



Penal Mediation Policy of Land Criminal Offense Resolution in the Outer Courts of Indonesia



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Abstract

Land was a masterpiece that was created by the Almighty God had been given to mankind who lives at starting their born, their activities in the world until death. Therefore, the land was a basic human need, which required land for a living, to grow crops, investing to be a source of life. Cosmological, the land was wherein the people lived, to work and live activity places, and rest after hard working. The land was a natural resource that was needed by a human, the human needs for land always increasing, and land availability will be limited. Due it's limitation, it was impacted an economic value was higher based on increasing demand for land, therefore, the land was true for residential shifted into business items that led to the competition was very tight and raised a legal issues unlike the land disputed in aspects Civil law, the law of the State Administration to Criminal Offense. The criminal policy towards a land criminal offense resolution resolved through various means that penal policies and non-penal policy / mediation penal, penal mediation policy as one of the best ways for settling disputes on the outer courts in Indonesia based on the philosophical basis of Pancasila state solution based on the precepts 4th, democracy led by the policy wisdom in the consultative / representative of the essence of each problems resolved by discussion and consensus, especially, on criminal cases land in the form of crime / offense against the annexation of land rights, occupying land without the landowner's permission, forging documents of land ownership, doubling certificate of property rights to land, embezzlement rights over immovable unlike a land, houses, and fields. The criminal offense other than intentional, negligent as well as was structured, due to the circumstances and the need that was conducted by any individual or legal entity offender.

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1. Introduction

Land has a very high value observed from any dimension, including philosophical thought, juridical, sociological, anthropological, cultural, political, military, and economic investment. It is a place for indwelling everyone, work, reproduce, and customs and religious rites. Traditional society view that the residence of the gods and spirits, therefore, it must be constantly maintained, if it does not, the gods and spirits will be angry and the destroyer of the land can be darned.

The philosophy basis of the control and land ownership since the human birth is based on the mastery of hereditary which is a value that is not measurable due to it is inherited by the heirs of human in Indonesia unlike an agricultural country, legally due to the land issue there is no tip base and will not be completed due to various problems, particularly, the land which related issues unlike land criminal offense intentionally, negligence, structured actions, circumstances and the actor needed, both individuals and legal entities.

Sociologically, based on the reality that occurred in the society there has been a lot of land criminal cases in the form of annexation of land rights, occupy land without authorization, fraud, embezzlement, entered and occupied the grounds, buildings and other people's land, destruction of fences, sheds, signpost, building, documents falsification, certificates, letters regarding a land, occupy other people's land without right, even, in order to seize and secure land rights can constitute the murder offense.

In cultural anthropology, the humans maintain the customs and culture with an ethics sense in their life, in politics and the military in the era of the Orde Baru (after 2008) era each person/group / Indigenous own, control the ground when asked to be left alone to be built, economic / investment signage the rampant problem of land is known, especially, in the big cities all businesses thriving center of trade and industry, build a shopping center with major malls, highways, government center needs a land. It is multi-function for any development, consequently, the land which had a social function of commercial value at the social values expense, culture and others.

The actor of criminal land continually arise and become more complex when the speculators come in the system to form The Association of Land Realtors to the land mafia, the perpetrators purchased a land as many as possible to be used as merchandise, not used alone, the active form is a series of actions course contradictory with laws that require the resolution of the unnecessary expense of time, effort, cost complicated bureaucracy, even fatalities, were resolved through penal mediation for completing disputes out of court.

Barda Nawawi Arief stated that the *penal mediation* is often referred to the term *mediation in criminal cases* or *mediation in penal matters* "*strafbemiddeling*" (Netherlands), "*Der Aubergerichtliche Tatausgleich*" (Germany) abbreviated ATA and in terms of Pernaci is called "*der mediation penale*". Due to the penal mediation especially brings the perpetrators of criminal acts with the victim, penal mediation is often as well as known as "Victim Offender Mediation" (VOM), Tater-Opfer-Ausgleich (TOA), or Offender Victim Arrangement (OVA).¹

Penal mediation is a form of alternative dispute resolution for the court outer known as the Alternative Dispute Resolution (ADR) as stipulated in the Regulation of the Republic of Indonesia No. 30 of 1999 on Arbitration and Alternative of Dispute Resolution. Based on the positive law a criminal case can not be settled out of court, unless a civil case, however, in practice often criminal case settled out of court through various discretionary law enforcement officers or through a mechanism of consultation/consensus /peace or forgiveness institution in society (consensus among family, involving the community leaders/rural, indigenous, religious leaders) in accordance with the state philosophy of Pancasila. The practice settlement of criminal cases law outer, therefore, is far as non-formal legal basis, therefore a case often informally has no peace settlement (although through the mechanism of customary law, law religion), however it is still processed through the courts in accordance with laws and regulations in Indonesia, therefore, the author observes a strictly necessary to set up legislation on Penal Mediation. Based on the above description, the article is formulated the legal issues as follows:

- 1) How does penal mediation policy regulation towards the resolution of land criminal offense perpetrators on the outer court in the future?
- 2) How does the resolution of the land criminal offense in the outer court of Indonesia?

¹ Barda Nawawi Arief, *Penal Mediation of Case Resolution in the Courts Outside*, Publishing Pustaka, Postgraduate of Semarang, unknown year, pp. 1-2

2. Materials and Methods

Juridical-Normative is used in the present study. Peter Mahmud Marzuki (2006) stated that the variety of studies using the normative approach includes: statute approach, case approach, historical approach, comparative approach, conceptual approach. While with Peter J. Ibrahim (2006) and Mahmud Marzuki (2006), was added the analytical approach, philosophical approach.² The approach used is the legislation approach, concept approach, historical approach, analytical approach, and philosophical approach.

Valerine (2016), was retired used to the Chief Justice of the Supreme Court of the Republic of Indonesia stated that Normative Legal Research Application in the Criminal Code apply normative law research; in the study of criminal law regarding:

- 1) The purpose of learning in each law education stratum unlike bachelor academic lecturing is on the basic concepts in the jurisprudence science (begrip) and practical aspects (as a foundation for the profession), therefore, the research is more descriptive and prescriptive. The illustrations, in this case, has been seen a penal provisions application in the judgment, thus the approach is on dogmatic law (positive law) and the criminal law science (law theory in the narrow sense). The master degree student is required to use the law reasoning at analyzing, e.g. by reviewing the criminal provisions in legislation regarding the law principles and establishing law requirements and this stratum students are expected to apply the approach interdisciplinary (theory in a broad sense), unlike criminology. In doctorate, the students are expected to conduct a philosophical study, e.g. by reviewing the criminal provisions in the legislation to analyze its philosophical foundation, the ontology basis, and logical ratio;
- 2) The scope of the law study to the present article of criminal law can be conducted or covered;
 - a) The legal concepts unlike the concept of "right of self-determination" or the concept of "Whistle Blower" and research on legal principles, e.g. the principle of "presumption of innocence"
 - b) The historical study which may include legal history (d.h.i criminal law), or the legislation histories
 - c) The case study, by tracing the 'ratio decidendi' in the decision or analyze their 'heteronomy' or "autonomy"³ in a decision based on "Legal Discourse Theory" or the Theory of Legal Argumentation.⁴
 - d) The research comparisons may include institution distinction of law enforcement in some countries (unlike KPK) a comparison of the legislation (unlike laws juvenile justice act, money laundering);
 - e) Analytical research, for instance, to analyze the criminal concept regarding PMH in the case of environmental crime or the concept of 'discretion' in corruption committed state officials;
 - f) A theoretical approach, e.g. punishment theory studies (or it might be combined with philosophical research and distinction of the civil law system and common law.⁵

The description above confirms that the method used in the present study is a juridical-normative method, as stated by Peter Mahmud Marzuki *et al.*, (2006).

3. Results and Discussions

3.1 Penal mediation policy regulation towards the resolution of land criminal offense perpetrators on the outer court in the future

Efforts the crime prevented / the land criminal offense can be solved through the Penal Resolution (criminal law application) as well as through NonPenal Resolution (Penal Mediation). In the present article, it discussed only non-penal mediation. The legal arguments that demonstrates the political criminal law in the punishment of land criminal perpetrators for the future in Indonesia explained that the process of sentencing in criminal law is the last resort (*ultimum remedium*), due to prior to the sentencing first performed legal work "non-penal", according to the theory of Political crime / criminal law policy that explicitly explains that the crime prevention policy through two ways i.e. non-penal and penal.

² Johny Ibrahim, *Theory dan Normative Research Methodology*, Malang, Bayu Media Publishing, 2006

³ G.J. Wiarda, *Drie Typen van Rechtsvinding*, Zwolle: Tjeenk Willink, 1980

⁴ Jurgen Hubermas, *Between Facts and Norms*, Great Britain, Polity Press, 1996

⁵ Valerine J.L. Kriekhoff, *Normative Law Research in Criminal Law: Method and Its Application*, in the *Book of Anthology of Justice Criminal Law and the Criminal Justice System 6 Decades by Harkristuti Harkrisnowo*, Jakarta : Pustaka Kemang, 2016, pp. 527-529

The crime prevention policies or commonly known in the term "political crime", may include the scope is quite broad. G.P. Hoefnagels stated that the crime prevention can be reached includes:⁶

- a) Criminal law application
- b) Prevention without punishment
- c) Influencing views of society on crime and punishment/mass media

Hoefnagels (2006) opinion illustrates that efforts crime prevention can be broadly divided into two, namely by "penal" (criminal law) and via "non-penal" (instead of / outer of criminal law). In the division G.P. Hoefnagels above, measures referred to in clause (b) and (c) can be inserted into a group effort "non-penal". Those stances are suggested that efforts to control the land criminal sector are non-penal i.e. prevention without crime (prevention without punishment) and public affect perceptions regarding crime and punishment through media publishing (influencing views of society on crime and punishment/mass media).

Based on the opinions and criminal law policies, there are some criminal acts on the land case can be settled through penal mediation includes the crime/violation towards the land rights annexation, occupying the land without the landowner's permission, forging of land ownership documents, duplicate Certificate of Land Property Rights, embezzlement rights over immovable unlike land, houses and fields, except corruption and murder should not be settled by a penal mediation, despite the good intentions of the perpetrators are an ease special punishment murder while for corruption towards perpetrators is proved restore financial losses and the country's economy with a loss of state over IDR. 1.000.000.000 (one billion) then resolution it through a penal mediation, however, if the state loses more than IDR. One billion if the offender has returned the remains acceptable losses to the state and imposed a light sentence.

3.2 The Way of Case resolution of Land Sector for Outer Courts

Combating crime towards the criminal perpetrators in the land sector without criminal is through social policy basically i.e. policy or national efforts to achieve the community welfare. Therefore, it is synonymous with the policy or national development planning that includes the various aspects of fairly comprehensive development. Handling or various aspects of development policy is very important for the model allegedly resolution in various congresses of the United Nations (UN) (regarding the Prevention of Crime and the Treatment of Offenders), that development itself can be "*criminogenic*" if the developments are:

- a) It was not rationally planned; unbalanced / inadequately planned;
- b) Cultural and moral values; and
- c) Did not include integrated social defense strategies.⁷

One aspect of social policy that would be paid attention is the resolution issue for social hygiene, either individually or as members of health / the family well-being (including the issue of child and youth welfare), as well as generally the public. The issue resolution of "mental health", "national mental health" and "child welfare" was stated in the scheme by Hoefnagels (1996) as one of the way "prevention (of crime) without punishment" (non-penal way).

Sudarto (1981) stated that "the youth clubs activities, the Boy Scouts and the resolution of social mental health with religious education "is a non-penal effort in preventing and combating crime".⁸ The resolution of mental health issues/spiritual as an integral part of crime prevention strategies, including the land crime area, is as well as UN congress focus. In the resolution consideration No. 3 Congress 6th, 1980, on "effective to Prevent crime", is stated:

- a) That crime prevention is dependent on the man himself;
- b) That the strategy of preventing crime should be based on efforts to generate/raise the spirit or soul of man and attempt to reassert his belief in his ability to do good (that crime prevention strategies should be based on exalting the spirit of man and reinforcing their faith in his ability to do good)

The above resolutions affirmation explained that in addition is a very important and strategic role of religious education and religious education of media various forms in strengthening the conviction and the human ability is followed the path of truth and goodness. Respecting the religious education and counseling are effective, not merely

⁶ G. Peter Hoefnagels, *The Other Side Of Criminology*, Holland: Kluwer, Deventer, 1973, P. 56

⁷ *Ibid*.

⁸ Sudarto, *Capita Selecta Criminal Law*. Bandung: Alumni, 1981, page. 144

expected looking after on personal healthy human soul/religiosity however as well as healthy family and a healthy social construction environment.

The importance of national cultural approach is proposed, as pointed out in the 6th UN Congress in 1980 that “*the importation of foreign cultural patterns which did not harmonize with the indigenous culture had a criminogenic effect*”. It is similarly stated, that one of the factors conducive to the crime is the factor of “*the destruction of original cultural identities*”.⁹

The description is basically emphasized that the most strategic non-penal efforts to the politics of criminal law in a criminal prosecution against perpetrators of criminal acts in the land sector in Indonesia an ideal/accurate in the future is all the effort to make society as environmental-social and environmental healthy living (in material and immaterial) factors criminogenic. This means that the people with all their potential, especially, for those who have the financial capability adequate to the religious level health / mental health as well as the culture and values of the nation's view of the social life at Indonesia under Pancasila philosophy. In relating, it is precisely the strategy outlined by the Congress of the United Nations that “*the novel all organization of society should be conceived as anti-criminogenic*”.¹⁰

Referring to the non-penal efforts defines, it is needed to be explored, developed and exploited the full potential support and societies participation an effort to streamline and develop the “*extra-legal system*” or “*informal and traditional systems*” that exist in the society, in the criminal sanctions customary form is fine through the justice system to a local custom. This, therefore, reaffirmed the UN congress (on *The Prevention of Crime and the Treatment of Offenders*). In the 4th congress discussed “*Non-judicial forms of social control*”, stated that:

“*It was important that traditional forms of primary social control should be revived and developed*”.¹¹ Likewise, in the “*Guiding Principles*” that has a results of the 7th Congress (particularly relating to “*traditional forms of social control*”) stated that “*When new crime prevention measure is introduced, necessary precautions should be taken not to disrupt the smooth and effective functioning of traditional system, full attention being paid to the preservation of cultural identities and the protection of human rights*”.¹²

Barda Nawawi Arief (1996) stated that:

“Crime prevention efforts through “*non-penal*” is more precautions for the crime, then the main aim is to deal with the factors conducive to the crime caused. The conducive factors includes the issues center, or social conditions that directly or indirectly may cause or the potential crime. Thus, it is viewed from the Political Crime and global macro, then non-penal key efforts and strategic positions of the overall effort of the Criminal Politics. The key and strategic position in tackling the causes and conditions that give rising a crime confirmed as well as in various UN congressional on “*The Prevention of Crime and the Treatment of Offenders*”.¹³

The criminal law is codified in *Wetboek*, it is not seen in all the countries. Especially, in the countries Angelsaks (UK, USA, Australia, and Singapore), those have a fundamental criminal law based on *Common law* (hukum adat) and *Statute law*, i.e. the law regulation in the legislation. The second issue is discussed using integrative law theoretical developed a comprehensive and holistic analysis in the face and anticipate national and international developments in the public life in various areas. As well as the arguments are supported in using a restorative justice theory, in the non-penal sanctions criminal form (penal mediation).

The description is briefly observed in the justice aspect and law regulation, there is a vagueness norm in the articles of the Criminal Code that used to combat crime in the land sector due to it is not formulated a minimum penalty, if the justice aspect of the formulation is quite unfair when the perpetrators are the victims of harmful billions and even trillions rupiah punished the same as that harm the victim tens to hundreds rupiah, therefore, it is required a resolution through prevention efforts of penal mediation.

The resolution model through penal mediation as follows: a resolution model via common law through deliberation in the jurisdiction of the appropriate Pancasila state in accordance with Indonesia philosophies. On the one hand, the models used is “informal mediation carried out by personnel of the criminal justice system, the duties normally are the General Prosecutor by inviting the parties to informal resolution is not purposing stop the

⁹ Sixth UN Congress, A/CONF. 145/L., page 7

¹⁰ *Ibid*, page 44

¹¹ Fourth UN Congress, Report, 1971, page 24

¹² Seventh UN Congress, *Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a new International Economic Order*, UN Department of Public Information, August, 1988, page 15

¹³ Barda Nawawi Arief. *Legislative Policy in Combating Crime with imprisonment*. Semarang: Diponegoro University. 1996. Page. 42

prosecution if any agreement. On the other hand, it can as well as be done by a social worker or official inspectors, officials police or judges, traditional village models or *tribal moots*, entire communities met to resolve the conflict crime among citizens, victim-offender mediation models, the mediation between the victim and the perpetrator in meetings involving the independent mediator through the process stages both wisdom police, the prosecution, stage sentencing or after sentencing, this model can be applied to perpetrators and the land crime victims, reparation model of negotiation programmers,

This model solely is to assess the compensation value or repairs to be paid to the victim-offender. It is usually at checking in the Court is the most appropriate for the perpetrators and victims of crime for land issue, a model community panels or courts is a program for diverting criminal cases from prosecution or judicial procedure society that is more flexible and informal and often involve a mediation or negotiation elements. The model of family and society group conferences, the models that involve community participation in Criminal Justice System (known SPP) not only involves victims and perpetrators of crime, however, as well as the family actors and other community members, police and judge certain actors and victim supporters, the offender and their family is expected to produce a comprehensive deal and satisfy the victim can help to keep out of perpetrators trouble / next issues.¹⁴

4. Conclusion

Based on the above description, it can be concluded as follows:

Penal Mediation Policy towards Criminal Cases Land Affairs Resolution in the Outer Court in the future is a policy that is equitable, accurate and useful legally, due to the criminal mediation that departed from the ideas and working principles of conflict handling through a mediator, a process-oriented quality rather than the results, therefore, that sensitize offenders will guilt, unresolved conflict needs, a fear tranquility victims, informal process, non-bureaucratic, avoid a strict legal procedures, there is an active participation and autonomous.

Penal Mediation Settlement model towards offenders of the crime land in the outer court, the resolution is a common law model based on deliberation in the jurisdiction of the appropriate Pancasila philosophy in Indonesia. As well as, the model is applied an informal mediation, a model of a traditional village or *tribal moots*, victim-offender mediation model, model preparation negotiation programmers, a model of community panels or courts, a model of family and community group conferences.

Recommendations

The Republic of Indonesia in the future should be established legislation that is urgent to transform on Penal Mediation Regulation, therefore, can be minimized the accumulated cases criminal cases both at the police level, judiciary, and District Court, respectably to the Supreme Court of Indonesia Republic.

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Statement of authorship

The author(s) have a responsibility for the conception and design of the study. The author(s) have approved the final article.

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¹⁴ Sfm.jura.uni-sb.de/archives/images/mediation-en%5B1%5D.doc dalam Barda Nawawi Arief, *Op. Cit.*, pp. 5-12

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