

## **THE CONSTRUCTION OF PENAL MEDIATION MODEL IN HANDLING FAMILY NEGLECT CASES IN THE FUTURE**

I Ketut Sudira

### **Abstract**

Case neglect of household, the which is one form of domestic violence is a criminal case that has implications for the familial relationship between the perpetrator and the victim will not be Able to finish the perpetrator prosecuted therefore the use of penal mediation in cases of domestic neglect can be done as a model of handling civil matters and diversion in the juvenile justice system.

In the Law of the Republic of Indonesia Number 11 Year 2012 on the Criminal Justice System Children (SPPA) determines that the results between the perpetrator and the victim mediation greatly affect the decision handed down by the judges.

Model peace set out in the law and mediation and mediation in civil cases that are used in local knowledge is used as a model in criminal law reform in Indonesia in an effort to reorient and reform of criminal procedure in accordance with the values of the philosophical, political and community culture the policy underlying the rule of law in Indonesia.

**Keywords:** penal mediation model, family neglect case

### **1. Introduction**

The positive criminal law of Indonesia holds the principle saying that a criminal case cannot be settled in a peace resolution because such a way cannot be applied as the reason for abolishing the punishment. Instead, it can be used as a consideration to reduce the punishment if the defendant is proved guilty.

Certain criminal cases, especially family neglect as forms of domestic violence are cases that have an implication towards the family relationship between the perpetrator and the victim. It cannot be settled only by the punishment imposed on the perpetrator. Therefore, the application of penal mediation in family-neglect case can be practiced in the similar way as the settlement of civil cases and diversion in the criminal justice system for children.

The alternative settlement for criminal cases by way of peaceful resolution between parties is carried out after the prosecutor declares the letter of accusation in the court. Afterwards, the council gives chances for both parties (the perpetrator and the victim) to conceive peaceful resolution through penal mediation. Of course, the mediation does not always reach an agreement. It means, the examination through normal procedure is carried out when mediation fails. However, when mediation succeeds, the examination of the case is carried out concisely because the peaceful resolution requires the confession of the accused. It is because Indonesian Criminal Code regulates that the confession is used as an instrument of proof. Consequently the examination on the witness can be carried out in a simple way.<sup>1</sup>

The Indonesian Law Number 11 Year 2012 on the Criminal Justice System for Children stipulates the procedure of the case handling in which the defendants are children. The law stipulates that the case handling must involve penal mediation in the beginning of the court examination (Article 52). The result of mediation between the perpetrator and the victim can really influence the judge's decision. On the other hand, the Law Number 3 Year 1997 on Children Court does not stipulate the mediation process in handling criminal cases committed by children.<sup>2</sup>

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<sup>1</sup> Umi Rozah, Political Construction of Penal Law Mediation as an Alternative Resolution Criminal Case, Pustaka Larasan, Denpasar, 2012. p. 329

<sup>2</sup> I Article 52 point 2 of the Law Number 11 Year 2012 on the Criminal Justice System for Children stipulates that the judge is obliged to conduct diversion within the maximum period of seven (7) days after he or she is ordered by the chief of the court to be the

The peaceful resolution model stipulated by the law is known as diversion. It is further stipulated that if diversion succeeds, the judge will report to the chief of the court to issue a letter of decision. On the other hand, if the diversion fails, the conventional court-examination process resumes.

The peaceful resolution is also needed in cases other than those committed by children, such as in the case of family neglect. Especially for cases in which the victim and the perpetrator still lives in the same house, peaceful resolution is useful for the resilience of the marriage between the perpetrator and the victim.

The reform of Indonesian criminal law places penal mediation as a method to handle a case placing dialog between the victim and the perpetrator of crime. It is an important matter in the effort to correct the orientation and reform the law of criminal procedure in order to adjust it with philosophical values, politics and culture of the society which are the foundations of the law enforcement policy in Indonesia.<sup>3</sup>

The family-neglect case has specific character compared to other form of domestic case. It is because family neglect has both psychological and economical dimension which, in turn, affect the children upbringing. On the other hand, children's growth is an aspect to be guarded and this is the purpose of the issuance of the Law on Criminal Justice System for Children. Therefore, it is hoped that family-neglect cases will have a model for their court examination process in the future. To be specific, it must be handled by judges with special competence similar to judges in the children court. Besides, penal mediation must be placed as a procedure that must be followed in handling cases of family neglect which are different from other criminal cases in general.<sup>4</sup>

The Draft of the Law of Criminal Procedure (RUU KUHAP) covers penal mediation, but this is still limited to the level investigation and prosecution. However, due to the existence of some articles in the draft stipulating the guidance of sentencing which considers the influence of the crime for the victim as well as for the future of the perpetrator and the mercy given by the victim, it is necessary to conceive stipulations on the handling of cases placing penal mediation as a procedure that must be followed, especially in the case of family neglect. It is because such a crime can be categorized into domestic cases and the sentencing usually results to the existence of the new victim. As the family of the convict, they will be influenced by the missing rights of the perpetrator for achieving certain positions in his or her profession because of the status as a citizen who has ever been punished by the court.

Due to the specific characteristic of the family neglect, it is necessary to reconstruct the model of case handling by conducting transplantation of the stipulations on the settlement of civil case and the Law on the Criminal Justice System for Children which regulate penal mediation.

Referring to the explanation above, the problem to analyze further is how is the precise penal mediation model for handling family neglect case in the future?

## 2. Discussion

The reform on the criminal law is based on the policy of the criminal law reflecting the aspiration of the national law and today's as well as future need of the society. Necessary comparison of the penal mediation development in other countries must also be put into consideration.<sup>5</sup>

In line with the reform of the criminal law, there should be thorough analysis on the effectiveness of the valid criminal laws and regulations as well as the influence of the criminal stipulations of the Indigenous Law and religion law living in the diverse society of Indonesia. This is especially aimed at deciding the precise principles of criminal law, including the principal matter requiring stipulation in the new criminal law in the future.<sup>6</sup>

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judge in charge; point (3) stipulates that diversion stipulated by the point (2) is conducted for maximum thirty (30) days; point (4) regulates that the diversion process can be conducted in the mediation room; point (5) regulates that when the diversion process reaches an agreement, the judge submit the minutes of the diversion and the agreement reached in the diversion to the chief of the court in order to make the decision point (6) regulates that if the diversion fails, the case resumes its examination process in the court

<sup>3</sup> Barda Nawawi Arief, *Flower Potpourri Criminal Law Policy*, Aditya image, Badung, 1996, p 30-31.

<sup>4</sup> Neglect crime as a form of domestic violence is discussed by Moerti Hadiati, Soeroso in her book : *Domestic Violence In Juridical Perspective - Viktimologis* (Domestic Violence in the Juridical and Victimological Perspective), Sinar Grafika, Jakarta, 2011, states that violence in the family has both special and exclusive characteristics. The exclusive characteristics lie in the relation between the perpetrator and the victim. In other cases, sometimes the perpetrator does not know the victim at all. However, the perpetrator and the victim have special relationship: husband-wife relationship, blood relationship (parents, children, nephew) or the relationship based on working contract, such as the maid who lives in the same house with the perpetrator.

<sup>5</sup> I Made Widnyana, Op.cit. p.159.

<sup>6</sup> Ibid.

According to Barda Nawawi Arif, the criminal law reform must be conducted by way of policy approach because the criminal law reform is essentially a part of the policy or legal politics in general and especially a part of criminal law policy (*strafrechtpolitiek*).<sup>7</sup>

The law policy is inseparable part of the law enforcement policy, criminal policy and social policy. Therefore every policy must be considered as a value. In this way, the reform of the criminal law is hoped to have an orientation towards living values in Indonesian society as well as other countries' which can be used as references in Indonesian criminal law reform.<sup>8</sup>

The effort in reforming Indonesian criminal law in the attempt to review and reconstruct the criminal law which is in accordance with the central values of socio-political aspect, socio-philosophical aspect and socio-cultural aspect of Indonesian society. Consequently, it is necessary to research into the Indonesian values in order to reform Indonesian criminal law. In this way, it is hoped that the future Indonesian criminal law will be in accordance with socio-cultural values of Indonesian society.<sup>9</sup>

The orientation towards the basic ideas of the Pancasila principle should be the foundations of the effort to reform the Pancasila national criminal law. Therefore, it can be elaborated that:

“Pancasila values containing the balanced values of:

- a. Religious moral ;
- b. Humanism ;
- c. Nationalism ;
- d. Democracy ; and
- e. Social Justice.”<sup>10</sup>

The penal mediation as an alternative settlement for the criminal case conducted outside the criminal justice procedure or as part of the criminal justice mechanism in Indonesia has bright future because of some reasons. One of them is that penal mediation is recommended by the United Nations (UN) as an alternative settlement for handling criminal case outside the court in order to avoid negative impact of criminal justice operation.<sup>11</sup>

The supporting document of the UN 9<sup>th</sup> Congress year 1995 related to the management of criminal justice suggest the importance for all nations to consider to “privatize some law enforcement and justice function” and “alternative dispute resolution” (ADR) (in forms of mediation, conciliation, restitution and compensation) in criminal justice system<sup>12</sup> and in the effort to protect the victim of family neglect, the mechanism of mediation and restorative justice should be introduced.<sup>13</sup>

The penal mediation is necessary to be employed as an effort to handle criminal case because it has been practiced as alternative dispute resolution in various countries and it has brought positive results for victims, perpetrators and the community. Some countries who have employed penal mediation are members of European Union (France, Germany, Austria, Belgium and Poland) as well as The United States, Japan and Australia. In reality, there are some patterns of mediation conducted by the police, public prosecutor, the court and informal institution chosen by the perpetrator and the victim. If the penal mediation succeeds and an agreement between the victim and the perpetrator is reached, investigation, prosecution or **trial process** is canceled.<sup>14</sup>

The settlement of the criminal case, especially family neglects the needs penal mediation because the model has the root in the Indonesian culture, especially in Indonesian Laws Commons. The models is also Aimed at creating the peace between the perpetrator and the victim by giving Restitution to the victim and implementing the customary

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<sup>7</sup>Barda Nawawi Arief, Criminal Law Reform and Policy Issues in the Complaint offense I Made Widnyana, Flower Potpourri Indonesian Legal Development, Eresco, London, 1995, p. 54-55.

<sup>8</sup>*Ibid.*

<sup>9</sup>I Made Widnyana, *Op.Cit.* p.163

<sup>10</sup>*Ibid.*

<sup>11</sup>Salman Luthan, *Op.Cit.* p.221.

<sup>12</sup>*Ibid.*

<sup>13</sup>*Ibid.* p. 222

<sup>14</sup>*Ibid.* The trial process (written bold by the researcher) of some countries employ the cancellation of court examination. The researcher does not agree with the use of the term trial process. Instead, the term court examination process is preferred. It is because the trial process includes investigation, prosecution, court examination and imprisonment. Actually these elements must work together as an integral part in order to achieve the goal of the system. But it usually easier to say than putting it in the practice. (See Marjono Reksodiputro, Human Rights In The Criminal Justice System, Service Center for Justice and Legal Services, Institute of Criminology, University of Indonesia, Jakarta, 1994, p.85.)

compensation. The Indigenous sanctions function and play the role as the stabilizer to return the balance between the world and the supernatural realm. If there is a violation, the Violator is obliged to make-certain Efforts such as the ceremony to purify the village Aimed at restoring the disturbed balance and amending spiritual power. The Indigenous sanction has important role in the life of the Balinese community. It is imposed on the individual WHO breaks the law. Even the common perpetrator of delict is Often punished by the Indigenous sanction although the perpetrator has been punished by the court.<sup>15</sup>

The Indigenous sanction imposed on the perpetrator of the Indigenous delict WHO has been punished by the court goes against Jurisprudence. The Jurisprudence stipulates that it is not right to impose sanction twice. The perpetrator of the crime WHO has been sanctioned by the Customary Law cannot be processed in the court. It is stipulated by the Supreme Court's decision Number 1644 / pid / 1988 that the perpetrator WHO has been sanctioned by the Customary Law (Customary reaction) by the chief of the indigenous cannot be processed anymore (for the second time) in the court on the basis of the same accusation of the violation of Indigenous and then he or she is sentenced by an imprisonment referring to stipulations of the Criminal Law.

Mediation is important to highlight and employed in handling family-neglect case because it has been practiced by law enforcement officials (investigator, public prosecutor and the judge) to settle certain case although there is no Indonesian law regulating penal mediation. Cases which are often settled through penal mediation are traffic law violation in form of carelessness causing other individual injured or dead. Besides, penal mediation is practiced in domestic-violence cases processed in the court by the judge.<sup>16</sup>

The reality shows that crime rates have climbed highly recently and this causes the large pile of cases in the court and overpopulated prison. Patrialis Akbar says that almost all prison and jails in Indonesia are over populated. From year to year the number of the population in jails and prisons has reached highly.<sup>17</sup> Such a condition stimulates the birth of the prisoner release program though parole program, including more chances to be given reduction period of imprisonment and more attention for old and sick prisoners. The programs are aimed at expediting the integration of the prisoners into the community. This, in turn, the number of prisoners and participants of community education who have returned to the community has more and more increased. It finally reduces the population of jails and prisons.<sup>18</sup>

The discourse on penal mediation has been well acknowledged in the community in the way that there are scientific activities in the campus and law enforcement institution related to the discourse, the publication of scholarly works and the use of penal mediation as the topic in the master thesis and doctorate dissertation. Besides, the discourse concerning the importance of the restorative justice as an instrument for settling criminal case has also been widely developed an accepted in the community of academic and legal practitioners.<sup>19</sup>

In handling cases by applying penal mediation, an effort to look into the which values come from the Indigenous Law, positive criminal law (Criminal Code) religion law, criminal law of other countries and international agreement on the substance of the criminal law is conducted.<sup>20</sup>

The Indigenous Law roomates employs Indigenous mediation in settling the dispute has been a common practice. It is Because The traditional realm of thought characterized by cosmic-religious element prioritizing the balance between the common world and the supernatural one. Therefore any conducts disturbing the balance are of legal violations and law enforcement Officials are obliged to take action in order to restore the legal balance.<sup>21</sup>

The practice of the case handling According to the Balinese Customary Law must follow requirements as follow:

“The basics for settling the cases are Indigenous:

- a. The Balinese Adat Law, either written in the *awig-awig*<sup>22</sup> of *paklraman* village or unwritten one (catur dresta) which do not go against the national law.

<sup>15</sup> I Made Widnyana, *Op. Cit.* p.141.

<sup>16</sup> Ridwan Mansour, *Penal Mediation Case Against Domestic Violence*, Yustisia Gema Foundation, Jakarta, 2010, p. 104.

<sup>17</sup> Patrialis Akbar, *Op.Cit.* hlm. 47.

<sup>18</sup> *Ibid.*

<sup>19</sup> Salman Lutha, *Op.Cit.* hlm224.

<sup>20</sup> *Ibid.*

<sup>21</sup> Soepomo, *The chapters on Customary Law*, Pradnya Paramita, Jakarta, 1979, p.92-93.

<sup>22</sup> *Awig-awig* is a body of regulation aimed at maintaining order in Balinese traditional community known as Pakraman village. Most *awig-awig* are unwritten, but some are written. Besides, the old version of *awig-awig* is different from the new one. The difference lies in the substance and structure of the *awig-awig*. Generally, the structures of *awig-awig* of the old time are not organized well and they are difficult to understand. Therefore, *awig-awig* should be written according to the future development of the community, especially concerning with structure, substance and sanction that can be imposed on the violator. In this way, *awig-awig* will be

b. Objective condition in the community and general truth which are in accordance with values of Hinduism.”<sup>23</sup>

Until the present moment, there is not any written *awig-awig* of the Adat village which clearly stipulates family neglect. On the other hand, written *awig-awig* generally covers “advisable conducts”, but they do not administer conducts which are qualified as improper. However, they implicitly cover the prohibition on family neglect which can be seen from the purpose (*petitis*) of *awig-awig* : To establish the peace in the Adat village covering both human environment and its supernatural aspect (*ngerajegang kesukertaan desa saha pawonganya sekala lan niskala*).<sup>24</sup>

There are not any detail elaborations of the prohibition on domestic violence as a requirement to achieve *kesukertan desa*, Ilet alone economical violence or family neglect. Such a condition is a distinctive nature of the Adat norm in Bali compared to the Law Number 23 Year 2004 on the Elimination of Domestic Violence<sup>25</sup>

According to the positive Indonesian Criminal Code, the peace resolution for criminal case is stipulated in the Article 82 KUHP. The stipulation allows a perpetrator to be freed from any charges because he or she has paid maximum fine. However, the draft of the new criminal law covers peace resolution in handling criminal case and the general guidance for judges in making some considerations before deciding the case. In this regard, the draft has formulated the sentencing guide for judges which is previously not formulated by the law.

The sentencing guide gives possibilities for the judge to calculate all phases of the events. They cover the proportion of the delict and how it is conducted, the personal aspect of the perpetrator, the age of perpetrator, the intelligence of the perpetrator and the condition when the crime is committed.

One sentencing guide for the judge stipulated in the draft of the Indonesian Criminal Law covers aspects which must be regarded by the judge in deciding a case. As the Article 51 point 1 of the draft of Criminal Code year 2012 regulates:

“In deciding the sentence for a case, the judge must consider following aspects :

- a. The guilt of the perpetrator;
- b. Motive and purpose of committing crime;
- c. The method of committing crime;
- d. The psychological aspect of the perpetrator;
- e. The curriculum vitae and the socio-economic condition of the perpetrator;
- f. The attitude and the conduct after committing crime;
- g. The influence of the sentence for the future of the perpetrator;
- h. The community’s perception on the crime committed;
- i. The influence of the crime upon the victim or victim’s family, and or;
- j. Whether or not the crime is premeditated.”<sup>26</sup>

The above stipulation covers sentencing guide to help judges to consider the type or the length of the punishment. By referring to the guide, it is expected that the sentencing will be proportional and understandable for the defendant and the community.

If the elaboration of the point (1) of the of the Article 51 of the draft of the Criminal Code 2012 is further analyzed, the stipulation is not limitative in the way that judges can employ other consideration than those stipulated in the article.

The element of premeditation covered in the old Criminal Code, is not included in the formulation of crime in the articles of the second book. However, it does not mean that the premeditation element is eliminated. It will be wiser if the element is clearly elaborated. Therefore, decision made by the judge must refer to the guilt of the perpetrator, motive and purpose of the crime, the method of the crime and psychological element of the perpetrator.

The peace made by the perpetrator and the victim related to family neglect case is usually in forms of mercy, expression of regret, payment for the loss covering medical treatment, repair fee as well as fee of burial and traditional ceremony. Those are responsibilities of the perpetrator for the victim. This, in turn, is considered as the attitude and conduct of the perpetrator after committing crime as stipulated by the Article 51 point (1) number 6 of the Criminal Code Draft 2012.

The stipulation on peace resolution between the perpetrator and the victim has reached an advanced step after the Article 55 point (1) number 10 of the Criminal Code Draft 2012 explicitly formulates the sentencing guide:

easier to understand (Wayan P. Windia, Questioning *Awig awig*, Customary Law and the village's existence in Bali, Documentation and Publication Institute FH.Unud, Denpasar, 2008, p. 1

<sup>23</sup> Operational guidelines and technical guidelines Settlement Procedures Speech by Pakraman Assembly (MDP) Bali, p.15

<sup>24</sup> *Ibid.* p.141.

<sup>25</sup> *Ibid.*

<sup>26</sup> Criminal Code Draft 2012

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- a. The guilt of the perpetrator;
- b. Motive and purpose of committing crime;
- c. The psychological aspect of the perpetrator;
- d. Whether or not the crime is premeditated
- e. The method of committing crime;
- f. The attitude and the conduct after committing crime
- g. The curriculum vitae and the socio-economic condition of the perpetrator;
- h. The influence of the sentence for the future of the perpetrator;
- i. The influence of the crime upon the victim or victim’s family;
- j. Mercy given by the victim or victim’s family and/ or;
- k. The community’s perception on the crime committed;.”<sup>27</sup>

The handling of the case in the court, especially family neglect requires the judge to research the fact on the event or incidence. It should be researched whether or not the defendant committed the crime, whether the conduct is a crime and whether or not the defendant can be held responsible for the guilt. Finally the judge decides the type of the punishment if the defendant is proved guilty and can be held responsible for what he or she has committed.

The peace resolution is also developed by the UN. According to Barda Nawawi Arief, The Supporting Document of the 9<sup>th</sup> UN Congress year 1995 (Document A/CONF.169/6) states that Alternative Dispute Resolution (ADR) can also be applied extensively in criminal laws, for example in fraud cases, white collar crime or when the defendant is a corporation. Therefore, the main goal of the court examination is not to punish the defendant, but to reach a fruitful result for the interest of the community in general and prevent the repetition of the crime.

Referring to the explanation above, it is clear that peace resolution between the victim and the perpetrator can be used as the consideration for the judge to give judicial pardon (Dutch: *rechterlijk pardon*) as stipulated in the Article 55 point (2) of the draft of the Indonesian Criminal Code. Some criminal conducts which can be pardoned include fraud, light persecution, theft and negligence crime as well as crimes of which perpetrators are still related as members of families. This, of course, includes family neglect.

The draft of Criminal Code year 2012 formulate guidance for judges on some aspects which favor the defendant in court process as stipulated in the Article 132 of the Criminal Code Draft year 2012. The guidance covers some favorable aspects for the perpetrator:

- a. Attempt to commit crime;
- b. Assisting the crime;
- c. Voluntary surrender to law enforcement officials after committing crime;
- d. Crime committed by pregnant woman;
- e. Fine payment or voluntary repair for the damage caused by the crime;
- f. Crime committed because of great psychological shock; or
- g. Crime committed by the perpetrator stipulated in the Article 39 or
- h. Factors originate from the living law in the community.”<sup>28</sup>

As the Article 132 point e of the Criminal Code Draft Year 2012, the case which can be solved through peace resolution and the perpetrator pays for the loss suffered by the victim or victim’s family as medical fee or burial, ceremonial fee. These can be considerations for the judge in deciding lighter punishment for the perpetrator.

To analyze the existence of penal mediation in handling criminal case, it is necessary to involve comparison analysis with foreign laws in order to support the development of legal science and legal reform. Sudarto says that some of the advantages of studying foreign laws are improving the understanding on communal institution and culture as well as building critical attitude towards legal system.”<sup>29</sup>

According to Andi Hamzah, the advantage of learning the criminal law comparison is that when a country needs to revise or create a new Criminal Code, an easy way to get data on principles, delict formulation and modern criminal justice system is by reading and comparing some newly written criminal codes.<sup>30</sup>

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> Sudarto, *Op. Cit.* p.122.

<sup>30</sup> Andi Hamzah, *Op. Cit.* p. 15. \_\_\_\_\_

Referring to the analysis above, peace resolution is essentially a problem-handling by peaceful way when the victim forgives the perpetrator or the judge forgives/ pardons the perpetrator.

The stipulations on *rechterlijk pardon* in the Netherlands, *dispensa de pena* in Portugal, *pardon institution* in Islamic Law and plea bargaining in the United States regulate peaceful resolution in those countries. Each has its own terminology, goal, procedure and legal consequence. In other words, they have their own special characteristics based on their values. However, they all have stipulations aimed at creating peace situation.

One modern influence in criminal law is a principle known as *subsosialitas* (*Subsocialitet*) meaning if a conduct is a delict but socially has a little significance, it is not necessary to involve punishment or further legal action. As we can see from the Article 9 of the Dutch Criminal Code:

“the judge may determine in the judgment that no punishment or measure shall be imposed, where he deems this advisable, by reason of the lack of gravity of the offense, the character of the offender, or the circumstances attendant upon the commission of the offense or thereafter”<sup>31</sup>

This stipulation covers mercy or pardon given by the judge which is known as “*rechterlijk pardon*”. In this way, the judge does not employ punishment or take any action because:

- a. The minor character of the crime;
- b. Personal character of the perpetrator; or
- c. Situation during the execution of the delict or after the execution.

Because of mercy or pardon given by the judge, the perpetrator can be released from any punishments although proven guilty. However, “*rechterlijk pardon*” is only applicable for minor offense.

According to the Dutch Criminal Code, to give “*rechterlijk pardon*”, the judge must consider whether or not the crime is minor, the condition or the character of the perpetrator and situation after the delict is committed.

The pardon is an absolute right of the judge given by the law and through the pardon, the judge considers that the conflict has finished or ended.

The decision of the judge in giving *rechterlijk pardon* to the perpetrator to settle the case is regarded as peace resolution because the pardon indicates forgiveness as the core of the peace.

The policy to determine penal mediation as an alternative for criminal case settlement and a part of criminal justice process is very essential. In this way, penal mediation is hoped to facilitate valid settlement of criminal case and its result binds all parties, law enforcement officials and the community. Consequently, criminal case settled through penal mediation eliminates the authority to prosecute.<sup>32</sup>

The discussion above signifies that family-neglect cases in Indonesia needs model formulation. It is because the court process of such a case has specific characteristic compared to other cases in general. The model should place penal mediation as a procedure that must be followed in handling the case which is different from other cases in general.<sup>33</sup>

The Article 111 of the Criminal Code Draft year 2012 stipulates the method of how to handle a crime case in detail.

It regulates:

- a. The investigator has the authority to cancel investigation due to the lack of proof or the incidence is not a crime or the investigation is cancelled in the name of law.
- b. The cancellation of investigation as stipulated in the point (1) can also be based on :
  - 1) The judge’s decision on pretrial process based on the request of the victim or individual’s report;
  - 2) Agreement between the victim and the suspect through mediation.
- c. Crimes which can be settled through mediation as regulated in point (2) are:
  - 1) Minor crime;

<sup>31</sup> Barda Nawawi. *Op. Cit.* p. 135. cited from the Dutch Criminal Code.

<sup>32</sup> Umi Rozah, *Op. Cit.* p. 309.

<sup>33</sup> Related to the specific nature of a family neglect which is a form of domestic violence, Moerti Hadiati, Soeroso writes in her book : *Domestic Violence In Juridical Perspective - Viktimologis*, Sinar Grafika, Jakarta, 2011, states that violence taking place in the family has special and exclusive characteristic. Its special status lies in the relationship between the perpetrator and the victim. In other criminal cases, sometimes the perpetrators do not know the victim at all. However, in domestic violence, the perpetrator and the victim has special relationship, they are marriage relationship, blood relation (parents, children, nephew) or relation based on contract such as the maid living in the same house with the perpetrator..

- 2) The crime which is punishable by imprisonment for maximum 4 years;
  - 3) Crime which is punishable only by fine payment;
  - 4) When the perpetrator commits crime, he or she is above 70 years old;
  - 5) The loss has been paid;
- d. The stipulation in the point (3) is only applicable for a crime which is punishable by imprisonment for maximum 5 years;
  - e. When an investigator cancels investigation as stipulated by the point (3) above, he or she must submit the report to the supervisor or superior
  - f. Further regulation on the procedure of settlement through mediation stipulated by the point (3) is regulated through government's regulation."<sup>34</sup>

The Japanese regulation on mediation is different from the United States' or European countries. The Japanese regulation on that matter is written in detail and mediation is united in the justice system. Unlike United States and European countries, the Japanese mediation regulation is put in written law.<sup>35</sup>

The jurisdiction of mediation in the Japanese court is divided into two parts: Family Dispute Section (*Kaji Chotei*) and general civil case (*Minji Chotel*). The difference is that mediation is mandatory procedure in family case, while it is not mandatory for common civil case.<sup>36</sup>

The study on mediation system above leads us to conclude that Indonesia can extend the jurisdiction of mediation in the court which does not only deal with civil case, but also juvenile case, domestic violence, minor crime such as defamation, theft and so on. In reality, there are judges specialized in juvenile crime or in legal terms, it is known as Children Facing Legal Problem (Children in Conflict with the Law).<sup>37</sup> There are also cases of domestic violence handled through mediation. This method gives bigger chances for the victims, mostly women, to express their interest. By the intervention of the mediator, mediation tries to balance the power of all parties in order to establish constructive negotiation in order to reach a win to win agreement.<sup>38</sup> All settlements of this case are based on the spirit of restorative justice prioritizing healing process for all disputing parties.<sup>39</sup>

To make this argument clear, let us see the flow chart as follows:

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<sup>34</sup> Criminal Code Draft year 2012;

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.* p.96.

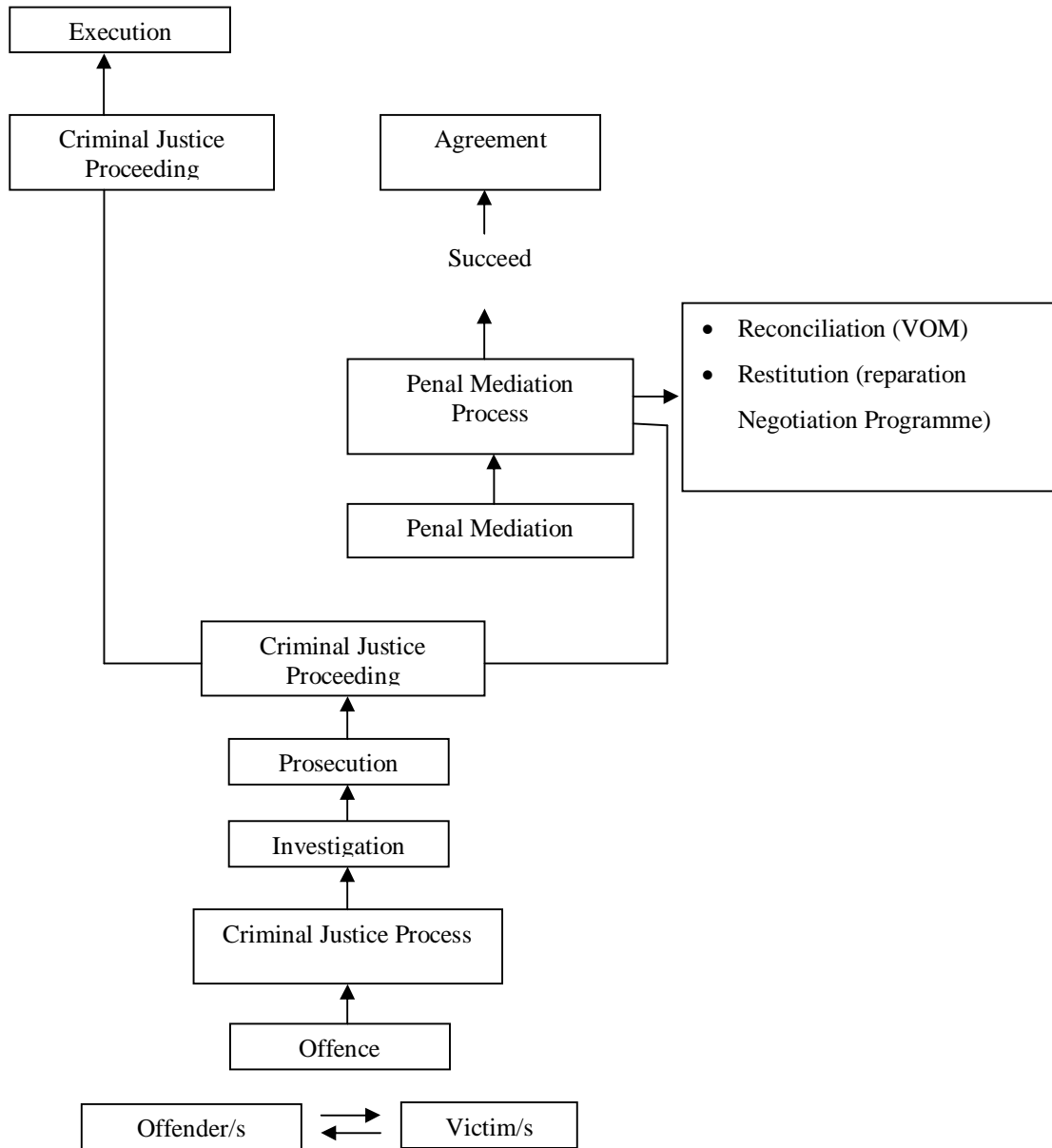
<sup>37</sup> *Ibid.* p.114. cited from Dewi and Abdul Syukur, *Penal Mediation: Applying restorative Juvenile Justice in Indonesia (Penal Mediation: The Implementation of Restorative Justice with Youth Offender in Indonesia)*.

<sup>38</sup> Fatahillah Abdul Syukur, *KDRT Op. Cit.* p. 78.

<sup>39</sup> *Ibid.*.



Figure 1. Penal Mediation in the Criminal Justice Proceedings Stage<sup>40</sup>



Explanation:

Succeed : An agreement is reached in penal mediation in form of reconciliation and restitution has been paid to the victims.

Failed : The penal mediation fails to reach agreement, reconciliation and restitution.

<sup>40</sup> Umi Rozah, *Op. Cit.* hlm.330.

Successful Mediation can be used to cancel criminal liability. Therefore, the defendant is not punished because of the pardon resulting from the mediation. Mediator in this stage can be the judge or other mediator coming from outside the court, but registered by the court. This mediation is a mixture of the models “Victim-Offender Mediation and Reparation Negotiation programmers.”<sup>41</sup>

The mediation usually starts after the case is thoroughly studied and mediation can be offered as alternative solution to establish peace between parties. When all parties agree, voluntary agreement is made in order to settle the case by way of mediation involving the perpetrator and the victim.

If mediation cannot reach an agreement the court examination resumes. On the other hand, if agreement is reached and all parties accept the reconciliation as well as the payment of the restitution by the perpetrator for the victim, the agreement which is put in the letter of agreement has ultimate binding power like the court decision and the perpetrator cannot be processed and prosecuted in the court.<sup>42</sup>

Referring to the discussion above, the reconciliation obtained from mediation can release the perpetrator from criminal liability on the basis of reconciliation as the reason for the cancellation of punishment.

### 3. Conclusion

The existence of penal mediation in handling criminal case requires comparison studies on foreign legal system. It is aimed at supporting the development of criminal law study and criminal law reform. Therefore, to deal with family neglect cases In Indonesia requires the model formulation in the trial process of cases with special characteristic. These cases are different from other cases which have more general characteristics. By placing penal mediation as a mandatory procedure in dealing with cases, it is hoped that legal certainty, justice and usefulness can be achieved.

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<sup>41</sup> Umi Rozah, *Op. Cit.* p.329.

<sup>42</sup> *Ibid.* p. 329.