY SIRRI IN INDONESIA</b>	
Muhlas .....	639

<b>IDEAL RECONSTRUCTION OF REHABILITATION PUNISHMENT FOR NARCOTICS ADDICTS AND ABUSER'S VICTIMS JUSTIFIED BASED ON THE LAW OF THE REPUBLIC OF INDONESIA NO. 35 YEAR 2009 (CASE STUDY IN SUMATERA UTARA PROVINCE)</b>	
Ahmad Zaini .....	648
<b>IMPLEMENTATION OF ACCELERATION SYSTEMATIC LAND REGISTRATION FULL IN HUMBANG HASUNDUTAN DISTRICT</b>	
Ruslan .....	658
<b>RECONSTRUCTION OF STATUS AND AUTHORITY OF THE SHARIA COURT IN THE NATIONAL JUDICIAL SYSTEM BASED ON JUSTICE</b>	
Jufri Ghalib .....	667
<b>RECONSTRUCTION OF LIABILITY NOTARY PUBLIC OFFICERS TO ACT AS A VALUE-BASED JUSTICE</b>	
Elpina .....	679
<b>RECONSTRUCTION OF CONSUMER PROTECTION LAW IN MAKING THE BALANCE BUSINESS BASED BUSINESS AND CONSUMER VALUE OF JUSTICE</b>	
Ramon Nofrial .....	693
<b>RECONSTRUCTION OF LAND USED RIGHT EIGENDOM VALUES BASED ON JUSTICE AND LEGAL CERTAINTY</b>	
Hakim Tua Harahap .....	706
<b>RECONSTRUCTION OF DIVERSION CONCEPT IN CHILD PROTECTION OF CONFLICT WITH THE LAWS BASED ON THE VALUE OF JUSTICE</b>	
Ulina Marbun .....	726
<b>RECONSTRUCTION OF PARATE EXECUTION MORTGAGE RIGHTS TO LAND BASED ON THE VALUE OF JUSTICE</b>	
Zaenal Arifin .....	740
<b>THE RECONSTRUCTION OF DIVORCE DUE TO MARITAL STATUS UNDER THE UNAUTHORIZED GUARDIAN AS VALUE OF JUSTICE</b>	
Abdul Kholiq .....	751
<b>THE RECONSTRUCTION OF LEGAL AID LAW FOR CHILDREN WHO GET CONFLICT WITH LAW IN PROCESS OF JUSTIFICATION FOR CHILDREN BASED ON THE VALUE OF PANCASILA</b>	
Adi Mansar .....	767
<b>MEDIATION RECONSTRUCTION AS ONE OF THE ALTERNATIVE SETTLEMENT OF DECLINE IN THE COURTS BASED ON THE VALUE OF JUSTICE (Study at the Simalungun District Court)</b>	
Mariah S.M. Purba .....	778
<b>POLYGAMIC POLICY IN INDONESIA (Analysis of Polygamic Arrangements and Practices 1959-2015)</b>	
Warman .....	790

<b>LAW ENFORCEMENT AGAINST CORRUPTION IN PERSPECTIVE OF HUMAN RIGHTS IN INDONESIA</b> Sekhroni .....	798
<b>THE PRINCIPLE OF NATURAL JUSTICE AND HUMAN'S RIGHT PROTECTION FOR CITIZENS IN ERADICATION OF CORRUPTION IN INDONESIA</b> Indriyana Dwi Mustikarini .....	809
<b>PREVENTING LAND MAFIA USING POSITIVE LAND REGISTRY SYSTEM</b> Bambang Sulistyowati .....	816
<b>UNRULY PASSENGER IN AVIATION: THE REGULATIONS AND CASES IN INDONESIA</b> Adya Paramita Prabandari .....	826
<b>EDUCATION ANTI-CORRUPTION IN INDONESIA: PROBLEMS, CHALLENGES AND SOLUTIONS</b> Alwan Hadiyanto .....	839
<b>SPIRITUAL URGENCY OF RELIGIOUS AND EXPENSES OF EVIDENCE IN COMBATING CORRUPTION IN INDONESIA</b> Sulistyowati .....	852
<b>SUE FOR THE STATE ADMINISTRATION OF JUSTICE IN INDONESIA</b> Sarjiyati .....	863
<b>CONSISTENCY MODEL OF COURT DESIGNATION TO FOSTER PARENT RIGHTS AUTHORITY DUE TO DIVORCE ON CHILDREN</b> Erna Trimartini .....	873
<b>AN INVESTIGATION AUTHORITY OF CRIMINAL ACT ON CORRUPTION IN CRIMINAL JUSTICE SYSTEM IN INDONESIA</b> Sukmareni .....	885
<b>PRO CONS THE EXISTENCE OF DEATH PENALTY IN CORRUPTION ACT OF 1999 IN INDONESIA</b> Anis Rifai .....	903
<b>PENAL MEDIATION IN SOLVING MEDICAL MALPRACTICE CASES AS AN ALTERNATIVE OF PENAL SANCTIONS BASED ON LOCAL WISDOM</b> Sri Setiawati .....	913
<b>SPECIAL PROTECTION OF CHILDREN IN CRIMINAL JUSTICE SYSTEM</b> Achmad Sulchan .....	922
<b>MORAL REFORM BUREAUCRACY AS PREVENTION OF ILLEGAL PAYMENTS TO INDONESIA CLEAN OF CORRUPTION</b> Herwin Sulistyowati .....	932
<b>STANCE AND AUTHORITY OF PEOPLE'S CONSULTATIVE ASSEMBLY DURING REFORMATION ERA 1945</b> Ahmad Mujib Rohmat .....	944



<b>TAXES AND ALMS SEEN FROM ISLAMIC LAW</b>	
Mohammad Solekhan .....	954
<b>DIVERSION IN COURT (Case Studies in Karanganyar District Court)</b>	
Anita Zulfiani .....	964
International Seminar	
Photos.....	971

# **PENAL MEDIATION IN SOLVING MEDICAL MALPRACTICE CASES AS AN ALTERNATIVE OF PENAL SANCTIONS BASED ON LOCAL WISDOM**

**Sri Setiawati**

Faculty of Law UNTAG Semarang  
[iyengsantoso@yahoo.com](mailto:iyengsantoso@yahoo.com)

## **ABSTRACT**

In the 1945 Constitution of Indonesia's preamble, it is stated that in order to form a government of Indonesia, a legal system based on the values of Pancasila is formulated. 1945 Constitution of Indonesia itself becomes the basic law in formulating a rational effort in solving crimes. In other words, the penal policies in Indonesia must also be based on the values of Pancasila in social policies contained in the 1945 Constitution of Indonesia.

The formulation of the Bill of Penal Code begins with "the idea of a balance" between the interests of society and individual interests; recognition of the law which serves as a source of law in addition to Act, even justice is served not only by law, but also based on the guidance of the Almighty. Why is Penal Mediation able to be selected to complete the culpa offense case, especially medical malpractice? Mediation is a way of settling penal disputes outside of law in accordance with the desired way the community in resolving the case, namely the peaceful deliberations. Penal mediation gives space to bring the victim and the perpetrators of penal acts together, so that the interests of both parties can be accommodated. Long before the developed countries thought of ADR and policies in a limited and selective use of penal sanctions, the Indonesian people are already familiar with their local wisdom resolve any conflict with deliberations.

**Keywords: penal-mediation, medical malpractice, local-wisdom**

## **Introduction.**

In the 1945 Constitution of Indonesia's preamble, it is stated that in order to form a government of Indonesia, a legal system based on the values of Belief in One and Only God, Just and Civilized Humanity, The Unity of Indonesia, Democracy Guided by the Inner Wisdom in the Unanimity Arising out of Deliberations amongst Representatives, and Social Justice. Therefore, 1945 Constitution of Indonesia itself becomes the basic law in formulating a rational effort in solving crimes. In other words, the penal policies in Indonesia must also be based on the values of Pancasila and social policies contained in the 1945 Constitution of Indonesia.

Penal policy or the policy of crime prevention should be done in integration between crime prevention policies using penal (penal policy) and crime prevention policies by means outside the penal (non penal policy). In fact, crime prevention by means of penal is still excellent, although policies in a limited and selective use of penal sanctions already widely voiced in various meetings and scientific papers in order to reform the Penal Code. This is evident from the products of legislation, which is almost all Acts, are likely to regulate penal sanctions as well, even though they mainly regulate administrative field. That means, although there is an understanding that penal sanctions should be *ultimum remedium*, or only used if another way is not "impervious", penal sanctions remain as the main punishment politically. Similarly, although restorative justice (judiciary to improve and not to retaliate) has been widely discussed, in reality with such products of legislation, it seems that the chance to place conviction is still wide open.

Meanwhile, the penal law itself has a limited ability to accommodate and bear the brunt as a means of crime prevention. Partly because of the rise and fall of a crime in one country is not related to changes in laws or tendencies in the judgment, but rather related to the operation or functioning of major cultural changes in society.

In the Indonesian positive law, basically a penal case cannot be settled out of court, although in certain cases there are possibilities of settlement outside of court. In Indonesian law enforcement practices, there are often penal cases settled out of court with the discretion of law enforcement officials, especially the police, through the mechanism of peace, traditional institutions and others. Mediation in penal cases (Penal Mediation) is possible for the case of complaints, offenses which cause light loss, and in practice it is often used to resolve the case of traffic accidents (negligence causing someone a serious injury/negligence causing someone to lose their lives).

Mediation is a way of settling penal disputes outside the law in accordance with the desired way the community in resolving the case, namely the peaceful deliberation. Penal mediation gives space to bring the victim and the perpetrators of penal acts together, so that the interests of both parties can be accommodated.

This paper highlights the possibility of penal mediation to be used as an alternative to settle medical malpractice as one form of culpa offense, given the advantages of mediation penal, the development of sentencing's objective, the limited ability of the penal law, and the values of harmony that is forged through consensus and peace in accordance with the spirit of Pancasila and local wisdom.

### **Discussion.**

As a source of basic values that contain ethical judgments, Pancasila is a ground norm of all laws in Indonesia. Article 2 of Law 12 Of 2011 on the Establishment of Laws and Legislations affirms that Pancasila is the source of all sources of State Law. Thus the basic values contained in Pancasila should be the moral foundation in building a legal system in Indonesia. Because Pancasila is the soul of the nation, it should be a source or basis for positive legal norm. True law, is the law that reflects the values or the soul of the nation, which is Pancasila. (Tanya L. Bernard et. al., 2015: *Pancasila Bingkai Indonesia*, p. 32).

Penal mediation is one form of restorative justice application, which is a concept that sees malicious or a crime act is not just a matter between the offender with the states representing the victim, leaving the settlement process only to the offender and the state. Restorative justice requires penal proceedings to provide the fulfillment of the interests of the victims, who suffers because of the offender. Thus, a paradigm shift in sentencing to put penal mediation as part of the penal justice system in the future is needed in the National Penal Code among others.

Prevention effort of disputes out of court is generally known as the "Alternative Dispute Resolution" (ADR) or in terms of Indonesian law is APS (*Alternatif Penyelesaian Sengketa*), which one of its forms is Mediation. Mediation is generally used in the civil cases, not penal cases. Based on the currently used legislation in Indonesia (positive law), a penal case cannot be settled out of court in principle, although in certain cases, it is possible that the settlement of a penal case is out of court (Barda Nawawi Arief, *Aspek Kebijakan Mediasi Penal dalam Penyelesaian Sengketa diluar Pengadilan*, 2007, page 1).

While theoretically the resolution of dispute outside the court exists only for civil disputes, in practice some penal cases are also settled out of court through various discretionary law enforcement officers or through the mechanism of deliberation/peace or institution to palliate existing in society (the family council; deliberation village; customary deliberation etc.). The practice of settling penal disputes outside the court has no formal legal basis, therefore there often is a case that informally have been settled by peace (through the mechanism of customary law), but still processed to the court in accordance with the law.

ADR has long been known as one of the methods in a variety of beliefs and cultures in resolving disputes in the community. But the context of approaches and procedures for its implementation is adjusted to Legal Culture or Local Customary (Susanti Adi Nugroho, *Mediasi Sebagai Alternatif Penyelesaian Sengketa*, 2011, page 2). Definition of Legal Culture used is the habits of a society based on law and legal systems prevailing in the society or in other words, a cultural society which is based on the legal system.

Traditional Asian societies, for example, consciously accept moral bonds due to the influence of social sanctions rather than as imposed by law. Ancient Asian tradition influenced by Confucian philosophy has a conciliatory culture where mediation or conciliation has long been recognized as the most suitable mechanism for dispute resolution.

The definition of ADR is an institution for settling disputes through procedures agreed upon by the parties; which is the settlement out of court by way of consultation, negotiation, mediation, conciliation or assessment by experts. It is explained in Law 30 of 1999 on Arbitration and Alternative Dispute Resolution that ADR is an institution of dispute resolution outside the court by the agreement of the parties to the exclusion of dispute resolution litigation in court.

Law 30 of 1999 stressed that Indonesia does require ADR as an alternative dispute resolution agency. This is required before society, especially legal practitioners, become a society which is "litigious minded".

The advantages of the Penal Mediation are as follows:

1. Penal Mediation helps reducing the feeling of revenge against the victim, is more flexible because the procedure is simpler, cost-effective, the process is faster than the penal justice process;
2. Reducing the burden of cases in the judiciary and the time needed to settle a problem with Penal Mediation;
3. The Penal Mediation provides an opportunity for victims and offenders to meet and

discuss the losses that have been suffered, expressing concern, regret and apology, as well as the demand for restitution;

4. Penal Mediation recreates a harmonious relationship between victim and offender, allowing the victim to remiss, thus reducing offender's guilt as well as reconciliation between the two.

(Jack B Weinstein, in I Made Agus Mahendra Iswara, *Mediasi Penal, Penerapan Nilai-nilai Restorative Justice dalam Penyelesaian Tindak Pidana Adat Bali*, 2013, p. 52)

Moreover, the concept of settling disputes outside litigation path has become a cultural root in Indonesia. Article 6 of Law 30 of 1999 has provided some preferred institutions for peaceful settlement of disputes which can be reached by the parties using consultation, negotiation, media, conciliation or assesment by expert. Issues of mediation in penal cases is already on the agenda at the international level, namely the Congress of the United Nations 9/1995 and 10/2000 on "Prevention of Crime and the Treatment of Offenders" and in the International Conference on Reform of Penal Law (International Penal Reform Conference) in 1999 (Barda Nawawi Arief, *Aspek Kebijakan Mediasi Penal Dalam Penyelesaian Sengketa Diuar Pengadilan*, 2007 p.10).

The background of this thinking is associated with ideas of penal law renewal (penal reform), and pragmatism as well. The background of pragmatism among is to reduce stagnation or accumulation of cases ( "the problems of court case overload"), for the simplification of the judicial process and so on (Barda Nawawi Arief, *Kebijakan Legislatif dalam Penanggulangan Kejahatan dengan Pidana Penjara*, 2000, pp. 169-171).

Meanwhile, on the basic idea of thinking of this mediation model, Recommendation R (99) 19 of the Committee of Ministers of the Council of Europe 15 September 1999 has stated that the idea of mediation unites those who want to do the reconstruction of the previous model, those who want the strengthening of the position of the victims, those who want alternative punishment, and those who want a reduced financing and workload of the penal justice system or make the system more effective and efficient.

In addition to the theoretical background and international developments above, the customary laws of Indonesia, which are based on the natural cosmic mind, magical and religious, have long recognized this penal mediation institution, for example in West Sumatra, Aceh and Lampung customary law. (Hilman Hadikusuma, in Barda Nanawi Arief,

2007, page 19). Even Aceh (NAD) has set in Bylaw 7/2000 on the Implementation of the Customary Life which essentially governs peaceful resolution of disputes through customary deliberation (Article 13), as well as peace binding on the parties, and those who do not heed the decision will be penalized by customary law (Article 14).

In Baduy community, Kanekes Village, District Rangkasbitung Lebak district, Banten province, the settlement of disputes and penal cases between its citizens are always resolved peacefully, through village meetings, and the traditional leaders always act as peacemaker or mediator. In this case, that leader is Jaro Tangtu. Jaro Tangtu is a traditional leader whose position is directly under Pu'un or Customary Chief. Jaro Tangtu is in charge of implementing the tasks of everyday Customary Institution, and has the authority to establish policy and decision of Baduy Customary Law. When conflicts occur because a Baduy citizen harms another (on Baduy, there is no strict separation between the breach of civil law and penal law), the first step is reconciliation by their families, by doing "silih hampura" or forgiving each other, preceded by an apology from the offender to the victim. Silih hampura has a deep meaning, not only to forgive each other through speech and a handshake, but it interprets as an apology as well to the ancestors of victims. The goal is that there is no animosity and for the conflict to be finished as soon as possible.

If peace through "silih hampura" cannot be achieved, Jaro Tangtu will intervene, reconciling the parties with the ceremony of "Ngabokoran", which is a ceremony to cleanse the mind of the conflicting parties, so the whole family and the ancestor of both sides can forgive each other. Likewise, the traditional institution as well as the village will become clean of stains caused by the infringement of the law. If Baduy citizen commits abuses against residents outside Baduy, the peace will still be pursued with the help of Jaro Kanekes, which is the traditional leaders and head of the village. If the victim (resident outside Baduy) rejects peace and wants to finish through litigation, the offender (the Baduy citizen) will also get customary sanctions, in the hope the victim can forgive (Interview with Father Murshid, Vice Jaro Kampung Cibeo, Baduy Dalam, 2014).

From the description above, it appears that since the beginning, penal offense resolution with penal mediation has given space to the offender and victim to meet, without having to fulfill the penal law procedure that does not bring the victim and the offender together. The necessity for the victims and offenders to adhere to penal law procedures and the use of penal law as the only way to resolve conflicts caused by a penal act is contradicting the function of penal law. This is caused by the necessity of victims and offenders to obey and submit to the

procedures of penal law with all its consequences, as well as placing said victims and offenders as objects of law, not subjects to the law.

Currently, offense that is possible to be solved by peace is, among others, an offense committed in the form of "offenses punishable by fines" (Article 82 of the Penal Code) and in the case of penal offenses committed by children under the age of 18 (Law No 3 of 1997 on Juvenile Justice). Domestic violence, as well as other possibilities, can be seen in Law 39 of 1999 on Human Rights Court which authorizes the Human Rights Commission to conduct mediation in cases of human rights violations (see Art. 1 to 7; Art. 76: 1; Art. 89: 4; Art. 96), although it is not expressly stated that all cases of human rights violations can be mediated by Human Rights Commission. Similarly, there is no provision which expressly states that the mediation by Human Rights Commission can eliminate prosecutions or convictions. Article 96 (3) only specifies that "mediation decisions are legally binding and valid as legal evidence".

In addition, the police have stated that they has the authority to resolve cases through ADR with the Police Chief Letter B / 3022 / XII / 2009 / SDEOPS, dated December 14, 2009 on Case Settlement Through Alternative Dispute Resolution (ADR).

In everyday reality, penal cases based on negligence can be solved by mediation, even if it causes someone's death (e.g. in a traffic accident). In this case the investigator will act as mediator, facilitating meetings between offenders with victim's family and ending it with peace.

It is possible to be done because the victim's family realize that the traffic accident that resulted in deaths are not events that occurred due to deliberate action from the offender. They accept that the traffic accident is an unfortunate event, and realize that even though the offenders are investigated, prosecuted and sentenced, their loved ones who died would not live anymore. Sometimes, the victim's family is the one who ask the investigator to not process the matter by penal proceedings. The victim's family and the offender will make peace, based on the goodwill from both parties. This would be impossible if the victim's loss of life is intentionally caused by the offender, which that case requires the offender to meet legal consequences.

Similarly, the perpetrators will not be held accountable legally if their offense is an oversight that is committed unconsciously (onbewuste schuld). Said oversight usually happens because of stupidity, ignorance, shock, tiredness or unhealthy state of mind and/or soul of a person that resulting in their inability to control their behavior and estimate the cost



of their actions. Besides the difficulty in proving the connection between the oversight and the cause in cases like this, there is no benefit to convict someone whom state of mind and action has nearly zero connection (Jan Remmelink, in Rizky Adi Pinandito, 2015, *Rekonstruksi Sanksi Pidana terhadap Delik Culpa* p. 36).

Malpractice done by doctors or other health professionals is similar to traffic accident in a sense that it is a negligence or oversight that results in serious injury or death. Unintentional event such as patient's injury or death when undergoing medical service is an incident caused by faulty actions based on negligence. Medical malpractice has a bad connotation since it implies bad practice and is stigmatic, which should still be proven according to law. Meanwhile, Van der Mijn argued about "The Three Elements of Civil Liability" or errors because the negligent criteria, namely Culpability (there is negligence to be blamed); Damages (there is loss) and Causal relationship (there is a causal relationship) (Sarsintorini Son, 2005, Scientific Journal, *Hukum dan Dinamika Masyarakat*).

If the victim and offender have achieved peace, in which the offender is willing to fulfill the rights of victims, and the victims have forgiven the offender, then the law purposes have been achieved. When the law purposes have been reached, the coercion of state law enforcement to them with all the formalities will be wasted. (Waluyadi, 2015, *Perdamaian dalam Penegakan Hukum Pidana pada Tingkat Penyidikan, Relevansinya dengan Islah menurut Hukum Islam*, Summary of dissertation, UNS).

## **Conclusion.**

In practice, mediation appears as one alternative thinking in the problem solving of penal justice system. This issue arises from the discourse of restorative justice that seeks to accommodate the interests of victims and offenders of penal acts, and to find a better solution for both sides, to overcome the problems of the penal justice system to another. Mediation is selected, because mediation process will not only seek for a law certainty, but it will also the present facts so the parties included will find truth and expediency, as well as the decision to settle the matter without pressure.

Penal mediation in resolving culpa offense cases, an unemotional oversight in particular, is worthy to be institutionalized because: first, there has been a change of penal purposes towards improvement and not vengeance; second, the policy to use penal punishment selectively and limitedly in accordance with the nature of penal, which is ultimum remedium; The third, the inner attitude of offenders in culpa offense is negligence, which can arise due to ignorance and lack of experience; and fourth, the settlement of the

conflict within the Indonesian people, who have the spirit of Pancasila, will be more appropriate if done through deliberation and consensus to achieve peace.

### **BIBLIOGRAPHY**

Arief, Barda Nawawi, 2000, *Kebijakan Legislatif dalam Penanggulangan Kejahatan dengan Pidana Penjara*, Bandung, Alumni.

-----, 2012, *Pembangunan Sistem Hukum Nasional (Indonesia)*, Semarang: Pustaka Magister

-----, 2014, *Bunga Rampai Kebijakan Hukum Pidana (Perkembangan Penyusunan Konsep Kuhp Baru)*, Jakarta: Kencana

Moeljatno, 2001, *Kitab Undang-undang Hukum Pidana (KUHP)*, 21<sup>st</sup> edition. Jakarta: Bumi Aksara

Muladi, 1995, *Kapita Selekta Sistem Peradilan Pidana*, Semarang, Semarang: Badan Penerbit Undip

-----, 2010, and Barda Nawawi Arief, *Teori-Teori dan Kebijakan Hukum Pidana*, Bandung: Alumni

Sudarto, 1983, *Hukum Pidana dan Perkembangan Masyarakat*, Bandung: Sinar Baru

Susanti Adi Nugroho, 2011, *Mediasi Sebagai Alternatif Penyelesaian Sengketa*, Jakarta : Telaga Ilmu Indonesia

Tanya, Bernard L. et. al., 2015 : *Pancasila Bingkai Hukum Indonesia*, Yogyakarta: Genta Publishing

### **Scientific Journals/Research Results**

Barda Nawawi Arief, Mediasi Pidana (Penal Mediation) Dalam Penyelesaian Sengketa/ Masalah Perbankan Beraspek Pidana Di Luar Pengadilan, makalah dalam Dialog Interaktif Mediasi Perbankan, di Bank Indonesia Semarang, December 13<sup>th</sup> 2006; in KAPITA SELEKTA HUKUM, special publication in the event of 50<sup>th</sup> Dies Natalis FH UNDIP, 2007.

I Made Agus Mahendra Iswara, Mediasi Penal, Penerapan Nilai-nilai Restorative Justice dalam Penyelesaian Tindak Pidana Adat Bali, Thesis, 2013.

Sarsintorini Putra, Patient Safety dan Risiko Pengobatan Sebagai Upaya Penanggulangan Malpraktik Kedokteran, Jurnal Terakreditasi, Hukum dan Dinamika Masyarakat, FH Untag Semarang, 2005.

Waluyadi, Perdamaian dalam Penegakan Hukum Pidana pada Tingkat Penyidikan, Relevansinya dengan Islah menurut Hukum Islam, Dissertation summary, UNS, 2015.