

# FORGIVENESS AND PENAL MEDIATION IN TRIVIAL OR INSIGNIFICANCE CRIMINAL CASES SETTLEMENT BASED ON INDONESIAN LOCAL WISDOM

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**Submission date:** 25-Jan-2021 01:56PM (UTC+0700)

**Submission ID:** 1493857777

**File name:** KLL4308-Umi-Rozah-FORGIVENESS-AND-PENAL.pdf (145.51K)

**Word count:** 5540

**Character count:** 29385

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**FORGIVENESS AND PENAL MEDIATION IN TRIVIAL OR INSIGNIFICANCE CRIMINAL CASES SETTLEMENT BASED ON INDONESIAN LOCAL WISDOM**

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**ABSTRACT**

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One of functions of law system is as a tool of social integration through settlement of dispute. The basic function of legal system is to offer machinery and a place where people can go to resolve their conflicts and settle their disputes. Existence of law as a social integration realized by the court which have tasks to solve social conflicts in social relationship in the society. Social conflict could be appearance such as crimes or offences that violate of the rights, or things or interests of victim or society. Here, the criminal law works to prevent and protect the rights or things, or interests of victim from violation. Through the criminal justice process all criminal matters be solved with the end of sentencing, for all cases that proofed all elements of punishment, also for the trivial or insignificance cases. Indonesia has any local wisdom to solve the trivial or insignificance cases without punishment. There are forgiveness and penal mediation which prevailed in Masyarakat Adat Lampung and Masyarakat Adat Bali as a communal society. This paper is based on research that done in Masyarakat Adat Lampung and Bali on how they solve some trivial or insignificance criminal cases by forgiveness and penal mediation as an alternative of settlement in criminal matters.

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Keywords: forgiveness and penal mediation, trivial or insignificance criminal cases.

**INTRODUCTION**

Indonesian Constitution Undang-Undang Dasar Negara Republik Indonesia 1945 amandemen ke-4, formulated in an Article 1 paragraph (3) that Indonesia is the rule of law state. One of functions of law system is as a tool of social integration through settlement of dispute, as Friedman said that the basic legal function is to offer machinery and a place where people can go to resolve their conflicts and settle their disputes. Existence of law as a social integration realized by the court which have tasks to solve social conflicts in social relationship in the society. Social conflict could be appearance such as crimes or offences that violate of the rights, or things or interests of victim. Here, the criminal law works to prevent and protect the rights or things, or interests of victim from violation. Generally, through the criminal justice process, the offender who commits an offence get some examinations according to certain procedure of criminal justice process. Here, the offender have to face so long process from investigation stage until execution stage, and the victim have no place to express his/her interest related to his/her damage cause of offender's action.

Criminal justice process in Indonesia based on Indonesian Code of Procedure Criminal Justice (Kitab Undang-Undang Hukum Acara Pidana / KUHP) Number 8/1981 that regulates on criminal justice process from investigation stage, prosecution stage, examination in the court and execution of sentencing stage. We need so long chain to solve one case from investigation until execution of offender. We have to waste many money, many time, and many energy just to solve one case, especially light/minor/trivial/insignificance cases.

Recently, in penal theories and criminal justice practices have undergone of significance development along with researches of social science, pathology, and other knowledge, which influenced to punishment, sentencing, and criminal justice concept. The concept of punishment and sentencing start to develop from the classic school which has center on the action that committed by the offender. So punishment is logical consequences of the action, and the aim of punishment is revenge (retributive purpose of punishment). On the other way, modern school give a meaning of punishment and sentencing not merely logical consequence that following the action like in a revenge theory, but punishment and sentencing have some aims to protect of society against crimes, to protect and rehabilitate of the offender, and also to protect of victim.

Recent, at International development on criminal justice concept and procedure to handle criminal cases in many countries introduced of penal mediation as a settlement dispute in criminal matters (penal mediation, mediation penal, mediation in criminal matters, victim - offender mediation), as a part in criminal justice system. Initially, mediation model just works to solve private matters, but now many countries use it to solve criminal matters. In the restorative justice context, aim of penal mediation is to restore of victim's rights. Through penal mediation we don't need to bring any cases to the traditional criminal justice process, but everything related to criminal matters was solved inside.

Indonesia as a country which has many cultures and ethnic groups that known as a plural nation. Each ethnic group in Indonesia has a customs as way of live and way to solve any conflict in their community included in criminal matters, especially on the

trivial or insignificant cases which purpose to achieve substantial justice and to restore of balancing in society. In this context penal mediation works effectively especially in trivial or insignificant criminal cases. So they don't need their cases to be continued in criminal justice process which needs so long time process. In penal mediation process, both offender and victim and/or victim's family sit together to solve these problems through conference, to achieve an agreement which regards fair enough for all parties (offender and victim). An agreement which agreed all parties prevailed as a decision which tied for all parties. To use penal mediation as a settlement disputes in criminal matters is needed voluntary of all parties to perform it. Here, the offender will confess of his/her action and blameworthiness and the victim will forgive of offender's action and blameworthiness too. Next step after that, they are looking for an agreement to how compensate any damages or injuries that suffered of victim. Here, the victim has a chance to express his/her any interest and compensation. If an agreement has achieved by all parties, thus the case stop and furthermore an agreement will tie all parties that in future they will not prosecute each other. Especially, to solve the trivial or insignificant criminal cases, penal mediation and forgiveness works most effectively. We could save many times, money and energy, and the most important that we may decrease of stack of many cases in the court, and in other side, penal mediation could fulfill of interests of all parties (offender and victim).

Indeed, mediation ways in criminal matters solving has used in almost ethnic groups in Indonesia since hundred years ago, which known as an indigenous wisdom or local wisdom of Indonesia. This paper will present my research in Lampung and Bali about utilizing forgiveness and penal mediation to solve the trivial or insignificant criminal cases.

### FORGIVENESS AND PENAL MEDIATION CONCEPT

Penal mediation as a shape of restorative justice that views crime more broadly. This concept viewed that the offences or crimes were not merely offender's business against state which represents of victim to prosecute offender and imposed him/her of a punishment, and then leave of settlement to offender and the state (in this context is prosecutor). Restorative justice demands such criminal justice process that could fulfill victim's interest as an injured party. Here, needed a shifting of paradigm in sentencing process to put penal mediation in criminal justice process as a part of criminal justice system.

Penal mediation according to The European Forum For Victim Service, described as a process which involves contact between the victim and the offender, either directly or through the mediator. The process of mediation is generally regarded as part of the broader issue of restorative justice<sup>1</sup>.

Meanwhile, according to the Belgium Criminal Law Procedure, the Belgian Law of 22 June 2005, formulated mediation in criminal matter "as a process that allows people involved in a conflict to have voluntary, active participation in a fully confidential process for solving difficulties that arise from a criminal offence, with the help of a neutral third person and based on a certain methodology. The goal of mediation is to facilitate communication and to help parties to come to an agreement by themselves concerning pacification and restoration."

Trend in criminal law, sentencing, and criminal justice reform theories or practices were developed reconciliation or mediation concept in settlement of criminal matters. This resolution method as an alternative chosen by society because its give bigger advantages to fulfill victim's interests and create a space for rational conflict management. Considering of ethic view about reaction against an offence as an offence itself, so we avoid of new damage or injured against the offender.<sup>2</sup>

The ideas that base of penal mediation is an aim to unite all parties who want to reconstruct criminal justice model that need so long process with restored by resolution model. This model will powerful position of victim and seek an alternative of punishment, and then looking for the way to lack of damages and burden of criminal justice system by considering that this system more effective and efficient.<sup>3</sup>

The principle of working in penal mediation was developed such follows<sup>4</sup>:

- a. Conflict Handling/Konfliktbearbeitung

<sup>1</sup>Statement On The Position Of The Victim Within The Process Of Mediation, the Executive Committee of the European Forum for Victim Services, November 2003

<sup>2</sup>Dieter Rössner, Mediation as a Basic Element of CrimeControl: Theoretical and Empirical Comments, www.buffalo university journal

<sup>3</sup>Recommendation No.R (99) 19. (the Committee of Ministers of the Council of Europe) 15 September 1999.

<sup>4</sup>Stefanie Tränkle, The Tension between Judicial Control and Autonomy in Victim-Offender Mediation - a Microsociological Study of a Paradoxical Procedure Based on Examples of the Mediation Process in Germany and France, [http://www.iuscrim.mpg.de/orisch/krim/traenkle\\_e.html](http://www.iuscrim.mpg.de/orisch/krim/traenkle_e.html).

Task of mediator to make all parties to forget all of law framework and pull them to involve in communication process. In this idea that crime/offences has done and rised interpersonal conflict between offender and victim, and this conflict is addressed by mediation process.

b. Process Orientation; Prozessorientierung

Penal mediation has an oriented to more quality of a process than a result, namely to make awareness of offender about her/his action and blameworthiness. Here, through penal mediation the need of handling of conflict is fulfilled and victim freed from his/her scare feeling, so in other word that penal mediation could solve of criminal matter as whole.

c. Informal Proceeding – Informalität

Penal mediation as an informal process, without bureaucracy and always avoid of strict procedure of law.

d. Active and Autono-mous Participation - Parteiautonomie/Subjektivierung)

In penal mediation all parties (offender and victim) didn't be viewed as an object of criminal law procedure, but more as a subject who have personal responsibility and capability to act their interest. In this process we need their voluntary to solve their criminal matters by themselves.

While the European Forum For Victim Service give a Guiding Principles in penal mediation process such follows<sup>5</sup>:

- a. Mediation requires the involvement of the victim and it is therefore important that their interests are considered fully;
- b. Mediation processes should only be used with free and informed consent of the parties and the parties should be able to withdraw consent at any time;
- c. Victim/ offender mediation in criminal cases is different from similar processes of mediation in other areas of life- the mediation process must include the offender accepting responsibility for his act and the acknowledgement of the adverse consequences of the crime for the victim;
- d. It is vital that the mediator and everyone involved in the mediation process has received appropriate training on the special issues concerning victims of crime which will be relevant to the mediation process.

Based on experiences in penal mediation practice which developed in North Carolina, laid down under G.S. 7A-38.3D and the Supreme Court's Rules on Implementing Mediation in Matters Pending In District Criminal Court, penal mediation has some advantages that constituted as follows<sup>6</sup>:

"There are many reasons why you should consider mediation. Mediation is usually less stressful and time consuming than a trial. You will not have to take the stand and testify, nor will you have to bring witnesses. You don't even need a lawyer. Mediation offers you and the other party(ies) the opportunity to be in control of the outcome of your dispute. Some research indicates that people are more likely to follow through on agreements that they make as opposed to ones forced upon them by a court. If you are a defendant, a successful mediation may mean that you can avoid a criminal record and more expensive fines and costs. If you are a complaining witness, an opportunity to sit down with others involved in the dispute and work out your conflicts may provide more satisfaction than a judge's verdict. Sometimes mediation can help bring people together. If those involved in a dispute are relatives, neighbors, or were once friends, talking about and working through conflict can often be an important first step in repairing damaged relationships. People may be angry or hurt when they come to mediation and the mediator(s) will try to help everyone understand the differing perspectives of those involved in the conflict. When underlying causes of a conflict are brought to light, people often settle the case at hand and also learn how to avoid future conflicts".

Based on explanation above, it may be concluded about advantages of penal mediation as follows :

1. Its an advantage for the victim, so they could lack pressure so far than if they bring their case in criminal justice process. Here, they didn't need to bring a witness, or to pay a lawyer, and they have a chance to control its result;
2. An advantage for the offender, he / she could be avoided from sentencing, criminal records, or to pay some fines and saved bigger of cost in criminal justice process .

<sup>5</sup>Statement On The Position Of The Victim Within The Process Of Mediation, the Executive Committee of the European Forum for Victim Services, November 2003

<sup>6</sup> Frequently Asked Questions about Criminal District Court Mediation, www.mnnc.org/pg1.cfm

3. Mediation also can be retight or reunite or make closer in relationship between offender and victim. In penal mediation if a peace agreement have been achieved and compensation have been paid, so it could give some lesson to an offender to avoid some conflict in future.

According to the Explanatory memorandum of European Council No <sup>1</sup> No. R (99) 19 on “Mediation in Penal Matters”, constituted as follows <sup>7</sup>:

a. Informal mediation model.

This model performed by criminal justice personnel in his/her normally tasks, that is general prosecutor to invite all parties to perform informal settlement to stop prosecution if an agreement have been achieved. Here, as a mediator could be conducted by a social officer or a probation officer or a police officer or a judge. This model used to perform as an alternative settlement in criminal matters.

b. Traditional Village or Tribal Moots Model

In this model all members of society have a conference together to solve of criminal conflict between citizens. This model used to work in underdevelopment countries and in rural areas. This model inspires for most of modern mediation programs. This modern mediation program often try to introduce many advantages of tribal moots in a form that adapted to structure of modern society and individual rights that regarded by the law.

c. Victim-Offender Mediation Model

This model involve all parties to sit in meeting program that be presented by a mediator who is appointed to help of process. That many variation in this model, as a mediator could be performed by a formal officer, independent mediator or combined both of them.

This model could be performed in every stages of process, such as investigation stage, prosecution stage, sentencing stage and execution of punishment. This model could be implement to all types of offences such as especially for the minor offender or certain offences .

d. Reparation negotiation programmes Model

Reparation negotiation programmes model merely used to estimate of compensation or reparation that have to paid by an offender to victim. Generally this model performs in the court examination. tindakpidanakepadakorban, biasanyapadasaatpemeriksaan di pengadilan. This program didn't relate to the reconciliation between parties, but only related to materiel reparation planning.

e. Community Panels or Courts Model

Community panels or cout model is a program to deviate of criminal cases from prosecution or court examination by society procedure which more effective and informal.

f. Family and Community Group Conferences Model

Family and community group conference model has been developed in Australia and New Zealand that involve participation of society in criminal justice system. Here, not only involve of victim and the offender, but also the offender's family and other member of society, a certain officer (like a police and judge of children and all parties who give support to victim. In this model, offender and his/her family hoped to achieve an agreement which comprehensive and satisfied of victim's interests and could help to offender to get out from his/her next problems.

<sup>6</sup> Meanwhile, forgiveness is Forgiveness is what happens when the victim of some hurtful action freely chooses to release the perpetrator of that action from the bondage of guilt, gives up his or her own feelings of ill will, and surrenders any attempt to hurt or damage the perpetrator in return, thus clearing the way for reconciliation and restoration of relationship.<sup>8</sup>

<sup>7</sup> As Quoted by Barda Nawawi Arief, Aspek Kebijakan Mediasi Penal Dalam Penyelesaian Sengketa Di Luar Pengadilan, 2009, Program Doktorat Undip.

<sup>8</sup> Eugene R Milhizert, Justification And Excuse : What They Were, What They Are, And What They Ought To Be, St. John's Law Review . Volume 78 Issue 3 Volume 78, Summer 2004, Number 3, page 251 .



Forgiveness concept relates to de minimis/ insignificance and irrelevant Principle that developed in implementing of criminal law in insignificance and irrelevant cases (violence bagatela). According to LuizFlavio Gomez, there are two point to implement of insignificance principle in criminal law, namely : (a) insignificance of conduct; (b). insignificance of the outcome.<sup>9</sup>

The fundamental difference between the two principles mentioned is: a line jurisprudential (more traditional) recognizes the principle of insignificance taking into account (only) or desvalor of action or desvalor the result, it said, is sufficient (for the atipicidade) that the level of danger the conduct or the level of injury (to the well Legal), or the danger is tiny concrete verified.<sup>10</sup> Both principles (of insignificance tout court and the criminal irrelevance of the fact) are intended to guide us in the solution of the so-called violation bagatela. What is meant by infringing bagatela? Infringement bagatela or crime of bagatela expressed the fact insignificant, pittance or, in other words, a practice or even an attack on legal and which does not require the intervention criminal because it is outside the scope of type criminal. Here the violation bagatela must be understood in its two dimensions: (a) violation bagatela itself, (b) violation bagatela improper.<sup>11</sup>

To implement of insignificance and irrelevant principles in criminal law have to be pressured as a tool in many cases solving. If judge has a problem in implementing of insignificance principle, he could implement of irrelevant fact principle in this case. In implementing of insignificance (based on light of result), if there is doubtful in considering that there are a light action and result, so its be justified if irrelevant fact principle be implemented and punishment don't be imposed. Here, the judge saw character of the fact, that caused punishment was unnecessary.

In common law context, as the *de minimis non curat lex*, expressed that judges will sit in judgment of extremely minor transgressions of the law or the law does not concern itself with trifles. That is stated in the 2004 Supreme Court of Canada decision in *Canadian Foundation for Youth v Attorney General* dimana Hakim B. Wilson, in his dissenting opinion, state that<sup>12</sup>:

"The Chief Justice is rightly unwilling to rely exclusively on prosecutorial discretion to weed out cases undeserving of prosecution and punishment. The good judgment of prosecutors in eliminating trivial cases is necessary but not sufficient to the workings of the criminal law. There must be legal protection against convictions for conduct undeserving of punishment. And indeed there is. The judicial system is not plagued by a multitude of insignificant prosecutions for conduct that merely meets the technical requirements of "a crime" (e.g., theft of a penny) because prosecutorial discretion is effective and because the common law defence of *de minimis non curat lex* (the law does not care for small or trifling matters) is available to judges.

Generally, the justifications for a *de minimis* excuse are that<sup>13</sup>:

- (1) it reserves the application of the criminal law to serious misconduct;
- (2) it protects an accused from the stigma of a criminal conviction and from the imposition of severe penalties for relatively trivial conduct; and
- (3) it saves courts from being swamped by an enormous number of trivial cases.

By *de minimis* principle thus, punishment theories based on an idea that every crime have been prevented by suffering, is not be in effect. Its consistence with dual principles in criminal law implementing that there is no culpability for harmless and blameless conduct.

#### FORGIVENESS AND PENAL MEDIATION IN LAMPUNG AND BALINESE SOCIETY

Forgiveness is a consequences of individualization of sentencing principle which treats penal sanction elastic / flexible/ plastic and dynamic. This nature of elastic/plastic/flexible/ dynamic appropriate with demand of justice in society and an aim of law to give justice. According to Djodiguno that the law which have a purpose for justice have to be dynamic, and always change from one circumstance to other circumstance, and plastic character that could be adapted to certain circumstance and situation, or in other word that justice is not static, because the view of society about justice is dynamic and always change a day for a day.<sup>14</sup>

The adat criminal law of MasyarakatAdat Lampung always give priority to fulfill of society justice as a collective awareness of local society. Thus, there is opened and flexible settlement appropriate with development of society justice. In MasyarakatAdat Lampung, if there is happen insignificance cases such insignificance stolen, then the settlement will be performed as follows :

<sup>9</sup>LuizFlávio Gomes, Principle of insignificance and irrelevance principle of the criminal suit (Irregularità of bagatela), page 4.

<sup>10</sup> Ibid, page 6

<sup>11</sup> Ibid, page 7.

<sup>12</sup>De Minimis Non CuratLex Definition, www.duhaime.org/legal dictionary, page 2.

<sup>13</sup> Loc. Cit,

<sup>14</sup> M. Djodigogoeno, ReorientasiHukumdanHukumAdat, 1961, Jogjakarta, PT. PenerbitanUniversitas, page.19

□ Trivial Case of a Little fruit stolen

In case of fruit stolen thus have to be differed between fruit stolen depends on place of its tree. The fruit stolen from a tree which is at periphery of street will be different with fruit stolen from a tree which is in the garden or in the yard. According to Article 52 Code of Kutara Raja Niti of Masyarakat Publiyan Lampung, constituted that : " stolen of fruit from the tree which is at periphery namely "nggranatnyinggahbaya", and the thief just be applied of reprimand and warning so that recommitted his/her action, whereas some fruits which is stolen will be given to the perpetrator. Meanwhile, according to Article 53 of Kutara Raja Niti, stated that "but if the fruits was stolen from a fence place or if a tree is at periphery, this action namely "nggranatngerumutbaya" and as a punishment the perpetrator have to pay back all fruit to its owner and imposed fine punishment four time of price of stolen things. In practice if number of fruit which is stolen is little, here the perpetrator be reprimanded and pardoned without punishment.

□ Trivial case of Little Rice Stolen

If someone stolen a little rice for hungry to fulfill his/her family need of rice because days they didn't eat anything cause of poverty, or stolen some of fruits for medicine, thus according to adat law the perpetrator could be forgiven or pardoned without punishment

In Adat law of masyarakat adat Lampung to solve of insignificance or trivial cases such as stolen of a chicken, some fruits which have thrift value, thus "punyimbang" (who represent of offender and victim) perform a conference to achieve an agreement that decide didn't impose of punishment to the offender. An agreement which is achieved just to announce that the offender have done violation and blame of his/her conduct, so he/she has to confess of his/her conduct and blameworthiness, and then promise in front of conference that he/she never recommit his/her violation. The conference then forgive him/her without impose punishment. Here, punishment replaced to community service order such as clean of public area like mosque, street, etc. if the offender is a minor offender, community service order could be perform with his/her parent. Here, no retributive aim in community service order that burdened to the offender, but rather as an education for offender and society in order to didn't imitate his/her violation conduct.

Meanwhile in Balinese Adat Law that lives and develops until now, formulated in an Act that known as Awig-Awig . Here, Awig-Awig regulates all things relate to behavior of member of society in "desa" (village). Although the rules of all Awig-awig in all desa was derived from Hindu Code, but each desa has Awig-Awig which different from other desa, because content of Awig-Awig depends on its interest to regulate its community. There are three (3) sanctions in Balinese Adat Law which could impose to perpetrator who violate of adat rules or delict of adat. There are : (1). Arthadanda sanction (property punishment) such fine; (2) Jiwadanda (soul punishment) its form such ask for forgive to victim and society in the opened forum; and (3) Ngaskaradanda (sanction which to restore of relationship between human being with nature), it performs by upacara adat (Adat ceremony).

Jiwadanda has three (3) levels : level 1. Kanoroyan sanction, which stop perpetrator as a member of society all his/her life; level 2. Kasapekang is exile sanction of offender from his adat life. Here, the offender and his family allow to stay in adat area, but they are exiled from adatsociety, no greetings and all their adat interests ignored by society; 3. Asking forgive, is lightest of jiwadandasaction, which the offender have to ask forgive to victim and society of adat in the opened forum.

If someone violates adat rules which caused of damage or defect to balancing in society life, he/she could be imposed of three sanction all at once. Here, "JiwaDanda" which perpetrator ask for fogive to victim and society in the opened forum has strategic position. Jiwadanda is the first sanction which imposes to the perpetrator, and also to consider of light or severe of arthadanda, moreover jiwadanda could be a reason to release of perpetrator, although its depends on seriously of violation. Jiwadanda is a sanction that judged as most severe sanction in Balinese Adat Law, because its relate to psichys of perpetrator, which have to be performed by perpetrator to confess his action and regret, and so ask for forgive to victim and society in the opened forum.

In the trivial or insignificance cases that cause of little damages to victim or society, JiwaDanda will be a reason to delete of arthadanda sanction. By ask for forgive to victim and society so perpetrator could be forgiven and released from arthadanda.

However, the offender decided impose "ngaskaradanda" sanction, such an adat ceremony to clean of village and restore of balancing in magic and social life of society. Ngaskaradanda has three (3) forms, namely : little, medium and big ngaskaradanda. The determination of ngaskaradanda level depends on economic capability of offender, so there is flexibility in adat punishment. If the offender is a richman so he imposed by the medium or big ngaskaradanda and the other way if the offender is a poor man, he imposed by the little ngaskaradanda. Moreover, if the offender is very poor so couldn't perform of ngaskaradanda, so the adatsociety voluntary together the offender to perform ngaskaradanda ceremony. There is collective

awareness of society "to punish themselves" perform punishment which is imposed to the offender. The aim of handling of offender's punishment by adat society is to restore of balancing in relationship between the nature and human being. There is belief that human being is part of the nature, who preserve of good relationship with the nature. Here, the nature judged as an appearance of God. The existence of the nature in Balinese belief differed between the visible nature (real word) that called of "sekala" and invisible nature (invisible world) as known "niskala", both of them have to be preserved of balancing. So, the action that caused damages of balancing between sekala and niskala, according to Balinese of society belief have to be cleaned by ngaskaradanda ceremony to avoid the nature anger such disasters etc which will fall on society.

#### FORGIVENESS AND PENAL MEDIATION AS INDONESIAN LOCAL WISDOM

Based on the research outcome on trivial or insignificance of theft above, we can say that to give justice need any special treatment in certain cases, the judge have to response of society common sense of justice so not always similar cases be treated equal. Here, the justice of each cases need individualization to be treated. Its need elasticity or flexibility or plasticity or dynamic along with common sense of justice in society which develop everytime. The need of elasticity or flexibility that based on individualization of sentencing in imposing of sentence relate with the final aim of law that is to reach social welfare.

In this context, Djodjodiguna said that law as a society creation to achieve social welfare should have a dynamic and plastic characteristic to adapt with society's circumstance. With the result that in implementing of law have to hold on to : a). principles and modeling of law in the past period which be static standard; b). the circumstance of society in the present which be dynamic standard; and c). individualization of each cases which be plastic/elasticity standard.

While, in practices of sentencing in trivial or insignificance criminal cases, the judge to be reluctant to implement of local wisdom as unwritten law. Here, because the judge only hold on principle of legality that formulated in Article 1 paragraph (1) Indonesian Penal Code (KUHP), which was derived from The Dutch Penal Code. To determine the source of law, the judge only hold on an Act or provision as a written law which judged as the most important of law than to implement of local wisdom as a living law. That is a positivism logical that produces closed logical system (syllogism logic). Positivism drives the judge to rigidities in implementing of law (as an Act), there is no any burden to dig legal and justice values that live in Indonesian society. Here, the judge just as an actor to sound of Law content without involve his/her lustrous and sense of justice, in other word, sense of justice was ignored and certainty of law be primadona.

But if the judge will apply of living law as a local wisdom to fulfill of sense of society justice in trivial or insignificance cases as a solution, this cases didn't need of sentencing, but could be solved by forgiveness and reconciliation in penal mediation between offender and victim, and the case be closed by an agreement of both of parties. Here, a sense of justice could be reached and relationship between offender and victim could be repaired.

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