

# Philosophy and Juridical Bases of Penal Mediation Implementation In The Criminal Justice System In Indonesia

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## ABSTRACT

Penal Mediation as a pattern of settlement of criminal cases in the criminal justice system in Indonesia is a progressive thinking based on restorative, corrective and rehabilitative paradigms in the penal reform, if it is associated with pragmatic issues in the field such as mass cases accumulation ranging from court in the first level to the Supreme Court, even it is frequently happened for relative small problems coming to the extraordinary legal effort/judicial review. Those problems implicate to the over capacity of places of detention ranging from police detention center, prosecutors and penitentiary. It does not only affect the high cost issue, but also the sociological and psychological problems of guidance, alternative of criminal case settlement with penal mediation either through mediation outside the court or mediation within the framework of the criminal justice system (starting from the preliminary investigation, investigation, prosecution and examination in the hearing) is a necessity that must be done as one way to solve the problems of law enforcement in solving the case and also as a precaution to simplify the settlement of criminal case so that in the implementation, the basic values of philosophy need to be explored; whether the penal mediation and its positive legal basis fulfilling the formal legal requirements of a criminal justice system can be implemented, and can be used as a reference in the policy of penal reform in the future.

**Keywords:** Penal Mediation, Criminal Case, Judiciary, Law Enforcement, Philosophy.

## A. Introduction

The Criminal Justice System according to Mardjono (1993), is a crime-control system consisting of police institutions, prosecutors, courts and the penitentiary of convicted person. The purposes of the criminal justice system are to prevent people from becoming victims of crime, to settle cases of crime so that people are satisfied that justice has been established and those who are committed crime are punished, and to make sure that those who have committed crimes do not repeat their crimes. Based on those purposes, Mardjono asserted that the four components of the criminal justice system (Police, Attorney, Court and Penal Institution) are expected to cooperate and can form an "Integrated criminal justice system". Therefore, the criminal justice system in the settlement of criminal cases is not only done by institutional approach but it has to pay attention to the implemented law and regulations and the values that exist in society.

A fundamental problem of this nation faced today is the dilemma that occurs in the field of Law enforcement, rapid population growth which is very influential on the complexity of quality and quantity of handling law cases that are continually increasing. On the other hand, the law enforcers themselves face many obstacles due to their limitations such as the quality and quantity of human resources, facilities and infrastructure that support law enforcement, moreover good laws either formal criminal law (procedural law) and material criminal law also contribute a lot over law enforcement obstacles in the frame of an integrated criminal justice system, including sectoral ego among law enforcement that often leads to friction between law enforcement agencies resulting in the shuffling law enforcement.

The Law Enforcement Principles as stipulated in the KUHAP are fast, cheap and low cost as if they do not provide solutions to criminal law enforcement in Indonesia today which is continually increasing, with the more sophisticated modus operandi, and it does not only happen in a country, but has already transcended nationally and even impacted internationally, moreover the cyber crimes that are related to virtual reality (cyber crime) whose disclosures and proofs can no longer be done in traditional or manual ways stipulated in the Criminal Procedure Code and the Criminal Code, with all our limitations we have it is not impossible if in the future it will be the country of target of crime and even the money laundering obtained from crime. However, in reality few small cases or cases that capacities are very small and do not cause a wide impact for the community and do not interfere with the public interest continue to be processed legally to the Court, this will make the

burden in the settlement of a case in every level because the existing formal and material laws have not provided a solution to stop such cases.

The Indonesian Crime Research Institute (ICRI) said that the over capacity of adult penitentiary residents not only happen in Indonesia, but also in many other countries in various continents. Professor Andrew Coyle from the International Prison Study Center in London (ICPS), as expressed by Radio Nederland Wereldroep (RNW) said that there are three factors that create a sad condition of jail namely crowded prisons, poor and less secure means, and fewer officers and less educated officers (Chairil A. Adjis dan Dudi Akasah, 2014).

In the above conditions, it would have a psychological impact on the convicted (perpetrators of crime) who acquired not only the guidance in penitentiary but it will trigger to do the mode and a new crime network after leaving the Penitentiary even in some Penitentiary some cases show the existence of criminal activities such as drug making, drug distribution, sexual abuse and others that show weak supervision and poor system of guidance and decline of moral / integrity of the institution. On the other hand, it does not provide solutions for victims of crime, society and the State. Sometimes it becomes a grudge within the community itself so that in such situation it needs the victim of crime to be involved in solving the problem so there must be a legal solution to the settlement of criminal cases conducted outside the Court as well as in the courts by applying Penal Mediation.

Implementation of Penal Mediation in the criminal justice system in Indonesia is part of the renewal of the criminal law system implemented in the future, because it is a constructive and responsive law breakthrough that in the future a clear legal umbrella both in material law and formal law is expected to be given. In line with that purpose of panel mediation, the writers argue that the implementation of mediation penal in a criminal justice system in Indonesia is an important and urgent aspect to be used as an operational basis for law enforcer in solving criminal cases both inside and outside the court, and can be used as a policy in term of penal reform. Based on the problem description above, the writers formulate some matters as the problems faced by Indonesia namely what philosophical basis on the implementation of penal mediation in the criminal justice system in Indonesia is and what the positive legal basis of penal mediation implementation in the criminal justice system in Indonesia is.

## **B. Research Method**

The type of this research is normative legal research, in accordance with the opinion expressed by Soerjono Soekanto (1983), as cited by Mukti Fajar ND (2010), that normative legal research is a study that includes research on legal principles, research on legal systematics, research on legal synchronization, legal history research, and comparative law research.

The research approach used are approaches as stated by Mukti Fajar ND (2010), in normative legal research that is *Statute Approach* because the researcher uses the legislation as the initial basis of doing analysis, Conceptual Approach, Analytical Approach is done by searching for meaning in legal terms contained in the legislation, thus the researcher obtains a new meaning or meaning in legal terms and examines its practical application by analyzing judicial decisions, Comparative Approach is conducted by comparing Indonesian law and regulation with one or more law and regulations of other countries, the Historical Approach is conducted by examining the background and development of the Prisoners' Rights in the Penitentiary, the Philosophical Approach is done because the researcher wants a review of the Rights of Prisoners in a Penitentiary deeply and a Case Approach aimed at studying the norms or rules of law that are conducted in legal practice.

## **C. Results And Discussion**

### **1. Pancasila as the Philosophical Basis of Penal Mediation in the Criminal Justice System.**

In terms of Pancasila as philosophical epistemological view, essentially it has a different character from other philosophical views such as the views of liberalism, individualism, socialism, communism, secularism, pragmatism, materialism, and religious fundamentalism. One thing that could make Indonesian proud is that Pancasila is a masterpiece formed by the founders of the nation which is the synthesis of the values and culture of Indonesia and a life view in the nation, in addition that Pancasila is a nation culture that has existed in Indonesian society before the state formed, so further Epistemological study of Pancasila philosophy is intended as an effort to seek the essence of Pancasila as a system of knowledge.

For the Indonesian, Pancasila philosophy is part of the Eastern philosophical system that exudes its superior value, as a system of philosophy of theism-religious. Rational proof includes (Teguh Prasetyo and Purnomosidi, 2014):

- a. Viewed from the material-substantial and intrinsic, Pancasila value is philosophical; such as the nature of a just and civilized humanity, moreover the belief in one God is metaphysical / philosophical;
- b. Practically-functionally, in the culture system of the pre-independence Indonesian, the value of Pancasila is recognized as a life philosophy or a practiced worldview/life view.
- c. Formally-constitutional, the Indonesian nation acknowledges that Pancasila is the basic state (state philosophy) of the Republic of Indonesia;
- d. Psychologically and culturally, Indonesian nation and culture are equal to any nation and culture. Therefore, the Indonesian nation as well as other nations (Chinese, Indian, Arabian, Europeans) inherited the philosophical system in their culture. Thus, Pancasila is a philosophy that is inherited in Indonesian culture.
- e. Potentially, Pancasila philosophy will develop with the dynamics of culture; Pancasila philosophy will develop conceptually, be rich conceptionally and literature in quantity and quality. Pancasila philosophy is part of the treasure and philosophy that exist in the literature and modern civilization.

Constitutionally, Pancasila is formulated in the Fourth Paragraph of the Preamble of the 1945 Constitution, "... then the independence of Indonesia was formulated in a Constitution of the Republic of Indonesia that sovereign people based on the Belief in one God, Just and Civilized Humanity, The Unity of Indonesia, Democracy guided by the inner wisdom in the unanimity arising out of deliberations amongs representatives, and by realizing Social Justice for All Indonesian People".

Then Pancasila is also contained in the decisions of the state, namely in the Constitution and Tap.MPR Number II Year 1978 and in Tap. MPR Number IV of MPR 19999, Pancasila has obtained its legality of law, applies and binds to every human being, whenever and wherever it is (Bahsan Mustafa, 2003).

A basic problem that we face in law enforcement is the high number of crime increases from year to year, which certainly brings negative consequences to law enforcement itself, especially to the protection of victims and perpetrators of crime ranging from the initial process of investigation to the settlement of criminal cases, an out-of-court settlement is an alternative offered by this State, by exploring the life values of the society, namely Pancasila becomes the Basis of State, State Philosophy, State Ideology, Vision of Law as the Foundation for the Establishment of State Law.

The settlement of criminal cases with Penal Mediation is very compatible with the values reflected in the Pancasila Principles, namely Value of Belief in one God, Humanitarian Value, Unity Value, Democracy/ Deliberation of consensus and discussion Value and Social Justice Value.

Therefore, in the practice the realization of Penal Mediation is expected to accommodate the values of Pancasila that is a State of law that is characterized or based on the values / identity and characteristics contained in Pancasila, namely:

- a. Principle of The Belief in one God becomes the basis of a legal culture which is based on religion moral;
- b. The Just and Civil Humanity of Justice becomes the basis of a legal culture that respects and protects non-discriminative human rights;
- c. Principle of Unity of Indonesia becomes the basis of a legal culture that unites all elements of the nation with each various primordial tie;
- d. Principle of Democracy becomes the basis of a legal culture that places power under the people's authority (democratic), discussion for consensus.
- e. Principle of of Social Justice for All Indonesians is the basis of the legal culture in social life with social justice so that those who are socially and economically weak are not oppressed arbitrarily by those who are strong.

Penal mediation based on responsive pancasila values that shelter and protect can be realized if the law is able to provide a sense of security and peace to the life of nation and state and to the people as a whole. The law becomes a place of protection and shelter for the people from acts that threaten and destroy security, peace and human rights. Consequently, the law of Pancasila is a law that is responsive in the eyes of the people and nation of Indonesia. Thus, the law of Pancasila is expected to fulfill our desire so far as a law that has justice and dignity.

## 2. The Positive Legal Foundation of Penal Mediation in Criminal Justice in Indonesia.

### 2.1. Penal Mediation in Customary Criminal Law.

Long before the existence of the National law, customary law has used mediation in resolving disputes, because thought of customary law is religious cosmic which prioritizes the balance between the birth world and the unseen world. Customary sanctions have a function and role as a stabilizer to restore the balance between the birth world and the unseen world. If there is a violation, the offender is required to make certain efforts such as a ceremony of cleaning village aimed at restoring the balance and magical power that is felt disturbed.

The above thought as a theoretical framework, as well as local wisdom in customary law in Indonesia based on cosmic, magical and religious thought have known a long time ago this penal mediation institution, namely in West Sumatra, Aceh, and Lampung customary law (Hilman, 1979). Even in Aceh (NAD) it has been set forth in Perda No.7 / 2000 on the Implementation of Customary Life.

After the independence, customary criminal has obtained a place under the Emergency Act no. 1 Drt 1951. Article 5 Paragraph (3) Sub-Paragraph b of this Law explains the customary criminal that has no comparison in the Criminal Code, customary criminal that has a comparison within the Criminal Code, and customary sanctions. Customary sanctions could be made as the principal criminal or main criminal by the judge in examining and adjudicating acts which according to living law are considered as an incomparable crime in the Criminal Code.

Then the Supreme Court Decision No. 1644 K / Pid / 1988 dated May 15, 1991. In this decision, the assembly considers 'a person who has committed an act which according to living law (customary law) in that area is an act which violates customary law, namely 'custom offense'. The leaders and Customary leaders react to customary reactions (customary sanctions) against the perpetrator. The customary sanctions have been carried out by the condemned. Against the convicted person who has got 'customary reaction' from the customary chief, he can not be filed again (for a second time) as a defendant in the trial of the state judiciary with the same indictment, violates customary law, and is sentenced to prison according to the Criminal Code (Article 5, paragraph 3, letter b Emergency Law No. 1 Drt 1951). Under such circumstances, the transfer of court files and judiciary demands in the District Court must be declared that it is unacceptable (*niet ontvankelijk verklaard*).

In this provision, customary courts and judges are not recognized in positive law in Indonesia. However, it does not mean that the enforcement of customary law decided by the customary law community does not exist at all. (FH UI, 1998), as Van Vollenhoven reveals that customary law is the original law of a people of Indonesia bound by genealogical or territorial relations (see Articles 131 and 163 *Indische Staatsregeling* - S. 1855-2).

In the present national law, people of customary law are recognized by the Indonesian Constitution as stipulated in Article 18B paragraph (2) of the 1945 Constitution which mentions:

"The State recognizes and respects the unity of people of customary law along with their traditional rights as long as they are alive and in accordance with the development of society and the principle of the Unitary State of the Republic of Indonesia, as governed by law".

### 2.2. Penal Mediation in Policy of Criminal Law Enforcer

In relation to the great amount of the loss, the Supreme Court has issued PERMA No. 2 of 2012 on the adjustment of the limits of minor criminal offenses and the number of fines in the Criminal Code, Article 1 of Minor Criminal Offense states that the words "two hundred and fifty rupiahs" in article 364, 373,379, 384, and article 482 of the Criminal Code were read into Rp. 2.500.000, - (two million five hundred thousand rupiah). However, in reality SEMA No.2 / 2012 is not able to be applied thoroughly in every court, it shows talking about the value of the loss can not be applied equally depending on the area of trying a case with the average economic standard of the local people.

The authority of the Attorney General as stipulated in Article 35 Sub-Article c of Law Number 16 Year 2004 concerning the Opportunities Principle beside only being applied to the Attorney General instead of the Public Prosecutor and in the explanation of Article 35 Sub-Paragraph c which is "Public Interest" meant is defined as narrowly includes interest of the nation and state and / or interest of wider community, in fact the implementation in various countries for the public interest is widely interpreted including criminal prosecution is considered less effective, for example in Indonesia the theft of used slipper, theft of a piece of cocoa wood that the perpetrator is old and including the underage, other sanctions that are more effective such as: compensation, administrative sanctions and others (Bambang, 2016).

The Attorney General of Indonesia once proclaimed as the internal policy concerning the minimum loss of the State which can be continued into the case by issuing the Circular Letter of the Young Prosecutor for

Special Crime Number: B-1113 / F / Fd / 05/2010 on May 18, 2010 regarding Priorities and Achievements in Handling Cases of Corruption, instructed all Heads of the High Prosecutors throughout Indonesia:

- (1). In order to handle corruption cases, priority is given to reveal the case that is big fish (large scale, seen from the perpetrator and / or value of state financial loss) and stillgoing on (incessant or continuous corruption).
- (2). In order for law enforcement it prioritizes a sense of community justice, which with its awareness, it has restored the state's financial losses (restorative justice) especially in relation to the corruption acts that the state's financial losses are relatively small; it should be considered not to be followed up unless it is still goin on.

In the development of Circular Letter of the Young Prosecutor for Special Crime, it experiences polemic in various circles, both internal and external especially anti-corruption activist (ICW) so that the enactment of the circular letter was revoked because the legal umbrella to bring that corruption case outside the court has not yet existed.

In the development of penal mediation process involving the Prosecution towards the criminal cases in the field of economy, it also recognizes Schikking (fine penalty) that the termination of criminal prosecution is due to the payment of fines, it is applied for economic acts such as taxation and custom crimes, at first this Schikking institution is regulated in article 29 *Rechtern Ordonantie (Staabsblad* Year 1882 No. 240) amended by Emergency Law Number 8 Year 1958 regarding the addition of Emergency Law Number 7 Year 1955 concerning investigation, prosecution of criminal justice of economy translated into ordonansi Bea (OB), which became known as economic crime, which was subsequently amended by Law No. 17/2006. Based on article 113 that states, "For the purpose of state revenues, at the request of the finance minister menteri keuangan, the Attorney General may stop the investigation of custom crimes, that ceasing is performed after the payment of Import Duty (BM) which is not or less paid, added with administrative sanction in the form of four times payment of fine (4X) of the amount of Import Duty which is not or less paid.

In addition to the case of custom offenses, Schikking may also be applied in a criminal act of taxation, in accordance with the provision of article 44 B of Law Number 28 Year 2007 regarding the third amendment of Law Number 6 of 1983 concerning General Provisions and Procedures of Taxation, stated "For the interest of the State's revenues, at the request of the Minister of Finance, the Attorney General may terminate the Criminal Investigation in the field of taxation not later than 6 (six) months from the date of the request. Termination of the prosecution can only be made after the taxpayer pays off the tax debt which is not or underpaid or which should not be returned and added with administrative sanction in the form of a four times payment of fine (4X) of the amount of tax which is not or underpaid, or which should not be returned. Nevertheless, in terms of implementation of this institution the victim is the State.

### 2.3. Penal Mediation in the Criminal Justice System

**The Juvenile Justice System.** In Indonesia, the diversion is applied in the settlement of children's cases ranging from criminal justice process to process of outside-criminal justice, provisions regulated specifically in article 1 point 7 of Law Number 11 Year 2012 about Juvenile Justice System. Children's case against the law must be tried in a court of law within the general court of law where starting from the process of handling childhood cases ranging from preliminary investigation, investigation, prosecution and judges who conduct done by special officials who understand children's problems, but before entering the judicial process, the law enforcers, family and society shall attempt the process of settlement out of court, through the process of Diversion based on Restorative justice, whose objectives are stipulated in Article 6 of Law Number 11 Year 2012 namely to achieve peace between victims and children, settlement of cases outside the judicial process, avoiding children from the seizure of independence, encouraging people to participate, and cultivating a sense of responsibility to the child. The result of the agreement shall be further explained in the form of a diversion agreement, then within 3 (three) days shall be submitted to the District Court for a determination, and not more than three days it obtains the determination, then within 3 days after obtaining the decision of the investigator, prosecutor or judge terminate the case meant, in case of diversion it reaches an agreement then the juvenile justice process is not continued.

**The Domestic Violence Justice System.** Household neglect is one form of domestic violences that is classified as economic violence. The Criminal Code actually has governed this, but due to the existence of various international movements aimed at eliminating violence against women and children, so the existing provisions are deemed inadequate to achieve the goal of eliminating violence. The Law on the Elimination of domestic Violence (*PKDRT*) Act No.23 of 2004 has a very important position because besides filling a legal vacuum that has also provided legal protection against women from domestic violence practices. Domestic violence cases including household neglect cases will open up opportunities to reveal matters that are considered



disgrace in the family, but the methods used must be adjusted to the existing judicial system so that there is no deviation between the application of the method of cases settlement and the existing judicial system.

**The Justice System of Serious Violations of Human Rights.** Settlement of incidents of serious violation of human rights based on Law no. 26 of 2000 above, besides being promised by several post-reform Presidents, it is actually also a reform agenda in the framework of national reconciliation as a whole based on the mandate of TAP MPR-RI no. V / MPR / 2000 on Stabilization of National Unity and Article 104 Paragraph (1) of Law no. 39 of 1999 on Human Rights. The possible non-judicial settlement refers to the following provisions:

- Article 47 of Law No. 26 Year 2000 has determined that serious violation of human rights happened before the implementation of Law No. 26 of 2000, it has a possibility that the settlement of the Commission of Truth and Reconciliation will be established by law. This anticipatory arrangement seems to be done by counting the various evidentiary constraints that might confront the process of ad hoc serious human rights trials towards the past cases, which are forced to enforce the provisions of criminal law retroactively (valid retirely) with new values and norms that are previously not known.
- The criminal justice system has demonstrated its success in prosecuting and imprisoning a person, but always fail to create a safe and peaceful society. The victims of crime should be treated with dignity and the perpetrators and victims must be reconciled. Perpetrators must not only be responsible, but also must be reintegrated into society to become productive, good and useful citizens in a democratic environment.
- In the above discussion, there is a shift from retributive justice towards restorative justice. What happens is a shift in the diametrical building structure, in the form of a paradigm shift from a punitive retributive justice approach to the process of restorative justice that emphasizes the balanced approach between the perpetrator, the victim and the society that are essentially “clients and costumers” of criminal justice system. Disconnection due to fear, suspicion, and retributive concerns will trigger new criminals that are more serious or criminogen and viktimogin.

Although the Act has provided an opportunity for non-judicial settlement or with penal mediation, in practice it has never been used because of the shackle of past political issues, it is difficult to prove and involve government agencies or apparatus, there is a reluctance to disclose them.

#### 2.4 Penal Mediation in the Draft of Penal Code and Draft of Criminal Procedure Code

In the draft of the Criminal Procedure Code on the Penalty Mediation, regarding the General Prosecutor and Prosecution, the first part of the Public Prosecutor is in Article 42 paragraph:

1. The Prosecutor shall also have the authority to stop the prosecution for the general interest and / or with certain reasons.
2. The Public Prosecutor’s Authority as referred to in paragraph (2) could be done if,
  - a. Criminal acts that are done are minor;
  - b. Criminal acts committed are punished by imprisonment of a maximum of 4 (four years);
  - c. criminal acts committed are only punished with a punishment of fine;
  - d. The age of the suspect at the time of committing a crime is over 70 (seventy) years old;
  - e. the loss has been replaced;
3. The provisions referred to paragraph (3) letter d and letter e are only applied for criminal offenses that are punished by imprisonment of a maximum of 5 (five) years;
4. In the case where the Prosecutor terminates his prosecution as referred to paragraph (2), the Prosecutor shall submit the accountability report to the High Prosecutor through the head of the District Attorney in each month.

It is not mentioned explicitly in Article 42 that a process of settlement of cases with Penal Mediation / settlement of criminal cases may be conducted outside the court, however termination of prosecution under the terms specified as in penal mediation has been determined in the draft Penal Code, so the Authority to do penal mediation can only be made by the Public Prosecutor under general conditions to be fulfilled as set forth in article 42 paragraph (2) that is for the general interest and / or certain reasons. However, according to the writer's opinion, the article should be elaborated in more detail and detail about the parties involved in the mediation (at least: there are perpetrators, victims, the public and the Public Prosecutor as Mediator), then the form of mediation is sufficient with a letter of statement / written approval then whether it is necessary shall be made in the form of determination or decision of the Head of the local Attorney General, or there must be a requirement to obtain a stipulation to the local District Court (it has not been regulated) and has not been explained to crimes that have no victims (such as gambling) or the victim is the State such as Narcotics / psychotropic, Corruption, Taxes, Custom, and etc). Subsequently, it needs further regulation in case of draft of Criminal Procedure Code is legalized in the form of Government Regulation.

In the Draft of Criminal Code (KUHP), paragraph 1 describes the purpose of punishment, according to Article 54 (1) the penalty is aimed to prevent the commission of criminal offenses by enforcing legal norms for the protection of the community, to socialize the convict by establishing guidance so that they become a good and useful person, resolving conflicts caused by criminal acts, restoring balance, and bringing a peace in society and the punishment are not intended for suffering and degrading human dignity.

According to the opinion of the writer, the provisions contained in the draft of Criminal Code as regulated in paragraph 2, the penalty guidance, article 55 there has been an agreement and alignment with the draft of Criminal Procedure Code, both acknowledging contextually that the purpose of criminal punishment is no longer an effort of revenge but rather a restorative justice (by considering justice and humanity), and the termination of the Prosecution for the general interest and / or for some reasons as an attempt to do penal mediation in the criminal justice system in Indonesia.

Furthermore, in line with the authority of the Public Prosecutor, thing related to the taking decision of case done by Panel of Judges is also regulated in the Draft of Criminal Code (KUHP) in the Second Section of Criminal, paragraph 1 on Criminal Section, article 71, which states:

*Considering Article 54 and Article 55, imprisonment to the extent is possible not to be imposed, when there are following circumstances, such as the defendant is 18 (eighteen) years old or over 70 (seventy) years old, the defendant has committed a crime at first time, a loss and the suffering of the victim is not too great, the defendant replaces the loss of victim, the defendant does not know that the crime committed will cause great harm, the crime is caused by the strong incitement of others, the victim of the crime encourages the crime happened, it is the effect of a situation that is impossible to be happened again, the personality and behavior of the defendant assure that he will not commit another criminal act, the imprisonment will cause great harm to the defendant or his family, non-institutional development is expected to be quite successful for the defendant itself, minor criminal penalty will not reduce the serious of the crime committed by the defendant, a crime occurs among the families; or occurs due to negligence.*

#### D. Conclusion

Based on the analysis and explanation of the problems that become the focus of discussion, it can be concluded as follows:

1. From the point of view of Philosophy, Penal mediation implementation based on Pancasila Value has had formal legality as stated in TAP MPR II Year 1978 and TAP MPR No. IV MPR in 1999, it is binding for every Indonesian who practically reflects the Pancasila Principles. **Deity** is the basis of a religious moral-based legal culture; **Humanity** is the basis of a legal culture which respects and protects non-discriminative human rights; **Unity** becomes the basis of a legal culture that unites all elements of the nation with its various primordial ties; **Democracy** is the basis of a legal culture that places power under the power of the people (democratic); and **Social Justice** becomes the basis of the legal culture in social life with social justice so that those who are socially and economically weak are not oppressed arbitrarily by those who are strong.
2. From the Positive Legal Perspective, Penal Mediation in the criminal justice system, practically in the field it can be traced in various terms and policies, as follows:

- a. In the practice of customary law, the settlement with consensus discussion by using the principle of mediation has received acknowledgment in the 1945 Constitution article 18 B paragraph (2). It further also regulates the Emergency Law No. 1 Drt 1951 Article 5 paragraph (3) letter b that states “Customary criminal that cannot be compared in the Criminal Code”.
- b. Penal Mediation in various law enforcer policies is spread as a policy undertaken by each law enforcer, namely:
  - Supreme Court has issued PERMA No.2 Year 2012 on the adjustment of minor criminal limits and the number of fines in the Criminal Code.
  - Attorney General of the Republic of Indonesia through the Circular Letter of the General Prosecutor for Special Crimes (JAMPIDSUS) Number: B-1113 / F / Fd / 05/2010 on May 18, 2010 regarding priorities and achievements in handling of Corruption Crime, applying a system of fine fines (Schking) in the criminal acts of customs and taxation and the application of deponering on certain cases in terms of the public interest based on Article 8 of Law No.16 of 2004 on the Attorney General of the Republic of Indonesia.
  - Police Chief Letter No. Pol: B / 30122 / XII / 2009 / SDEOPS on December 14, 2009 in handling cases through ADR / Alternative Dispute Resolution and Regulation of the Chief of Police of the Republic of Indonesia Number 7 Year 2008 about Basic Guidelines of Strategy and Implementation of Policing Community in the implementation of POLRI duty.
- c. Penal Mediation in the Criminal Justice System can be seen practically, namely:
  - Penal Mediation in Juvenile Justice, in practice it is called DIVERSION that is regulated in Law Number 11 Year 2012 about Juvenile Justice System article 1 number 7.
  - Penal Mediation in domestic Violence cases is regulated in the Law on the Elimination of domestic Violence (PKDRT) No.23 of 2004.
  - Penal Mediation in the Serious Human Rights Court System, in Law Number 26 Year 2000 article 47 enables the settlement of lawsuit in Non-Judicial way conducted by the Truth and Reconciliation Commission, but in practice the settlement of Serious Human Rights cases in Indonesia has never been completed in relation to the political interests from time to time, the involvement of the apparatus and the length of the legal process.
- d. Penal Mediation in the Draft of Criminal Code and Criminal Procedure Code, the idea of penal reform makes the mediation of penal entering the draft of change, the cessation of prosecution for a particular reason only becomes the authority of the public prosecutor.

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