

## **THE MODEL OF PENAL MEDIATION AS A COUNTERMEASURES OF VIOLENCE CONFLICT (*CAROK*) IN MADURESE SOCIETY BASED ON THE LOCAL WISDOM**

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### **Abstract**

This research is to explore criminal mediation based on local wisdom in dealing with *carok* violent conflicts in Madurese society. There are two important problems in this study, which is the reason why the criminal justice system is less than optimal in dealing with *carok* in Madurese society and how criminal mediation can be a model in dealing with conflict based on local wisdom. The research method used in this study is the doctrinal and non-doctrinal methods. By using Freidman's theory and Sociological Jurisprudence related to comparative law, it was found that the criminal justice system is not fully optimal in dealing with *carok* violent conflicts in Madurese society because of differences in interpreting the concept of justice in the perspective of local communities, the dominance of legalistic perspectives on law enforcement officers and the strong practicality of maintaining self-esteem and religion. The criminal mediation model used by law enforcement officers on Madurese people is based on local wisdom which is a model of family criminal mediation (victim-perpetrators, families, reparations) that is connected to the criminal court system ranging from investigations, closing speeches, examination of cases involving parties warring parties, with mediators, scholars, and law enforcement officials, and the results are written as an act of peace that can be used by the perpetrators to change the sentence. The study recommends that it is very important for law enforcement officials and social leaders, religious scholars and district governments to act as neutral mediators by empowering customary peace institutions that are connected to the criminal justice system.

*Penelitian ini untuk mengeksplorasi mediasi pidana berdasarkan kearifan lokal dalam mengatasi konflik kekerasan carok dalam masyarakat Madura. Ada dua masalah penting dalam penelitian ini, yang menjadi alasan mengapa sistem peradilan pidana kurang optimal dalam mengatasi carok dalam masyarakat Madura dan bagaimana mediasi pidana dapat menjadi model dalam penanggulangan konflik tersebut berdasarkan kearifan lokal. Metode penelitian yang digunakan dalam penelitian ini adalah metode doktrinal dan non-doktrinal. Dengan menggunakan teori Freidman dan Yurisprudensi Sosiologis terkait dengan hukum komparatif, ditemukan bahwa sistem peradilan pidana tidak sepenuhnya optimal dalam mengatasi konflik kekerasan carok dalam masyarakat Madura karena perbedaan dalam menginterpretasikan konsep keadilan dalam perspektif masyarakat lokal, dominasi perspektif legalistik pada aparat penegak hukum dan kuatnya praktet mempertahankan barga diri dan agama. Model mediasi pidana yang digunakan oleh petugas penegak hukum pada orang Madura didasarkan pada kearifan lokal yang merupakan model mediasi pidana keluarga (korban-pelaku, keluarga, reparasi) yang terhubung ke sistem pengadilan pidana mulai dari penyelidikan, pidato penutupan, pemeriksaan kasus yang melibatkan pihak-pihak yang bertikai, dengan mediator, ulama, dan pejabat penegak hukum, dan hasilnya ditulis sebagai tindakan perdamaian yang dapat digunakan oleh para pelaku untuk mengubah hukuman. Hasil studi merekomendasikan bahwa sangat penting bagi para petugas penegak hukum dan tokoh sosial, cendekiawan agama dan pemerintah kabupaten untuk bertindak sebagai mediator netral dengan memberdayakan lembaga perdamaian adat yang terhubung ke sistem pengadilan kriminal.*

**Keywords:** *Carok*, Penal Mediation Model, Local Wisdom.

## Introduction

Research and development of the national law that pivot on the politics of codification and unification has been successfully create a modern legal code by providing the written regulations that handled rationally.<sup>1</sup> We also have a modern judiciary, which includes many professionals who specially trained to operate the codification law, but the modern law system is not invulnerable from the problems. On the

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<sup>1</sup> Bernard L. Tanya, *Law in Social Space* (Yogyakarta: Genta Publishing, 2010), p. 1-3. Compare with, for example, Jacob Elvinus Sahetapy, *Causa crime and some psychological analysis* (Bandung: Alumni, 1981), p. 85-86.

contrary, the law that leans to the politics of codification and unification covers its own problems in the practice level, especially in the context of the local community with its unique and plurality.<sup>2</sup>

*Carok* in the Madurese society has been a culture that occurs hereditarily. *Carok* is quite a troublesome for the law enforcement officials, since it could cause many casualties and provoke revenge attempts from each warring groups, and could reappear anytime in an unexpected condition. A. Latief Wiyata said that the ethical entities of Madura have a cultural specificity that differs from the ethnography of other ethnic community. This specificity is shown on their obedience, loyalty, and submission hierarchically to the four main figures in life, especially in the religious practice. Those four main figures are *Buppa'*, *Babbu*, *Guru*, and *ban Rato* (father, mother, teacher and the government leader).<sup>3</sup>

Another dominant character of Madurese society is their sincere characteristic. The character of expressiveness, spontaneous, and the truthfulness in responding to everything they faced especially to other's behaviour toward them, which create opportunities of individual expression in a more transparent way. The other culture and characteristics attached to the Madurese is their Islamic spirit, as one said "*abantal syahadat, asapo iman, apayung Allah* (Whoever use *Shabada* (confession of faith) as the headwear, *iman* (faith) as the covers and being under the protection of Allah in life will surely be safe)". Disgracing their religion is treated equally to insulting their pride (*apote tolang*) and the punishment is death.<sup>4</sup>

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<sup>2</sup> Bernard L. Tanya, *Law in Social Space*, p. 2 (compared with the view of Soetandyo Wignjosoebroto who stated that the politic of legal codification and unification contradicts with the social reality in history, within his work: *Dari Hukum Kolonial ke Hukum Nasional: Dinamika Sosial Politik Dalam Perkembangan Hukum di Indonesia*, Raja Grafindo Persada, Jakarta, 1994, page.37-60).

<sup>3</sup> A. Latief Wiyata, *Madura yang Patuh?; Kajian Antropologi Mengenai Budaya Madura*, CERIC-FISIP UI, Jakarta, 2003, page. 1.

<sup>4</sup> Mien Ahmad Rifai, *Manusia Madura, Pembawaan, Perilaku, Etos Kerja, Penampilan dan Pandangan Hidupnya seperti Dicitrakan Peribahasanya*, Pilar Media, Yogyakarta, 2007, page. 347.

Based on the description of the research background mentioned above, and to elaborate in some extents the work of Cahyono,<sup>5</sup> the author formulates two main research questions as stated below:

1. Why the criminal justice system is not fully optimized in the countermeasures of violence conflict (carok) of the Madurese?
2. How the penal mediation could be model in overcoming the violence conflict (carok) in Madurese society based on their local wisdom?

Both issues will be discussed in this particular dissertation by adopting the theory of Lawrence M. Friedman, Sociological Jurisprudence and associating it with Comparative Law in modelling the penal mediation based on the local wisdom.

### **The Non-Fully Optimized Criminal Justice System in the Countermeasures of Violence Conflict (carok) in Madurese Society**

*Carok* is a one-on-one fight between men using a weapon called *celurit* (sickle). It is also a face-to-face action, if one of the perpetrators attacks the opponent from the back then the fight cannot be considered as carok. There is a manly and knightly attitude in carok. Someone who is going to perform carok used to schedule the place and time beforehand. However, there are some indications that today's people are performing the carok in a different significance. When the law is no longer able to restrain the instinct of violence and when the law with its actors considered incapable of protecting their people and satisfying the sense of justice, then the people will find their own solution. This fact illustrates the new social control in a society which considered as the right action even though it involves violence as happening in the Madurese society with their carok practice.

The cause of non-fully optimized criminal justice system in the countermeasures of carok according to the legal theory from Friedman is provoked by the existence of the criminal code and criminal code procedures that unfair to the victims, and the behavior of law enforcement officials with the culture of society (*nabang*) that

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<sup>5</sup> H. Cahyono, *Model Mediasi Penal Dalam Penanggulangan Konflik Kekerasan (Carok) Masyarakat Madura Berdasarkan Local Wisdom*, Yogyakarta: Deepublish, 2019.

affect the judicial act also could lead to the criminogenic factors, such as:

*The dominance of legalistic perspectives and the different meaning of justice perspectives*

After the case is handled by the law enforcement officials starting from the investigation by Police officers, prosecution by the prosecutors and resulting in the verdict by the district court of Pamekasan, The criminal of carok in the jurisdiction of Madura which includes in the regency of Pamekasan is sentenced by various charges, prosecutions and verdicts which based on the Criminal code including: “maltreatment”, “maltreatment causing serious physical injury”, “murder”, to “premeditated murder”, with the maximum punishment of death sentence (See: Article 353, Article 354, Article 355, Article 338 and Article 340 of the criminal code).

Most of the time, the practice of law by the law enforcement in Indonesia such as the practice of judiciary, police, attorney, and law practitioner (pillar group of the criminal justice system) tend to always rest on the thinking that legalism is the main characteristic of legal positivism. In this case, the legal perspective is observed merely from the telescope of legislation in order to judge the happening events. This kind of practice is not always interpreted as a mistake since the legalism has already and still continuously gives the meaning of legal certainty, while the legal certainty is an absolute necessity in the practice of law.

According to the commentary about the various verdict of Pamekasan District court which included in 10 (ten) carok cases, there are two crucial conclusions which indicate that state law considers *carok* in the positivistic frame. *First*, the judge who acts as a representation of the state law in investigating and deciding as well as adjudicating the carok case use the articles indicted to the perpetrator as the main base to determine whether he is convicted or not. Therefore, the main focus is in the facts revealed at the trial which is obtained from the evidence such as the testimony of witnesses and defendant, that also associated with the proof letter as *visum et repertum* and other proof letters, as well as evidence submitted to the trial, including sickle, clothes, etc. If these facts have been proved as suitable for the indicted articles and after the assurance is proven by

the evidence have been fulfilled for minimum number of two evidences, based on article 283 and 284 of the criminal code procedure, then the judge will decide that convicted defendant is committing a crime as in the proven indictment; and on the contrary if the facts are not proven to be related to the element of articles indicted, the perpetrator will be free from charges. *Second*, the judge treats the text as an autonomous thing, which means that every testimony of the witness and the defendant has to be adjusted to the element of articles indicted by the public prosecutor to the defendant (perpetrator). The existence of cultural values here is not taken into account and cannot affect in the verdict decided by the judge, since the text (law) is independent so its existence is objective from some critics and hermeneutical framework. According to him, the rightful interpretation is the one that corresponds to the reality of text autonomy.

The judge reduces the meaning of carok by simply consider it as a murder in general. The judge did not see carok as a defensive effort for Madurese society to protect their pride, descendants and religion. In every practice of murder and maltreatment causing death, regardless of its form and motive, will be indicted by the articles of crimes against life. A murder caused by revenge on the death of family member, insult to the spouse and aggravation of self-pride is reduced in term of its meaning by the judge as a general murder. Therefore, Article 338, Article 340 and Article 351 act (3) of the criminal code is the suitable foundation to convict the perpetrator. The judge will eliminate the facts that unrelated to the articles indicted. The meaning and cultural value of Madurese in term of protecting their pride, descendants and religion will not be taken as consideration to decide the murder case. Because of the formulation that considers some limitations as mentioned, the biggest risk might occur as an inaccurate formulation.

By the knowledge of positivism as mentioned earlier, the existence of state law (criminal justice system) for the people of Madura could not settle carok cases which generally related to the fortification of pride, descendants and religion, since criminal justice system do not cognize the murder cases related to one's culture with its uniqueness and locality (Madura). In the criminal justice system, every case is considered as murder, including carok, is equalized

universally with another region so carok is treated as a murder crime like in another regency outside Madura as regulated in the Article 338 of criminal code about murder and Article 340 of criminal code about premeditation murder.

Building a legal system usually related to three main aspects, which are the legal structure, legal substance and legal culture. These three main aspects of the legal system here were mentioned by Lawrence M. Friedman as *Three Element of Legal System*.<sup>6</sup> A legal structure according to Friedman is the frame or framework and the part of the law that keep lasting or the part that provides a kind of form and limit to the whole. The legal institution is part of the legal structure, including the Supreme Court institution, Attorney, and police. The legal material or substance is the regulation, norm, and distinct human behaviour involved in the system. The legal substance is also the product resulted from people in the legal system, including decisions they made, and the new regulations they formed. The substance also covers the living law, not only the law in books.

Legal culture is human's attitude toward the law and legal system, trust, value, thought and their expectation. The legal culture also covers the atmosphere of social thinking and social power which assign how the law is used, avoided and abused. Without legal culture, the legal system will be powerless. From the description of these 3 (three) elements of the legal system by Friedman, the legal structure was expressed as the machine, legal substance as the something done and produced by the machine, while legal culture is everything or whoever decides to turn on and off the machine and choose how the machine is used. In Indonesia, the consistency of law enforcement is still heard as a discourse.

Three law purposes, which are justice, assurance and properness, has not been entirely fulfilled. Regulation of law in Indonesia is merely limited to a phrase since the people still feel unprotected, even though the law enforcement is one of the agenda of reformation that has been executed for more than 10 (ten) years. As known, law enforcement has to be accompanied by the professionalism of its officials. However, this could not happen if the legal system in Indonesia is still chaotic

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<sup>6</sup> Lawrence M. Friedman, *The Legal System: A social science Perspektif*, New York: Russel Sage Foundation, 1975.

and the legal structure, substance and culture are still untouched, as said in the Lawrence M. Friedman theory.

According to the result of this research as mentioned in the result data about carok cases with motives concerning in the harassment to women (wife), and other motives (defending family's pride); sourced from Court order of Pamekasan District Court number 163/Pid.B/2003/PN.Pks, 06/Pid.B/2004/PN.Pks, 126/Pid.B/2006/PN.Pks, 02/Pid.B/2007/PN.Pks, 06/Pid.B/2007/PN.Pks, 14/Pid.B/2008/PN.Pks, 164/Pid.B/2011/PN.Pks, 66/Pid.B/2012/PN.Pks, 127/Pid.B/2013/PN.Pks and 160/Pid.B/2014/PN.Pks, as well as from the statement by a perpetrator who does not want to be named in an interview with the author accompanied by a prison officer called Rudi, Taufik, S.H. and Restu, S.H., on Monday, April 10<sup>th</sup>, 2017 at 10.00 AM IWST in the Pamekasan prison:

*“Hokom nagere reah tak bisa madeteng ka’adhilen. Oreng se agangghu binenah oreng reah te’ angkep sala minorot hokom nagere, mon tade’ saksenah. Padahal, agangghu binenah oreng, tade’ lain angeng mate’. Ben pole’ mon e pangatilen ukom’enna palengan coma satabon. Minorot oreng madure, agangghu binenah oreng otabbeh nginah agbama islam padhe ben akejhe’ nyabeh. Tade’ laen anging oreng kelle’ epathe’en”* (The existence of law in this country does not give any justice. The one who was harassing someone’s wife is not considered as a prohibited action, if there was no witness. Even though, harassing someone’s wife for Madurese people should be punished with no other punishment than the death. If the case is taken to the state court, the imprisonment is only for one year. As for Madurese people, insulting/harassing someone’s wife or offending the religion of Islam is like playing with your life).

Therefore, the existence of state law is recognized as an existing thing that related to the carok cases, but this fact does not have to be the only thing to solve the case. The Madurese have their own way of dealing with carok cases. With this different kind of construction, the state law, in fact, might be unable to solve the carok cases. A set of regulations and mechanism provided is not more than a normative guideline since Madurese people have their own mechanism in solving



the problem like the aggravation of pride, descendants and religion which considered more fair and appropriate to the cultural values of Madurese society.

Other aspects affecting the law enforcement process in carok countermeasures to be unsuccessful is the presence of cultural factors in Madurese society, as described below:

### *The practice of Nabang*

According to A. Latif Wiyata,<sup>7</sup> *nabang* is a process of affecting trial which might be done by the law enforcement officials or other parties who involved in *carok-mencarok* (the practice of *carok*), so if the process of *nabang* has been succeeded in the trial of *carok* case then this trial is, in fact, impure and manipulated. The practice of business transaction in *carok* case which done by an individual of police officers, attorney and even judge have an implication to the ecosystem of the integrated criminal justice system.

In an expression that there is a systemic motion of the supporting subsystems in the criminal justice system, such as police, attorney and the court in general, they unite in one duty and purpose. Therefore, in the correlation to the reality of *nabang* in carok cases, the meaning of integration has altered to be an integration in doing something wrong which directly will tear down the true meaning of integrated criminal justice system. The word “integrated” that at a first point to the definition of unison and harmony, structurally, substantially or culturally, turn into a sense of unison and harmony of demanding some money to the perpetrator of carok, if he wants to quicken the process and commute the sentence, even to be free of charge. Law enforcement officials are more concerned to the material gains rather than solving the carok case based on the regulation and cultural value of Madurese society. The basic essence of carok cases does not being solved according to the applicable provision, which makes the presence of state law in the criminal justice system is seems less important. Therefore, if that practice usually happened, it will result in the next carok case (revenge carok) because the law enforcement

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<sup>7</sup> A. Latif Wiyata, *Carok, Konflik Kekerasan dan Harga Diri Orang Madura*, Yogyakarta: LkiS, 2006, page. 198.

process of carok presumed to be unfair and does not fulfil one's sense of justice.

*The Practice of defending pride and belief*

The people of Madura are very prioritizing the respect and honour, especially to the elderly and someone who has a higher social state which makes the value of politeness is highly important in social life. Madurese society refuses to be underestimated, as the idiom *madu ben dara* (honey and blood) means that when a Madurese treated well, with upholding the value of politeness and respect, the return is also good. Madurese people whom pride have been insulted will feel *malo* (embarrassed), and then execute the act of carok to the one who insults them. As seen on the data of ten carok cases mentioned in the table below, all cases begin with an insult of pride, with different motives such as the one that related to harassment of women (wife) or outside of it. Therefore, to protect and redeem ones pride that has been offended, and because the mind has been *petteng* (blackout/uncontrolled) and chaotic, the only solution perceived is by doing *carok*.

The Madurese is well known to be very determined in upholding their belief (Islam). The Islamic characteristic appears in the way they dressed, who wears *songko'/kopiah* (headdress/cap -usually found in Indonesia/Malaysia) and *sarung* for a man especially in attending a religious ceremony, travelling or hosting unfamiliar guests. The number of Islamic boarding school managed by *kyai* (a Javanese Islamic cleric) in every rural area indicate their Islamic spirit, as mentioned in a phrase "*abantal syahadat, asapo iman, apayung Allah*" which mean whoever use Shahada (confession of faith) as the headwear, Iman (faith) as the covers and being under the protection of Allah in life will surely be safe. Offending one's belief is treated the same as insulting the pride (*apote tolang*) and the punishment is death (being *carok*). The numbers of carok cases investigated here were related to the practice of *santet* (witchcraft, like a Javanese voodoo) as listed on the table below, which indicated that Madurese people will be furious if part of their family is suffering and the reason is perceived to be from *santet*. As in the case of Sarmin who killed Abdul Wafi because he was considered to disobey his religion so the solution is by

being *carok* (killed). The same situation also found in other cases in the table which came from the presence of aggravation of pride by the perpetrator.

By the comprehension mentioned earlier, the existence of state law (criminal justice system) for the Madurese people is indeed unable to solve the carok cases that correlated to the fortification of pride, descendants and religion, since criminal justice system do not cognize the murder cases related to one's culture with its uniqueness and locality (Madura). In the eye of criminal justice system, every case is considered as murder, including carok, is equalized universally with other region so carok is treated as a general crime against life as conducted in the other regency outside Madura, as regulated in the Article 338 of criminal code about murder and Article 340 of criminal code about premeditation murder.

### **The Model of Penal Mediation as Carok Countermeasures Based on the Local Wisdom**

Various model of mediation has been held in many countries for quite a long time, for example in Saudi Arabia which known as its *Shulh*, China, United State, and Bangladesh. By implementing the theory of legal history and comparative law, the penal mediation essentially could be a benefit to prevent many carok cases emerged in Madura. This fact corresponds to the idea by Barda Nawawi Arief, who stated that the penal mediation could be used in handling cases which conducted by adults and children, and the method is by involving various parties who meet supported by the appointed mediator. The mediator could come from the formal officers such as police, attorney, prison officers as well as an independent mediator, or the combination of them. Penal mediation could be held on each step of the process, in the stage of police policy, prosecution, investigation in the trial, condemnation or post-condemnation.

The penal mediation has more advantages such as, *first*: could provide the access as wide as possible to the conflicting parties to gain their justice, *second*: the process of solving the case considered to be quicker, cheaper and simpler, and *third*: could offer any possibilities to a recovery of good relationship and satisfaction of every involved party in the case so it is potential to reclaim the original state and solve the problem completely.

The model of penal mediation based on the local wisdom, for the countermeasures of carok cases in the future, is totally possible and hopefully could be implemented in Madurese society, as refers to the formulation in Article 67 act (1) of criminal code bill year 2008 which also associated to the criminal code bill in year 2015, that emphasize the additional criminal nomination for the perpetrator of crime, including: (a) a revocation of selected right, (b) a seizure of selected good and/or claim, (c) the declaration of judge's decision, (d) a compensation payment, and (e) an obligation fulfillment of local tradition and/or the responsibility according to the law applies in society or the revocation of right gained by the corporation could be determined even if it is not stated directly on the crime formulation.

The idea of penal mediation model based on the local wisdom in the countermeasures of *carok* in Madurese society would be attained if there is reconciliation (peace) between the parties and determination to pay the compensation, so the idea of restoration which means to recover the damage and loss caused by the perpetrator to the victim will be carried out as soon as possible. The definition of immediate compensation payment to the victim as soon as possible needs to be managed by the following regulation, since the additional payment usually paid by the perpetrator to the state treasury not directly to the victim.

Penal mediation model based on the local wisdom is a rational effort from the society/authority in overcoming a crime, by involving every party who had a role in the occurrence of a crime, for together they could identify and understand the loss they created, the expectation of the victim and the responsibility of perpetrator, in order to recover and arrange everything in its better place.

As for the countermeasures of carok cases which settled by solely adopting the criminal law without accommodating local cultural values of Madurese society, the author agrees with Mahrus Ali based on three main reasons:<sup>8</sup> *First*, carok is the expression of self-defence to the Madurese's insulted pride and closely connected to cultural value that used as a guideline to behave, so the existence could not be compared in the same way as a general murder crime. *Second*, the countermeasures of carok cases by using the state law all this time is

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<sup>8</sup> Mahrus Ali, *Melampaui Positivisme Hukum*, Aswaja Pressindo, Yogyakarta, 2013, page.98.

more emphasizing in the formal-procedural aspect by fulfilling the offending elements of the article bill charged to the perpetrator of carok. The state law did not consider the peculiarity and uniqueness of cultural values in Madurese society especially in a defence of their pride, family and religion. *Third*, the presence of criminal law as one of the law enforcement instrument could not be separated from the diversity of cultural value in the society in handling a legal action. The countermeasures of legal action based on the construction thinking of criminal law are merely looking at one aspect. Even though, the legal action caused by the violation of cultural values is an essential reference to solve the problem.

The idea of penal mediation model based on the local wisdom in the countermeasures of carok in Madurese society would be attained if there is peace reconciliation between the parties and determination to pay the compensation, so the idea of restoration which means to recover the damage and loss caused by the perpetrator to the victim will be carried out as soon as possible. The definition of immediate compensation payment to the victim as soon as possible needs to be managed by the following regulation, since the additional payment usually paid by the perpetrator to the state treasury not directly to the victim. Penal mediation model based on the local wisdom is a rational effort from the society/authority in overcoming a crime, by involving every party who had a role in the occurrence of a crime, for together they could identify and understand the loss they created, the expectation of the victim and the responsibility of perpetrator, in order to recover and arrange everything in its better place.

Penal mediation model based on the local wisdom begin from the investigation process at the police, to the next stage which is the prosecution in the attorney and case investigation in the trial; if the penal mediation succeeded then the result of mediation will be attached in the case file and could be used as a file to commute the sentence for a perpetrator and will be continued to the next stage if there is any failure, to the decision of verdict by the particular district court.

Various model of penal mediation that has been implemented in some countries such as Australia and New Zealand observed by author by applying the comparative law method hopefully could benefit as the concept of penal mediation which shall be used in the

countermeasures of violence conflict of Madurese people (carok) whether in the stage of investigation, prosecution or the trial in court. The mediation performed in the investigation stage is the combination of a mediation model: Victim-Offender Mediation and Family and Community group conferences. In this phase, the procedures of penal mediation are defined as follows: 1) the investigator studies the case or the crime of carok performed by the perpetrator with selected criteria, offer a mediation and mediator to the perpetrator and victim, 2) penal mediation has to be done voluntarily by all conflicting parties, 3) mediation is done secretly and enclosed according to the confidentiality principle, 4) the perpetrator and victim meet to find the solution that mutually beneficial, 5) mediator has to possess an appropriate certification and trained to be a mediator, 6) if there is an agreement in this mediation, mediator shall report the finding to the investigator. On the contrary, if the mediation is failed then the trial will proceed, 7) the result of an agreement in penal mediation is limited to commute the sentence of the perpetrator, not the final verdict, so it cannot be used to remove the charges.

The penal mediation in carok case at the stage of prosecution is the combination of Victim-Offender Mediation and Family and community group conferences. While the procedures of penal mediation on this stage are described as following: 1) public prosecutor studies the case or the crime of carok performed by the perpetrator with selected criteria, offer a mediation and mediator to the perpetrator and victim, 2) the mediation has to be done with agreement and voluntarily by the perpetrator and victim of the crime, 3) public prosecutor can act as a mediator or could point out other certificated mediator, 4) mediator arrange the perpetrator and victim of the crime to meet which performed secretly and enclosed, not open to the public, 5) if the penal mediation is failed, the criminal case will proceed with an investigation process in the trial by prosecuting the criminal act, 6) If the mediation process resulting in an agreement of peace that accepted by all parties, the letter of agreement will not act as the final verdict and the prosecution will proceed, which function as a file to commute the sentence.

When the penal mediation in the trial produces an agreement for all parties, the result could be used as a file to avoid the criminal procedures for the perpetrator. Mediator in this phase could be a

judge or other certified mediators outside the court. The mediation is a mixture of Victim-Offender Mediation, Family and community group conferences and Reparation Negotiation Programmes models. The procedures of mediation in this stage are described as following: 1) the judge studies the carok crime performed by the perpetrator, could offer a penal mediation as an alternative of case solutions by the agreement of all parties, 2) If all parties approve it, then the voluntary agreement is conducted to follow the countermeasure of case by the mediation, 3) the judge can act as the mediator or by using other certified mediators who fulfil the requirement, 4) penal mediation is done secretly and enclosed according to the confidentiality principle, 5) if the mediation failed to meet an agreement, the trial will proceed as it is, otherwise the agreement which written as a letter of agreement and not the final verdict could be a file that commutes the sentence.

The countermeasure mechanism in carok cases, which begin from the stage of investigation, prosecution, and trial as mentioned above and based on the combination of victim-offender mediation, family and community group conferences and reparation negotiation programmes models, emphasize on a compensation payment, whether it is in a form of money, cattle (cow, buffalo, or goat), or gold that paid by perpetrator to the victim. However, due to the characteristic of carok which come from Madurese culture, a countermeasure of carok case by the penal mediation has to consider restorative justice by concerning on Madurese local wisdom that involves the Islamic scholars. In mediation, the one mediator should consider is not in the legal files on the particular criminal case but the how an effective communication could happen between perpetrator and victim in order to solve the carok case in a peaceful way to avoid a revenge carok.

The characteristic of Madurese society is a society who holds firm the religious law (Islam) and obeys the four figures: *Buppa'*, *Babbu*, *Guru*, and *ban Rato* (father, mother, teacher and the government leader). Other culture and character that close to the people of Madura is the Islamic spirit, as mentioned in a phrase "*abantal syahadat, asapo iman, apayung Allah* (whoever use Shahada (confession of faith) as the headwear, Iman (faith) as the covers and being under the protection of Allah in life will surely be safe)"; if the characteristic is related to the Islamic law (sharia law) in deciding a verdict of a murder cases, the solution is "*qishaash* (taking the same recompense)" or "*diyyat* (payment

of reasonable compensation)” as stated in the Holy Quran *sūra al-Baqara* verse 178 which say as following:

“O you who have believed, prescribed for you is legal retribution for those murdered - the free for the free, the slave for the slave, and the female for the female. However, whoever overlooks from his brother anything, then there should be a suitable follow-up and payment to him with good conduct. This is an alleviation from your Lord and a mercy. But whoever transgresses after that will have a painful punishment”.

And as the word of God and hadith of prophet Muhammad PBUH which are listed as follows:

“Because of that, we decreed upon the Children of Israel that whoever kills a soul unless for a soul or for corruption [done] in the land - it is as if he had slain mankind entirely. And whoever saves one - it is as if he had saved mankind entirely. And our messengers had certainly come to them with clear proofs. Then indeed many of them, [even] after that, throughout the land, were transgressors.” (*sūra al-Mā’ida*: 32, English translation of *Sahih International*).<sup>9</sup> “And if a woman fears from her husband contempt or evasion, there is no sin upon them if they make terms of settlement between them - and settlement is best. And present in [human] souls is stinginess. But if you do good and fear Allah - then indeed Allah is ever, with what you do, Acquainted.” (*sūra al-Nisā’*: 128, English translation of *Sahih International*).<sup>10</sup> “They ask thee concerning (things taken as) spoils of war. Say: “(such) spoils are at the disposal of Allah and the Messenger: So fear Allah, and keep straight the relations between yourselves: Obey Allah and His Messenger, if ye do believe.” (*sūra al-Anfāl*:c1, English translation of Yusuf Ali).<sup>11</sup> “If two parties among the Believers fall into a quarrel, make ye peace between them: but if one of them transgresses beyond bounds against the other, then fight ye (all) against the one that transgresses until it complies with the command of Allah; but if it complies, then make peace between them with justice, and be fair: for Allah loves those who are fair (and just).” (*sūra*

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<sup>9</sup> Accessed at <https://quran.com/5/32>

<sup>10</sup> Accessed at <https://quran.com/4/117-129>

<sup>11</sup> Accessed at

<https://quran.com/8/1?translations=84,101,21,20,85,22,19,18,95,17>



al-ḥujurāt: 9, English translation of Yusuf Ali).<sup>12</sup> “The Prophet (saws) said: “Do you want me to tell you of what is better than the rank of fasting, prayer and charity?” The Companions said, “Yes, O Messenger of Allah. He said, “Making peace between people among whom there is discord, for the evil of discord is the shaver.” (by Abī Dāwūd 4919 & Jāmi’ al-Tirmidī 2509). “Narrated by Sahl ibn Sad: Once the people of Qubā’ fought with each other till they threw stones on each other. When Allah's Apostle was informed about it, he said, “Let us go to bring about a reconciliation between them.” (by Sahih Bukhari 858).

Therefore, the peace is better than conflicting and by implementing the comparative law method, the penal mediation institution could be performed to handle the carok case in Madura.

Carok cases generally is a murder case done by a man to another man in Madurese society with the cultural motive which is “*rasa malu*” (embarrassment) caused by the aggravation of pride. If the perpetrator is proven to be committing carok and to prevent a revenge carok, the model of “penal mediation based on the local wisdom” certainly will be accepted and adopted as a solution in handling carok case. And in the future, there should be a legal product that create and legalize it as the articles related to a cultural crime (carok) by including the penal mediation when a violent conflict with cultural motive is emerging; particularly carok.

According to Tarmizi (Lawyer), in a case of murder the perpetrator can pay *di’et* (*diyat*), which is a compensation of something, usually as gold and slaughtered cow/buffalo, and giving it to the victim (the heir), and a traditional ceremony will be held by *imeum mukim*, *keuchik/geuchik* and *tengku meunasah* (leaders of a village) in order to end the grudge and the case; while in a maltreatment case, a fight which causes wound and blood shall be paid as goat or equivalent, to the body of “*sayam*”. Meanwhile the civil cases and related to the household is being solved by the body of “*suloh*”, which is a purpose to create the peace (*islah*) framed by traditional ceremony led by religious scholars (*ulama*) and traditional leaders/figures, by presenting *peusijuk* (a peace to the soul) and *peumat jaroe* (eating

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<sup>12</sup> Accessed at <https://quran.com/49/9?translations=31,84,101,21,22,20,17,95>

together), held in an open area for people can see that the conflicting parties have been at peace and the case is closed.

Madurese people should imitate the Acehnese people in overcoming the *carok* cases who have done a restorative justice by empowering their customary institution; which still in the frame of criminal justice system starting from the stage of investigation, prosecution, and case investigation, by including the conflicting parties, perpetrator and victim, traditional leaders, religious scholars, local government officials, security forces, and other law enforcement officials, with a policy model: "penal mediation based on the local wisdom". This policy model is characterized to be more flexible, if the peace (*islāh*) is failed then the case can be handled by the criminal law in a frame of the integrated criminal justice system, so the reference is still sourced from the applicable criminal code and criminal code procedures. Overcoming *carok* is also fixing the approach system in the problem of law enforcement, which based on some prominent expert finding as the interview result with Artidjo Alkostar, the judge of Supreme Court of the Republic of Indonesia who stated that the model of peace (*islāh*) is greatly appropriate to be implemented in solving the *carok* cases in Madura, which come from the Islamic law with the involvement of charismatic religious scholars (*ulama*), conflicting parties usually honour their religious belief which the majority happen to be Muslims. *Islāh* that at the beginning act as the core value of peace transformed into a peace in a criminal case.

The countermeasure of *carok* case emphasize in the value of local wisdom that hereditary possessed as an identity of Indonesian people generally, and Madurese people specifically, including the discussion for agreement, an effort to balance the uneven caused by a crime as well as the re-creation of harmonic life in the society which are the hope and expectation of people. These points correlated to the idea by John Rawls, the inventor of the most comprehensive justice theory, who stated a balance theory as part of justice concept, elaborated as the need of balance between personal interest and common interest and how the size of balance is determined as the justice. According to B. Ter Haar Bzn. regarding the balance (*evenwicht*) theory, the normal situation of human being with his relationship to the power of supernatural, land, and other things will be good and harmonious if everything is in balance, so the *delict* (violation) is a disruption to the

stability which provokes a traditional reaction as a demand of compensation payment (*delictsbetalingen*) for recovering cosmic balance where the balance is the requirement of human's happiness.

From various descriptions related to penal mediation based on the local wisdom, penal mediation is a proper model as indicated by some prominent expert of sociological jurisprudence such as Roscoe Pound (1870–1964), Eugen Ehrlich (1862–1922), Benjamin Cardozo (1870–1938), Hermann Kantorowicz (1877–1940)), Georges Gurvitch (1894–1965) and others. This faction developed in the United States, and the core of this study claim that a good law is the one that corresponds to the living law in a society. The word “correspond” means as the law that reflect the social values in society. The sociological jurisprudence study as one of the legal philosophy study emphasizes in the law and its relation to society. According to this study: “a good law is the one that corresponds to the living law in a society”. Referring to Lilirasjidi, sociological jurisprudence applies a social law approach, while the sociology of law uses the approach as from society to law. According to sociological jurisprudence study, a good law is the one that corresponds to the living law in a society. This study clearly divides the positive law and the one live in the society (living law). This study occurred as the result of a dialectic process between (thesis) legal positivism and (antithesis) the faction of history. Referring to Roscoe Pound, the law has to be regarded as a social institution which functioned to fulfil the social needs and it is the responsibility of jurisprudence to develop a framework which the social need could be maximally fulfilled by it. Eugen Ehrlich, an author who first recognized as the sociologist of law (*Grundlegung der Soziologie des Recht*, 1912), stated that the centre of tensile in the development of law is not in the constitution or the jurisprudence, but in the society itself. The study focused on the difference between positive law and living law or in another word the difference of law's principles and other social principles.

The positive law will only be effective when it accords with the law that lives in the society. Roscoe Pound assume that law is a social engineering and social control which intended to create harmony and balance in order to optimally fulfill the needs and interest of people in the society. Justice is a symbol of balancing effort that harmonious and does not take any side on undertaking the interest of people

concerned. For the ideal interest, force power is needed which done by the authority of the country. This study clearly divides the positive law and the one live in the society (living law). This study occurred as the result of a dialectic process between (thesis) legal positivism and (antithesis) the faction of history. As known, legal positivism considers no other law than the command of lawgivers. On the contrary, the faction of history perceives that the law emerged and established within the society.

In the countermeasure of revenge carok in Madurese people, a “penal mediation based on local wisdom by family model” model is required which begin from the investigation process in Police, to the prosecution process in the court and case investigation in the trial; if the mediation succeeded in one of the judicial processes, the result could be treated by the trial as a consideration in deciding a sentence. And if the mediation failed, the process will proceed to the next stages until a sentence is decided in the particular trial.

The description and various statements and the commentary of *carok* cases related to many violence conflict theories by Abbink visibly identify the factors that cause Madurese people to perform *carok*. Furthermore, the right solution is also identified by the policy model of criminal justice system that has been stated by the experts such as H.L. Packer, Griffithst, and Muladi, by the family model and integrated criminal justice system which further developed in this dissertation by the “penal mediation based on the local wisdom” model. Therefore, criminal justice system can also be criminogenic as in the prevention and countermeasure of violence conflict (*carok* cases) in Madurese society; even though each agency (Police, Attorney, Court, Prison and Advocate) has performed their function as written on the applicable regulations (criminal code procedures, criminal code, and other related regulations). However, the *carok* still exist in Madura, so it can be concluded that the criminal justice system has failed in executing their task. That failure could happen because of the inconsistency and ambiguity of each institution in performing their function and perception of the officers itself about the effect of the local culture of Madura. As mentioned earlier, since the right model for countermeasure and settlement of *carok* cases is not fully supported, further countermeasures of *carok*, especially in preventing another revenge *carok*, the model in integrated criminal justice system

need to be done by the model of “penal mediation based on local wisdom with the involvement of family”, to recover the damaged things and to satisfy the victim who already receive the worthy compensation, forgive each other and perform a reconciliation to minimize a revenge carok in Madurese society.

## Conclusion

The criminal justice system is less optimized in the countermeasures of violence conflict (carok) of Madurese people because of several reasons, including: there are some differences in interpreting the concept of justice in Madurese people’s perspective, there is dominance of legal positivism in law enforcement officials and there is a practice of intruding the process of trial (nabang), practice of defending self-pride and an imperfection of criminal code procedures’ regulation which does not follow “justice for all”, where the settlement for criminal case expected to be fair to all parties (defendant, victim, and society). The penal mediation model implemented in the countermeasure of violent conflict (carok) in Madurese society is the penal mediation that adopt: victim-offender mediation, family and community group conferences and reparation negotiation programmes which empower the customary institution connected to the criminal justice system starting from the investigation in police, prosecution in the attorney, and case investigation in the trial by involving the conflicting parties, religious scholars, leaders, and law enforcement officials as the mediators. The outcome of this penal mediation is in a form of agreement written on an act of peace, by compensation payment as money, cattle (cow, buffalo, goat) or gold which paid by the perpetrator to the victim, and could not be used as a reason to remove the charges, instead as a file to commute the sentence decided by the judge.

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