



Humanity Values on Reconciliation in Criminal Law: Indonesian Criminal Law Renewal Perspective

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ABSTRACT

The aim of the paper is to explain humanitarian values on reconciliation of criminal law in the reform of the Penal Code. Reconciliation is a tool to accomplish a problem or law cases that occur in the private and public fields. Currently, reconciliation has been often used to resolve criminal cases, because this solution is more oriented toward human values. The research is library studies, so secondary data (journals, legal documents, and literature) is the main data. The result of the research shows that there are two approaches to discussing human values of reconciliation. Firstly, the values approach shows that reconciliation as consensus - discussion is an admission of guilt in the form of apology, which is containing equality values, rationality, frankness, righteousness, and transparency. Secondly, the policy approach indicates that consensus - the discussion has flexible value and is proportional.

1. Introduction

The term of peace is known in all levels of society around the world, that functioned to resolve disputes that occurred. This term reminds us of the philosopher Immanuel Kant's thoughts on perpetual peace. The meaning is broader not only with related to peace between individuals but also peace broadly between tribes or nations, so that is related to universal human rights in state life regionally, national, and international.¹ Therefore, the policy or efforts to control the crime, essentially, is the integral part of community

¹ Herman Herman, "Upaya Non Penal dalam Penanggulangan Tindak Pidana Korupsi," *Halu Oleo Law Review* 2, No. 1 (Juni 6, 2018): p. 306, <http://ojs.uho.ac.id/index.php/holrev/article/view/4192>.

protection efforts (social defense) and efforts to achieve social welfare.² Another term that is commonly used when it comes to individual rights is reconciliation, although this term can also occur between tribes or between nations, viewed by the definition of reconciliation itself. The meaning of this term literally is “as restoration of harmony between persons or things that had been in conflict.”³ The other concept of reconciliation is “a complex set of processes of rebuilding relationships in the aftermath of human rights violations at the individual, interpersonal, socio-political, and institutional levels.”⁴ These two meanings show that the term reconciliation is not only a peace that can occur between individuals, but also can be occurred between countries.

Kant's idea of perpetual peace can be a reference for peace in a narrow scope, meaning that it is occurred between individuals or groups/tribes or between communities. Furthermore, Kant has point of view that religion is instrument in peace because religion is instrument in human life, and as a catalyst for the basic considerations of peace, although in doing peace does not mention religion as the basic. He also views religion as an ethical foundation in society, which is moral.⁵ Therefore, in this reconciliation should be there is a desire that is based on good morals from both parties in dispute/litigation, peace will not be realized.

Reconciliation in its development can also occur in criminal law, so that the case is not processed in the judicial process. For example, in cases of domestic violence, the police always mediate before the litigation process.⁶ The Other case, the tourist accident case, were resolved by deliberation for peace, between the manager of the tourist site and the victim's family, with the payment of compensation.⁷ And health malpractice cases, the solution is usually taken by peace through mediation between medical personnel and/or the hospital with the patient or the patient's family.⁸ Solution by reconciliation to legal cases is known as Alternative Dispute Resolution, which in criminal cases is referred as penal mediation or mediation in penal matters, namely the solution of cases outside the judicial process. In practice victims and perpetrators actively participate in solving crime

² Sudirman Sitepu, “Penanggulangan Kejahatan melalui Kebijakan Kriminal,” *Syiar Hukum* 8, No. 3 (2006): p. 325–335.

³ Bryan A. Garner dan Henry Campbell Black, *Black's Law Dictionary*, Ninth Edit. (St. Paul, Minn.: Thomson West, 2009).

⁴ Paul Sellis, “The Place of Reconciliation in Transitional Justice,” *International Centre of Transitional Justice*, No. June (2017): p. 1–16.

⁵ C Perrottet, “Immanuel Kant's Perpetual Peace: The New World Order of Critical Philosophy,” *The Journal of Global Development and Peace* (2009): p. 4–30; Eva Buddeberg, “Kant on the Role of Religion for Moral Progress,” *Kantian Review* 24, No. 3 (September 9, 2019): p. 335–357, https://www.cambridge.org/core/product/identifier/S1369415419000165/type/journal_article.

⁶ S Hartanto, I S Utari, dan R Arifin, “Implementation of Penal Mediation in the Perspective of Progressive Law (Study at the Semarang City Police Department),” *IJCLS (Indonesian Journal of ...* 4, No. 2 (2019): p. 161–188.

⁷ Kuswardani dan Fajar Ilhamsyah, “Penal Mediation in the Tourist Accident Case,” *International Journal of Sciences: Basic and Applied Research (IJSBAR)* 52, No. 1 (2020): p. 164–172.

⁸ Rudy Sapoelete et al., “The Concept of Penal Mediation for the Crime of Medical Negligence in Realizing Legal Protection for Medical Personnel and Patients or Their Families,” *International Journal of Multicultural and Multireligious Understanding* 8, No. 2 (Februari 2, 2021): p. 147, <https://ijmmu.com/index.php/ijmmu/article/view/2406>.

problems that occur freely. The parties make an agreement through the help of a third party as a mediator, so that the perpetrator is not punished.

Furthermore, we say that the term reconciliation can be used alternately with the term penal mediation or mediation in penal matters or alternative dispute resolution because all these terms essentially have the same meaning, namely solution without using formal procedures in court. Eleventh United Nations Congress on Crime Prevention and Criminal Justice in Resolution No. A/conf.2033/18 acknowledges that this penal mediation as a reference for solving all criminal cases, without being able to impose imprisonment, but it is necessary to pay attention to the rights of victims and perpetrators, to realize restorative justice. Indonesia recognizes penal mediation in Law no. 11/2012 concerning the Juvenile Criminal Justice System. This settlement in the children's cases is called diversion.

Based on the essence of peace, it shows that there is a balance of rights between the perpetrator and the victim, then it contains high humanity values. Moreover, it is associated with the philosophy of peace from Immanuel Kant, that it is a humanity value which is sourced in divine values, due to religion as a catalyst, it means the religion is not explicitly referred to as the basis of peace but can lead to changes in conditions for the better and accepted by the all parties.

Indonesian in the social process based on the principle of social harmonization, so that this society in living life leads to solidarity, camaraderie and cohesiveness, conflicts or disputes are always avoided, when it happens, the community will resolve with deliberation. The popular term is *Gotong Royong* ("mutual assistance or mutual cooperation"). This term does not only mean in a physical form such as helping with work or borrowing each other in living cost difficulties. Mutual cooperation has a non-physical meaning also, namely as a collective spirit in kindness between neighbors to strengthen economic and social resilience.⁹ This characteristic of mutual cooperation is reflected in customary law, which is the relations in society are based on togetherness, common interests are the main priority than individual interests based on religious magical values.¹⁰ For example the settlement of customary criminal cases, sexual relations break a marriage promise, which is the solution carried out by consensus.¹¹ Thus mutual cooperation in the form of deliberation leads to an agreement in solving cases based on human values that are based on divine values. These values are packaged in Pancasila as the nation's philosophy, state ideology and even as a source of Indonesian national law.

⁹ Agus Suwignyo, "Gotong royong as social citizenship in Indonesia, 1940s to 1990s," *Journal of Southeast Asian Studies* 50, No. 3 (September 12, 2019): p. 387-408, https://www.cambridge.org/core/product/identifier/S0022463419000407/type/journal_article.

¹⁰ M. R. Wilujeng, *Hukum Adat dalam Perkembangannya* (Jakarta: Universitas Katolik Indonesia Atma Jaya, 2020).

¹¹ Kuswardani Kuswardani dan Gilang Kartiko, "Asas Kesalahan Dalam Hukum Pidana Pilar Perlindungan Hak Asasi Manusia," *Seminar Nasional Online & Call for Papers* (2020): p. 11-20.

2. Method

This paper is library research, which is philosophical normative, that examines the renewal of criminal law that is oriented to human values by accommodating the values that live in society, namely the culture of mutual cooperation which is implemented in the settlement of criminal cases. This research sourced from secondary data or literature, which is collected using identification, inventory, and categorize to data that relevant with research problem. The data will be discussed using a criminal law renewal perspective which consists of two approaches, namely the values approach and the policy approach.

3. Result and Discussion

Criminal law as public law, which regulates actions that can be punished, and the state has the authority to impose sanctions. However, the punishment must not include torture, discrimination, or inhumane and degrading actions. Moreover, as a country based on Pancasila, human values imbued with the value of Belief in the one and only God become the main principles in its national legal system, including its criminal law system. The criminal law system includes several subsystems, namely substantive criminal law/material criminal law, criminal procedural law/formal criminal law, and criminal implementation law. Thus, the criminal law renewal means that includes the three areas of criminal law. However, in this paper, the criminal law renewal is the renewal of substantive criminal law/material criminal law or commonly referred to as criminal law, especially renewal in the legal substance.

Criminal law renewal is conducted with two approaches, namely the value approach and the policy approach. The value approach is a reform that should be oriented toward the socio-political, socio-philosophical, and socio-cultural of the society itself (Indonesian people). The policy approach is a crime that is part of social policy, therefore criminal law should be able to overcome humanitarian problems, which lead to crime. In addition, criminal law is also part of criminal policy, for this reason, criminal law renewal should be strived to be able as crime prevention and as an effort to provide social protection. Furthermore, criminal law renewal as part of law enforcement policies, it means that criminal law renewal is an effort to reform legal substance to make law enforcement effective.¹²

Firstly, Pancasila as a sociopolitical value, Indonesian society, means that decision-making, including law-making, should be oriented to the personal identity of the Indonesian people, that God Almighty is the source of value, which includes human values, the value of unity and the value of deliberation. This also shows sociocultural values, due to the nation's personal identity is also reflected in the legal products of the Indonesian nation.¹³

¹² Barda Nawawi Arief, *Bunga Rampai Kebijakan Hukum Pidana: Perkembangan Penyusunan Konsep KUHP Baru* (Jakarta: Kencana Prenada Media Group, 2017).

¹³ Dewa Gede Mangku, "Politik Hukum Pancasila dalam Paradigma Nilai-Nilai Sosial Kultural Masyarakat Indonesia," *Pandecta: Research Law Journal* 9, No. 1 (Juli 21, 2014): 2014, <http://journal.unnes.ac.id/nju/index.php/pandecta/article/view/2856>.

Beside that as a socio-philosophy, the legal sources are sourced on the values that contained in each precept in Pancasila. The value of God Almighty in the first precept as an idea that should be reflected in every law that is formed. The diversity of laws that live in society has legal ideas that are sourced in the values of the first precepts, considering the law characteristics that live are religious magical, so that the ideals of this law directly reflect human values as the nation's fundamental values

Secondly, the policy approach in criminal law renewal as an effort to overcome crime and provide society protection, this is related to social policy in the sense that to overcome crime it is not enough just punish the perpetrators, but as a crime prevention policy it is also necessary to pay attention to, consider and link with social policies. to eliminate the causes of crime both from the economic and social aspects. International Society at the Thirteenth United Nations Congress on Crime Prevention and Criminal Justice, 12-19 April 2015, Resolution No. A/CONF.222/17. This Resolution emphasizes the importance of an integrative strategy in crime prevention through the criminal justice system and socio-economic policies.¹⁴

Economic factors that result in poverty as the dominant factor in the occurrence of crime. Bill Dixon stated that social policy can be the goal of crime prevention, if social policy can break the factors that cause crime.¹⁵ It means crime prevention through preventive development programs. for Indonesia, it is not new things because the state's goal is to realize social welfare based on human values and justice.

Furthermore, criminal law renewal as part of law enforcement policies. It means making criminal law a tool to measure (1) that action is against the law; (2) the responsible ability of the perpetrator; and (3) a tool to determine the appropriate punishment for the perpetrator, in order to the punishment does not violate human values. This criminal law will be an effective instrument if the criminal law is clearly formulated at the formulation stage of criminal law enforcement, both in terms of principles, objectives, sentencing guidelines as well as in terms of the three main problems of criminal law. In the stage of formulating the legal substance of criminal law renewal, it is possible that there will be a shift in principle from criminal law or the goal towards criminal law that prioritizes human values.

The shifting of principle in law enforcement is to provide opportunities that the enforcement of criminal law (in the sense of application), does not always end with the criminal conviction on the perpetrator, even though the act is against the law and the perpetrator is able to be responsible. However, there is space between the perpetrator and the victim to find their own solution in solving the problem, so that it clear and ends happily. Elena Maculan, and Alicia Gil Gil, argues that in criminal law there needs to be

¹⁴ United Nations, *Report of the Thirteenth United Nations Congress on Crime Prevention and Criminal Justice*, vol. A/CONF.222/17, 2015.

¹⁵ Bill Dixon, "Development, crime prevention and social policy in post-apartheid South Africa," *Critical Social Policy* 26, No. 1 (February 2006): p. 169-191, <http://journals.sagepub.com/doi/10.1177/0261018306059770>.

other mechanisms such as an official apology, with an improvement for the victim's loss, both material and immaterial.¹⁶ It is what the author calls peace, which in criminal law is peace between the perpetrator and the victim.

3.1. The Value Approach of Reconciliation in Criminal Law Renewal as an Embodiment of Humanity Values

Value in this paper is not in an economic definition, which is related to money or property, but value in a cultural definition, namely the shared ideals of a culture, while the culture itself is what it should be */ought to be*. Michael Freese states that the value is an injunctive norm, so it shows what should be. Values as injunctive norms are the same as culture, but different from cultural practices / As Is, namely the shared perception of a society how people routinely behave, then cultural practice is not a value, because it is a real phenomenon of society behavior, while values are behavior that should be appropriate with instruction.¹⁷ Koentjaraningrat, states that value is an ideal form of culture called custom or behavior custom which in there is a very abstract value system, but it is an idea that conceptualizes things that are useful for social life in good thing. Furthermore, he explains that this value will find a more concrete form in society if this value contains an obligation or instruction and prohibition, which is called a norm. If the local society agrees to do this, it is called a rule of law.¹⁸ So it can be said that the rule of law is a concretization of values that have been agreed upon by the local society. This reminds us of the living law of Eugen Ehrlich that:

“Law is a social phenomenon that takes place and functions in society; and on the other hand, the law is a phenomenon that exists in the time dimension. It was proved that Eugen Ehrlich disagreed with the assertions of historians that the scientific understanding of the law can only be disclosed in the context of history. He believed that a wide recognition of the socio-historical aspect of the law would enable the judges to understand the absence of absolute legal norms through time and space, and would free them from “heavy chains” of technicism.”¹⁹

I have the opinion that the living law or mores is a system of custom behavior, which is a society culture that has substance about what should be called customary law or unwritten law, and it is dynamic. It (unwritten law which is dynamic) has become the basic for social processes in Indonesia until now, which is side by side with laws made by the legislative, which are written. In Indonesia there are several laws that serve as guidelines

¹⁶ Elena Maculan dan Alicia Gil Gil, “The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts,” *Oxford Journal of Legal Studies* 40, No. 1 (Maret 1, 2020): p. 132-157, <https://academic.oup.com/ojls/article/40/1/132/5716712>.

¹⁷ Michael Freese, “Cultural Practices, Norms, and Values,” *Journal of Cross-Cultural Psychology* 46, No. 10 (November 23, 2015): p. 1327-1330, <http://journals.sagepub.com/doi/10.1177/0022022115600267>.

¹⁸ Koentjaraningrat, *Bunga Rampai: Kebudayaan, Mentalitas & Pembangunan* (Jakarta: Gramedia Pustaka Utama, 2004).

¹⁹ Svitlana Karvatska, “Socio-Historical Factors of Law Perception in ‘Living Law’ Concept by Eugen Ehrlich,” *Erlihivs'kij žurnal* 1 (Desember 25, 2017): p. 42-51, <http://ehrichsjournal.chnu.edu.ua/index.php?journal=ehrichsjournal&page=article&op=view&path%5B%5D=10>.

in individual and social life, namely state law, customary law and religious law. Some laws that valid in a society under one cultural identity, called legal pluralism. It consists of official law (law made by the state) and unofficial law, it is like customary law, transplant law, namely laws that come from other cultures, which is accepted by the local society as the basic of their life, such as the laws of other countries or religious laws.²⁰ Transplant law in Indonesia, comes from religious law, especially Islam, such as the Marriage Law in Indonesia, which comes from Islamic religious law. This transplant law exists and applies well, not only in Indonesia but also in several Asian countries, such as in Taiwan, the results of research from Tay-sheng Wang stated that Taiwan is an example of a country that accepts well modern laws (western) which is transplanted (transferred) into the country's legal code and applies together with its local law.²¹ Transplantation in Indonesia does not necessarily apply the transplant law directly but needs to be filtered with the values of the nation, namely values on Pancasila. Therefore, as explained above, the value of humanity, the value of concurrent, the value of unity and the value of justice, which are the essence of the value of the One Godhead, are the main foundations in Indonesian law.

The value approach in criminal law renewal should be based on the values of Pancasila, including those related to peace issues in criminal law renewal. Peace as a non-physical form of the cultural value from *gotong royong* culture value of the Indonesian nation and has a spiritual aspect of the value of the Almighty God. Mutual assistance culture is a culture that emphasizes togetherness, solidarity, tolerance and avoiding conflict. If the conflict still persists, deliberations will be taken to reach a consensus, so that an agreement is reached, and the conflict ends.

Deliberations to agree is historically existed in Indonesian society before independence, which is reflected in the values that live in society, which still exist today. At first this was not only limited to conflict resolution but also for decision making at the village level, but now it is the basis of democratic life in Indonesia. This is shown in the practice of decision making in the legislative and executive with the principle of mutual consensus. David Dutwin explained that deliberation can achieve the goal if there is equality and rationality. This is possible if all participants are heard their opinion in discussing the topic of the deliberation, and there are rational reasons in choosing an agreement, so that it will establish public opinion, which can be used as a basis for public policy. Although David Dutwin also admits the weakness of deliberation, especially in terms of establishing public opinion to reach agreement, there is dominance of the political elite.²² This deliberation characteristic of David Dutwin is a characteristic of the political deliberation field in deciding public policy, but in essence the characteristics of the deliberation are indeed so, that the deliberation participants have the same opportunity to express their opinions

²⁰ Masaji Chiba, "Other Phases of Legal Pluralism in the Contemporary World," *Ratio Juris* 11, No. 3 (September 1998): p. 228–245, <https://onlinelibrary.wiley.com/doi/10.1111/1467-9337.00088>.

²¹ Tay-sheng Wang, "Translation, Codification, and Transplantation of Foreign Laws in Taiwan," *Pacific Rim Law and Policy Journal* 25, No. 2 (2016): p. 307–329.

²² D. Dutwin, "The Character of Deliberation: Equality, Argument, and the Formation of Public Opinion," *International Journal of Public Opinion Research* 15, No. 3 (September 1, 2003): p. 239–264, <https://academic.oup.com/ijpor/article-lookup/doi/10.1093/ijpor/15.3.239>.

with their arguments, so that they feel "humanized." These two principles (equality and rationality), it can bring about justice, because of justice as fairness, which in this justice there is actually equality and the same freedom naturally, so that humans must have the same opportunities in accordance with their rights. It is the principle of equality. On the other hand, humans have differences, especially in terms of obligations that should be accomplished, so that the compliance of these obligations is in accordance with their abilities. The justice can be realized, if it is based on morals.²³

Moral as the basic for peace, because without a moral basic for peace in the sense of deliberation and consensus to end a conflict will not be realized. In addition, equality and rationality, which are based on morals, also reflect honesty, truth, and transparency which ultimately bring about justice. In this deliberation for consensus (peace) there is an acknowledgment of guilt from the perpetrator, regret for his actions, which is manifested in the form of an apology formally, and compensation for losses in the form of material and non-material. It is like the solution of tourist accident cases in Rowo Jombor and Umbul Ponggok, with an official apology from the tourism management and the provision of compensation.²⁴ Islam as a source of human values, also teaches about forgiveness and deliberation. The instruction to forgive is like in the Qur'an Surah Al A'raf /7:199 that "God instructs to be forgiving." This instruction should be conducted in a good way, such as the Word of God in Surah Al Hjr/15:85, that the giving of forgiveness should be able to eliminate anger towards the perpetrator because of the incident, so that social interaction becomes good again. Giving forgiveness is not only in simple cases, but also in cases of deprivation of human rights. Allah teaches his people to be able to forgive the perpetrator, by relinquishing his right to retaliate. This is proof that Islam highly upholds human values, whose spirit can be accommodated as a country based on the One Godhead.

3.2. Policy Approach from Reconciliation in Criminal Law Renewal as an Embodiment of Humanity Values

This policy approach in criminal law renewal positions that criminal law renewal as an effort to prevention crime, and part of criminal law enforcement. These two approaches must show humanity values, they can even contain spiritual values.

Firstly, criminal law should be able to function to eliminate criminal acts. Therefore, criminal law must be rational, which is shown by the purpose of criminal law and punishment, that the goal should reflect justice in a broad sense, namely paying attention and considering humanity values. The purpose of criminal law and punishment should reflect justice in a broad sense, namely by paying attention and considering humanity values.

²³ John Rawls, *A Theory of Justice (Original Edition)*, Development Policy Review, Oxford Paperbacks 301 301 (Cambridge and London: Harvard University Press, 1971).

²⁴ Kuswardani dan Ilhamsyah, "Penal Mediation in the Tourist Accident Case."

The purpose of criminal law should not be separated from the state goals that to be realized, which in essence the goal of the state (Indonesia) is to realize welfare and social justice for all people. Therefore, eliminating crime, creating security, discipline and peace in society as an effort to do so, which does nothing but provide protection for the rights of humans both as individuals and members of society. Therefore, in order that the objectives of criminal law can be achieved, crime prevention should be comprehensive, it means that it does not only rely on criminal law as a tool, but it is also necessary to consider other tools outside of criminal law to support the realization of the criminal law goals. These tools can be done by eliminating factors that cause crime, such as economic factors that result in poverty. It is as shown by Baomin Dong et al that poverty and low-income levels are the causes of crime, even Baomin Dong agrees with the opinion of the Roman Emperor Marcus Aurelius who called it "Poverty is the mother of crime."²⁵ Yozi Aulia Rahman and Affandi Dwi Prasetyo said that the minimum salary has a significant effect on crime rates, which means that if the minimum salary is low, the crime rate tends to rising and vice versa. They do crimes such as theft, it is to meet the necessities of life.²⁶ Fernando Dos Costa in his study correlates poverty with human rights, that poverty is the cause of human rights violations or can also as a result of human rights violations. Due to with poverty there will be crimes, especially crimes in the property sector, it means that there is a violation of individual property rights, which are human rights that should be protected and respected by the state and everyone. He said to overcome the need to evaluate and develop the implementation of state obligations in order to accomplish it.²⁷ It means that with this poverty a decent standard of living is not accomplished, it can cause humans to lose their dignity, because humans will act to accomplish the feasibility of living without heeding the dignity of other human beings as human rights, which becomes limit. Strategies that can be taken to eliminate or at least minimize poverty by promoting social cohesion in all aspects of life, including in the economic and social aspect. This social cohesion is a social capital to improve the people's economy, by building high public trust that leads to togetherness, helping and respecting diversity. In Indonesia this is reflected in *gotong royong*.

Purpose of punishment, as an effort to crime prevention need to get the state attention. The theory of the punishment purpose has been around since the 17th century and has been developing. Purpose of the oldest punishment is the retributive theory which holds that punishment/criminal is retaliation against the perpetrator. This development has arrived at the hybrid theory/mixed theory that punishment is not only a chastisement for

²⁵ Baomin Dong, Peter H. Egger, dan Yibei Guo, "Is poverty the mother of crime? Evidence from homicide rates in China," ed. Shihe Fu, *PLOS ONE* 15, No. 5 (Mei 18, 2020): p. 1–22, <https://dx.plos.org/10.1371/journal.pone.0233034>.

²⁶ Yozi Aulia Rahman dan Affandi Dwi Prasetyo, "Economics and Crime Rates in Indonesia," *JEJAK* 11, No. 2 (September 10, 2018): p. 401–412, <https://journal.unnes.ac.id/nju/index.php/jejak/article/view/16060>.

²⁷ Fernanda Doz Costa, "Pobreza e direitos humanos: da mera retórica às obrigações jurídicas - um estudo crítico sobre diferentes modelos conceituais," *Sur. Revista Internacional de Direitos Humanos* 5, No. 9 (Desember 2008): p. 88–119, http://www.scielo.br/scielo.php?script=sci_arttext&pid=S1806-64452008000200006&lng=pt&tlng=pt.

the perpetrator, but also to provide protection to the society and rehabilitation to victims. The retributive theory has actually developed, by leaving the principle of punishment as mere retaliation, emphasizing humanity values from punishment. This principle is called the just desert principle, namely the worth or appropriate chastisement or a fair reward. This theory implies that punishment must be proportional. The principle of just desert is based on the principle that rational individuals are free to make free choices as well. This principle contains humanity values to be realized in the punishment of perpetrators, but is also oriented to the rights of victims. This principle provides opportunities for perpetrators and victim in criminal justice process to bargain in the reconciliation process, and in this reconciliation the victim will get the right of restitution which is not only financial but also non-financial (psychic). The existence of this reconciliation means that the purpose of punishment is not as revenge but to restore order in society as before. David A Starkweather said that:

"What is the "moral order" that the retributionists seek to restore? Moral order is the existence of "right" relationships among individuals and between an individual and the community." The "right" relationships are governed by a higher authority, whether it be God, natural law, or social contract. "moral order" is the ideal state in which the community should function. Therefore, under this definition of retribution, crime is conduct that disturbs the "right" relationships within the community: relationships between offender and victim, offender and community, and victim and community.

"These' gains have been attributed mainly to victims' desires for revenge or retaliation. However, victim participation in the plea-bargaining process is appropriate under a just deserts theory of retribution. Victim participation in plea bargaining would protect a victim's interest in both financial and psychic restitution without encroaching on the interests of the traditional plea bargain parties-judge, defendant, and prosecutor.²⁸

We said that the principle of Just Desert is a punishment that aims to take revenge or revenge but must show justice, because the goal is to protect human dignity, so that everyone will freely make moral choices. This can be done to provide access for victims and perpetrators of reconciliation, with the aim of restoring the correct moral order, that is, there is no crime. Therefore, the imposition of punishment must take into consideration the principle of proportionality, but also based on the principle of flexibility by providing access to reconciliation.

Secondly, criminal law renewal as part of criminal law enforcement, it starts from the stage of formulating the substance of criminal law. The legal formulation stage by the legislative is a strategic stage, because at this stage determine the law which can work at the next stage (the application stage and the implementation). Therefore, the legislative in formulating criminal laws should be based on the fundamental principles of criminal law, namely the legality principle and culpability. Principle of legality as the basis for the

²⁸ David A. Starkweather, "The Retributive Theory of 'Just Deserts' and Victim Participation in Plea Bargaining," *Indiana Law Journal* 67, No. 3 (1992): p. 853-878.

punishment of an act, and culpability principle is the basis to pass sentence for an actor or actors. These two principles think out the objective and subjective conditions of criminal imposition. Objective conditions are conditions related to the act that the act should be against the law both formally and materially, while the subjective condition relates to the perpetrator that the perpetrator should be able to take responsibility and have mistakes. The two principles that are the conditions for punishment indicate that there is protection for human rights so that they do not become victims of indiscriminate criminal penalties. The determination of the perpetrator's mistake is determined after the act as an objective condition is accomplished, and the determination is seen from the internal aspect, namely within the human being himself, namely having a healthy mind and being no longer a child, and also external aspects, namely from outside the individual's self, namely from his actions whether his actions are against the law. His actions are against the law. The standard of this unlawful nature is based on the law and the values that live in society.²⁹

In this case there is an acknowledgment of guilt from the perpetrators, the legislators should provide access to the perpetrators and victims to carry out the bargaining process for reconciliation, so that the fair chastisement does not have to be a prison punishment. In some countries (America and Europe) forgiveness in criminal law has found a place. For example, Spain has developed forgiveness in the Penal Code as at amendment March, 30, 2015 in Organic Law No. 1/2015 of March 30, 2015, which is acquit criminal liability for legal entities that commit economic crimes, which is replaced by reconciliation between legal entities as perpetrators of crimes and the community as victims. In the reconciliation there is an admission of guilt from the legal entity accompanied by an open apology, reparations for damages as a result of the crime.³⁰ This reconciliation has humanity values not only for the victim, but also for the punishment, because with reconciliation, punishments that are depriving individuals' independence can be eliminated. Therefore, in the formulation of the substance of the law, it is necessary to formulate the abolition of criminal liability from the mistake aspect due to an open apology by the perpetrator and the victim receiving it. So, punishment is not rigid but flexible, it means that the perpetrator may not be sentenced to a criminal, because of the apology from the perpetrator to the victim and the victim accepts it. There is a confession of peace in the formulation of legal substances, criminal law enforcement will be flexible.

4. Conclusion

Reconciliation (penal mediation) as a model of criminal cases solution that is based on humanitarian values. In Indonesia as a culture that has existed before independence, which is called the culture of mutual consensus (*deliberation*). Several criminal cases, such as the examples described in the paragraph above, are implemented well, and no one of the parties felt victimized. This type of criminal cases solution is not oriented towards

²⁹ Kuswardani dan Kartiko, "Asas Kesalahan Dalam Hukum Pidana Pilar Perlindungan Hak Asasi Manusia."

³⁰ Nicola Lacey dan Hanna Pickard, "To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice," *Oxford Journal of Legal Studies* (April 2, 2015): p. 665-696, <https://academic.oup.com/ojls/article-lookup/doi/10.1093/ojls/gqv012>.

revenge but is more "humanizing" the parties. This model provides proportional and rational equal access to perpetrators and victims for determining their own path in solving the problem. In addition, this model can restore the balance that was disturbed due to the occurrence of the case, with an apology from the perpetrator to the victim, which is a manifestation of the values of honesty, truth, and openness. These are all forms of human values. Penal mediation from the perspective of criminal law renewal with a policy approach, also shows humanity values, because with penal mediation or reconciliation. In this case, every person who is guilty and their guilt has been proven, does not always have to be punished. However, they may not get punishment because of the honesty value of admitting their mistakes and the existence of an apology, who the victim accepts the apology. This condition will better reflect the harmony in life together so that social cohesion is still maintained. Therefore, it is appropriate if in criminal law reform peace is formulated as the reason for not being convicted of the perpetrator.

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