

## Penal Mediation in the Criminal Law as a Shift in Social Contract Theory

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**Abstract:** Social contract theory is the theory that illustrates the origin of a state formation. The theory of social contracts is composed of several instruments, including natural human rights, morals and mutual agreement (common will). Humans (individuals) surrender their rights to the ruler (state). The rights that are handed over to the state include rights in the field of public law (public interest). One of the rights in the field of public law is the right to establish norms in criminal law (*ius poenale*) and the right to convict (*ius puniendi*). Through the existence of penal mediation in Indonesia, the state's right to convict offenders is reduced. It also means that the rights handed over by individuals to the authorities (state) in social contracts are reduced. Its theoretical implication is that the right of the state to impose criminal sanctions on offenders who are based on the surrender of individual rights to social contracts, begins to be purified again with the settlement between individuals through penal mediation on violations of public (criminal) law that take place.

**Key words:** penal mediation; shift; social contract

**JEL codes:** K40, K41, K42, K49

### 1. Introduction

The term “a state” is often equated with the term “*lo stato*” (Italia), “*the state*” (English), “*der staat*” (German) dan “*de staat*” (Dutch). Negara can be defined as a system of duties or functions of public and regular apparatus in certain territory (regions) (C. S. T. Kansil & Christine Kansil, 2004, p. 9). Dewa Atmadja stated that a state encompasses a system of function and all the state institutions with its people within certain territory (I Dewa Gede Atmadja, 2012, p. 19). Still on state terms, Pringgogidgo in Kansil argues that the state is a power organization or authority organization that must fulfill the requirements of certain elements, namely there must be: sovereign government, certain regions and people who live regularly so that it is a nation (C. S. T. Kansil & Christine Kansil, 2004). The three elements that make up the country are interrelated with one another. The relationship between the people and the sovereign government in a country is then discussed more in the theory of social contract. The discussion refers to the aspect where the theory of social contract becomes the theoretical validity of the role and rights of the state in the imposition of criminal sanctions against perpetrators of crimes in that country. The state exercises its rights in imposing criminal sanctions against violators of criminal law through state apparatus.

A criminal law, according to Eddy O. S. Hiariej, is a rule of law from a sovereign country, contains

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prohibited acts, accompanied by criminal sanctions for those who violate or who do not comply, when and in what cases the criminal sanctions are imposed and how the implementation of the criminal acts imposed by the state (Eddy O. S Hiariej, 2014, p. 13). Sutherland dan Cressey as quoted by Kanter and Sianturi stated “the criminal law in turn is defened conventionally as a body of specific rules regarding human conduct which have been promulgated by political authority which apply uniformly to all members of the classes to which the rules refer, and which are enforced by punishment administrated by the state” (Kanter & Sianturi, 1982, p. 14).

A similar notion was expressed by Hazewinkel-Suringa in Andi Zainal Abidin, that the term criminal law can be interpreted subjectively and objectively. The criminal law in the objective sense, which is also often called *poenale juice*, includes:

- 1) Orders and prohibitions, for which violations or their services have been sanctioned in advance by the competent state bodies, regulations that must be obeyed and heeded by everyone;
- 2) Provisions stipulating in what ways can a reaction be made against violations of those regulations; in other words penentiair law or sanction law; and
- 3) Rules that determine the scope of the enactment of these regulations at a time and in the territory of a particular country.

In addition, criminal law is also used in a subjective sense which is also commonly called *jus puniendi*, which is a legal regulation which stipulates the investigation, the follow-up investigation, prosecution, imposition and implementation of criminal law (Andi Zainal Abidin, 1987, p. 1).

The list of some views related to the notion of criminal law above contains the same view in positioning the role of the state in criminal law. The state is the only organization of power/authority that has a full role in forming the rules of criminal law and imposing criminal sanctions on someone (a criminal offender). In line with Adam Cazawi as quoted by Eddy O. S. Hiariej, the state has the right to impose criminal sanctions because criminals have attacked and violated protected rights and legal interests (Eddy O. S Hiariej, 2009, p. 10). The interests of law protected through criminal law are of common interest, so criminal law is dichotomized to become the scope of common law. Changes in society give rise to ideas in resolving a criminal offense without using criminal sanctions. The method of settlement in the theoretical level is known as the penal mediation method. Penal mediation method involves several parties such as perpetrators, victims, mediators and communities affected by criminal acts.

## 2. Discussion

### 2.1 Correlation of Social Contract Theory with the Imposition of Criminal Sanctions by the State

Social contract theory is a thought that tries to explain the nature of the existence of the state and the state's power to punish someone. The adherents of this theory that are recorded are Thomas Hobbes, Jhon Locke, and Rousseau. Thomas Hobbes in his book “*De Cive*” and “*Leviathan*” put his views on humans. Humans are in the natural (naturalist) where each human being has a natural will that is to dominate and possess, so that the clash between human interests which scrambles for possession and control is very possible. The impact is that there is no sense of humanity. Hobbes uses the terms “solitary”, “poor”, “evil” and “brutal” to describe human nature. Humans are considered as wolves for other humans (*Homo Homini Lupus*). These expressions describe the state of human nature, in which competition and war always arise between one and all other humans. The worst result of this situation is death, so every human being is followed by fear. Humans then avoid fear by holding

agreements between humans to give up all their rights to one person or organization.

In line with the overview of Ozan Örmeci Makaleler, Hobbes's thinking is as follows:

“... Hobbes concludes his theory by the realization that rational egoist human beings will profit more in an organized state, and thus, to make a social contract among them and give their power to a sole person who would be like a mortal God called “*Leviathan*” who would provide peace and order in society by making laws deriving from laws of nature and by punishing guilty people” (Ozan Örmeci Makaleler, 2013, p. 12).

This person or organization will have full and absolute power to regulate human life.

Jhon Locke sees the same thing that humans were originally in the status of naturalists (natural states). In this status humans have had various kinds of natural rights or known as human rights. The difference from Hobbes's opinion lies in the rights submitted to the state. Locke argues that human rights that are handed over to the state must be limited so that people/organizations cannot act arbitrarily in receiving the rights of the people. The power of an unlimited person/organization is feared to actually eliminate the goal of forming a state.

Rousseau, in his book “*Le Contract Social*” clearly states that social contracts are the basis of theory from the state. Soedjono Dirjosisworo summarized Rousseau’s thinking by revealing:

“...each person risks himself and all his power and surrenders it to society and puts it under the authority of the highest leadership of public security ... the “*volonte generale*” collectivity is sovereign and only concerns the public interest; “*Volente de tous*” is the opposite of the statement of the willingness of each person...” (Soedjono Dirjosisworo, 1984, p. 99).

As far as Rousseau’s thoughts are concerned, an understanding is obtained that social contract does not necessarily give power to the authorities because humans still held absolute power. It’s just that power is left to the authorities through the public will (*volonte generale*). This thinking leads to the form of democratic governance and people’s sovereignty.

If observed, Hobbes and Locke both view that the occurrence of social contracts begins with a human period called the natural period (natural state). The human condition in the natural state according to these two figures is different and also influences the situation after the contract. Dean Allen Steele highlights the difference between the two figures’ views about social contracts as follows:

“... Jean Hampton wrote in Hobbes and the Social Contract Tradition that the individuals’ rights are surrendered to the Sovereign. The only justifiable way to retrieve one's rights after the contract is initiated is to form a new contract. Authorization theory, on the other hand, considers the contract as revocable. The individual, as opposed to the Sovereign, retains the authority to terminate the contract at any time. Hampton called it an agency theory, retaining Hobbes’ terms, where the rights of each subject are only loaned to the Sovereign” (Dean Allen Steele, 1993, p. 2).

Hobbes considered the state of nature full of human egoism to dominate so that war and human fear arose. Locke actually has the view that humans in the natural state are in a state of happiness and calm and have good control of their rights. According to Hobbes, social contracts are held to avoid the fear of humans from all other human threats. While Locke considers the agreement to be held to protect the property rights of each human being. A view of the condition of the natural state that is different from the two figures gives rise to differences in circumstances after the agreement is formed. Hobbes believes that all human rights are surrendered to the state (called: ruler) so that people cannot have any rights unless given by the state. Meanwhile, Locke believes that not all human rights are left to the authorities, as a result if the authorities commit arbitration, the public can overthrow the power.

Based on the views of the three theorists, a conclusive understanding can be taken that the social contract theory seeks to explain the origin of the state and the state's authority to make arrangements in the field of public law. Matters included in the realm of public law are constitutional law, state administrative law and criminal law. Submission of rights by individuals/communities to the state in the realm of criminal law includes the right to establish norms in criminal law (*ius poenale*) and the right to convict (*ius puniendi*). The right of criminal imposition by the state is carried out to create order and prosperity of the people. With the holding of the right to set norms in criminal law and the right to impose criminal sanctions, the state positions itself as the only power organization that has the right to handle criminals. The handling of criminal acts is carried out through state organs, in this case law enforcement institutions (Police, Prosecutors' Office, Courts and Correctional Institutions) that are integrated into one Criminal Justice System. Similarly, each institution in the criminal justice system, each of which performs its duties (criminal rights) in a series of mutually integrated processes (Criminal Justice Process).

## **2.2 The Idea of Penal Mediation in the Paradigm of Solving Criminal Cases**

Penal mediation is also called “victim-offender reconciliation program” or “victim-offender meeting”. Based on the history of its development, penal mediation was first known in Kitchner-Ontario, Canada in 1974. Then it developed into several countries in the world. This method is carried out by bringing together actors and victims (directly or indirectly) to communicate and discuss problems in order to find the best solution (Fatahilah M. Syukur, 2011, p. 64). Mediation, as an alternative solution to criminal offenses, generally known in the field of civil law (ADR or Alternative Dispute Resolution) (Undang-Undang, 1999). Theoretically, criminal law does not recognize mediation as an alternative solution to a crime. However, the development of international and national criminal laws leads to the method of mediation as a settlement of a criminal offense (Barda Nawawi Arief, 2008, 2008, p. 1).<sup>1</sup> In line with the opinion of Lilik Mulyadi, at the national level there is no law that regulates the existence of penal mediation in the settlement of criminal acts, except for some partial arrangements such as the Letter of the Chief of the Indonesian National Police (*POLRI*) (Lilik Mulyadi, 2016, p. 115). Topo Santoso et al. explains that there are several criminal acts that can be mediated based on certain criteria as described as follows (Agustinus Pohan et al., 2012, p. 320):

- 1) Low criminal threats;
- 2) The level of losses incurred;
- 3) Crime committed due to negligence;
- 4) Crime which constitutes an offense of complaints both absolute and relative;
- 5) Criminal acts involving family members both perpetrators/victims;
- 6) Criminal acts where the perpetrators are minors;
- 7) Crimes whose elements of criminal offenses are unclear.

The existence of penal mediation is a new essence in the settlement of criminal cases. Conventionally, it was found that a series of criminal proceedings always ended in the conviction of both criminal sanctions and double track systems, which in fact the two estuaries are the authority of the state to carry it out. The existence of penal mediation as a settlement of criminal cases can be viewed philosophically in the dimensions of ontology,

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<sup>1</sup> The paradigm of applying criminal sanctions leads to the method of penal mediation on an international scale found in several international legal instruments including the recommendations of the European Council No. R (99) 19 concerning “Mediation in Penal Matters” and document A/CONF.169/6 (supporting documents for the 9th 1999 UN Congress relating to criminal justice management).

epistemology and axiology as shown in the following table:

**Table 1 Penal Mediation as a Settlement of Criminal Cases Can Be Viewed Philosophically in the Dimensions of Ontology, Epistemology and Axiology**

	Ontology	Epistemology	Axiology
<b>Conventional settlement (criminal sanction)</b>	<ul style="list-style-type: none"> <li>• focus: human dan the state</li> <li>• concretized in state law</li> <li>• tends to lead to "legal certainty"</li> </ul>	<ul style="list-style-type: none"> <li>• Passing through the criminal justice process</li> <li>• Performed by state apparatus (<i>Criminal Justice system</i>)</li> <li>• <i>Win-lost solution</i></li> </ul>	<ul style="list-style-type: none"> <li>• Creating public order</li> <li>• Creating community peace</li> </ul>
<b>Settlement by penal mediation</b>	<ul style="list-style-type: none"> <li>• focus: balance</li> <li>• concretized in peaceful behavior</li> <li>• Tends to lead to "justice"</li> </ul>	<ul style="list-style-type: none"> <li>• Through intensive communication methods (convensional)</li> <li>• Executed by certain parties</li> <li>• <i>Win-win solution</i></li> </ul>	<ul style="list-style-type: none"> <li>• Returning to the original state (restoration)</li> <li>• Satisfaction of the perpetrator-victims-community (community peace)</li> </ul>

Source: author's work.

In the table above, the settlement of criminal cases with mediation methods with conventional methods can clearly be compared. The essence of the idea of penal mediation arises from the spirit of balance (natural law). It is precisely the spirit of restoration that is embedded in several cultures of eastern society, so that if it is conceived as a new idea in resolving a criminal act, it must be accompanied by harmonious legal rules as a foundation. Given that the mediation method is a new idea, if it is entered in a "shaking" manner in the existing criminal law system, it is prone to create confusion or precisely put the value of certainty as one of the orientations of the continental European legal system.

### 2.3 Penal Mediation as a Shift in the Theory of Social Contract

As explained in the previous section, penal mediation is used as an alternative in resolving certain criminal acts. The alternative term is used because a criminal offense generally ends with the imposition of criminal sanctions as stipulated in written legal rules. Therefore, criminal sanctions are not free from purpose. Theoretically, there are several objectives for imposing criminal sanctions including:

#### 2.3.1 Retribution Theory (Absolute/*Vergeldingtheorie*)

According to this theory the basis of punishment must be sought from the crime itself. Because crime has caused suffering to others, in return (*vergelding*), the perpetrator must be made suffering. This theory is also referred to as the theory of retaliation. Retaliation is seen as a strong emotional reaction, because it has an irrational nature (J. E. Sahetapy, 1998, p. 11). In this theory Hegel implies that "law is a fact of independence. Therefore, crime is a challenge to law and rights. Punishment is seen in terms of rewards so that punishment is *dialectische vergelding* (dialectical retaliation)" (Leden Marpaung, 2008, p. 105).

#### 2.3.2 Theory of Intent or Purpose (Relative/*Doeltheorie*)

Based on this theory the sentence was imposed to carry out the purpose or purpose of the sentence, namely to correct community dissatisfaction as a result of the crime. The purpose of punishment must be viewed ideally. Apart from that, the purpose of punishment is to prevent (prevent) crime (Leden Marpaung, 2008, p. 106). The implication of this theory is that criminalization is not intended for retaliation but rather to prevent the occurrence or recurrence of a crime.

#### 2.3.3 Association Theory (*Verenigingstheorie*)

Association theory is a combination of *vergeldingtheorie* and *doeltheorie*. The combination of these two

theories teaches that the imposition of punishment is to maintain the rule of law in society and improve the person of the criminal (Leden Marpaung, 2008, p. 107).

The three objectives of punishment are manifested in the surrender of the right to the state to impose criminal sanctions (in social contracts). If examined more, the theory of social contracts is a theory that explains the origin of the formation of the state. The key instruments for the formation of this theory are, among others, natural human rights, morals and mutual agreement (common will). These three elements position some subjects who hold their respective positions in social contracts namely individuals, communities and authorities. It can be explained that social contracts are motivated by the desire of individuals to obtain security, certainty and order. Therefore, between an individual and a ruler (individual/organ or state) an agreement is made, in which individual rights are handed over to the state so that the state regulates the public interest.

Back to the nature of the existence of social contract theory as the basis for the formation and source of rights of a State, the usefulness of the theory of social contract is inseparable from the idea of a country. The idea of a country is oriented to the public interest (individuals and groups). The imposition of criminal sanctions on criminal offenders is one of the country's efforts to safeguard the public interest. If the purpose of imposing criminal sanctions is related to the purpose of the formation of the state, the most appropriate theory of the state's fall is association theory, given the existence of the state aims to create security and order. Therefore based on the purpose of punishment theory (association), the state imposes criminal sanctions solely aimed at making the perpetrators deterrent while providing protection to the public (social defense).

The existence of the penal mediation in the settlement of criminal acts seems to be irrelevant with the purpose of criminal theory in the discussion above. The spirit contained in the mediation mechanism is restorative justice. Restorative justice requires the restoration of the original condition before the consequences of a criminal act occur; not only solely oriented to the entrapment of perpetrators and protection of society or a combination of both. Restorative justice is oriented towards returning to the original state, both for the perpetrators, victims and the general public who are affected by crime. Given the orientation of the penal mediation method is not merely in the form of retaliation to the perpetrators, the imposition of criminal sanctions becomes less appropriate to be applied to achieve the objectives of restorative justice. The imposition of criminal sanctions is only oriented towards the perpetrators and the public without regard to the interests of the victims or the circumstances. The existence of penal mediation can be identified as the desire of each individual (perpetrator and victim) and the community to obtain a way of solving problems with criminal aspects, so that a sense of satisfaction from a sense of justice is felt not only by the perpetrator or the community but also by the victim.

Based on the theory of social contracts, the state obtains the rights of individuals/communities to regulate common law-oriented matters. State rights in the field of public law especially criminal law, one of which is the right to impose criminal sanctions for perpetrators of criminal acts. Social views can explain that individuals in society always experience dynamics. The dynamics in this context is a shift in the orientation of the settlement of a crime that occurs. If previously the orientation of the settlement of criminal acts was for entanglement, it had now shifted to the protection of the community, then shifted to a combination of entanglement and protection of the people. The emergence and application of the method of penal mediation in the settlement of criminal acts of medical malpractice indicates a shift in orientation in resolving criminal acts towards mutual satisfaction (recovery of conditions).

In essence the purpose of punishment is part of the purpose of criminal law. In this case, the purpose of criminal law is in line with the state's idea of security, order and public welfare. It is understood that the purpose

of criminal law is not merely the imposition of criminal sanctions. The imposition of criminal sanctions is only one of the instruments in realizing the objectives of criminal law that are identical to the objectives of the state. The instrument in question can be interpreted as a tool, so the nature of a tool can be replaced according to place, time and circumstances. In the method of penal mediation, criminal sanctions which are tools are replaced by other tools in the form of repair or recovery of circumstances. If examined theoretically, the application of the method of penal mediation in the settlement of criminal acts can be interpreted as the withdrawal of the right to impose criminal sanctions on the State, which is part of the rights granted by individuals/communities to the state to regulate public law. As a theoretical reasoning that the applicability of social contract theory in Indonesia, especially the right to impose criminal sanctions, begins to be purified again (withdrawn by individuals/communities), marked by the application of the method of penal mediation in the settlement of criminal acts against medical malpractice.

### 3. Conclusion

Building on the essence of the theory of social contracts, some or all of the rights of the people related to the public interest include the realm of criminal law submitted by the public to the state. This means that the community gives to state rights in the field of public law (state administration and criminal). Concretization of state rights in the field of criminal law is to determine the rules of criminal law and enforce the law for every violator of criminal law. In Indonesia, criminal acts do not always end in criminal penalties. There is a method of penal mediation that is often used in resolving cases about criminal acts. Penal mediation is chosen because it gives more value to justice for the perpetrators and victims. Therefore, the theory of social contracts in Indonesia does not apply purely because not all domains of public law are given by individuals to the state. The imposition of criminal sanctions that were previously the rights of the state, are now abolished (the term author: withdrawn) returned by individuals. The form of withdrawal or elimination of the right to impose criminal sanctions is indicated by the application of penal mediation in the settlement of criminal acts.

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