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RESEARCH ARTICLE

PENAL MEDIATION AS AN ALTERNATIVE RESOLUTION IN THE INDONESIAN CRIMINAL JUSTICE SYSTEM (A DIGNIFIED JUSTICE JURISPRUDENCE)

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Abstract

Restorative justice perspective in this paper sees a penal mediation as a non-penal means within the Law. This institution has been utilised as an alternative in the Indonesian Criminal Justice System to deliver dignified justice in criminal cases. Although this model appeared as "vague", since stipulated only between the lines in the Indonesia Criminal Code (KUHP) and the Criminal Procedure Code (KUHAP), the concept of restorativejustice has been existing in the Indonesian Volksgeist (the Spirit of the Indonesian, i.e. Pancasila) from the begining of time. This author would argue bellow that penal mediation has been used to mitigate penal cases by law enforcement institutions in order to achieve dignified justice in the concept of restorative justice, to serve human as human beings recognised by the Law in the Pancasila Legal System. The police may use penal mediation basing upon their discretionary power and the public prosecutors may also use their own prerogative power or the what so called "prosecutor's power of opportunity" in place of the due process and make creative innovations, beginign from misdemeanor or complaint offenses. Even Indonesian judges have broad discretionary authority to use penal mediation in solving criminal cases so that the dignified justice, can be obtained, particularly by victims de lege lata.

Introduction:-

The criminal justice system or the Indonesian criminal law enforcement system is a modern or dignified criminal justice system. It has been implemented as the Indonesian nation determines its own fate, the Indonesian dignity in taking part and contributing to the international world of Jurisprudence by basing its country as a rule of law (rechtstaat) and not a power state (machtstaat) as the nation aspires. Indonesia is a republik, it establishing the Unitary State called the Republic of Indonesia (NKRI). In this case, as one of the indicators of its achievement is the formation of conditions and the ability of citizens or the community to obey the law as their commander in chief in resolving all legal problems in the broad areas of the life of the citizens related to and under the law. Citizen must abides by the law, making the people who obey the law, becomming the law abiding citizen.

The Pancasila Legal System dictates that the law enforcement process should not be mailnly carried out by using formal justice methods. It has been commonly understood that one of the form of formal justice approach will promote a repressive police actions. It would then followed by a litigation process or law enforcement process. This

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attitude has been considered as a legal thinking merely formalistic and rigidity. It has becomming a new awarness that the formal litigative action depends a lot on the efforts of coercion and the authority of the legal officers who do it. Furthermore, even if appears a result, it will generally end up with a situation of lost-lost or win-lost, the winner takes all legal approach.

It has becomming a general knowledge that with such idea of the modern criminal justice system mentioned above as a sole means of distributing justice has been encountering many obstacles. One of the obstacles is that modern justice system has been preocupied with formalities, procedures, bureaucracy and strict methodology and with the same nature of process handelling all types of problems, or one zise for all mechanism. It apperas to be that the system is a Legal positivism or legalistic views that dominates the rigid system.

Distribution of justice through the judiciary is provided through bureaucratic decisions for the public interest, therefore tends to be in the form of formalistic rational justice. So it is not surprising that the justice that modern society receives is nothing but bureaucratic justice, while the goal of the law is only legal certainty. This is very contrary to the desire of the public who demanding a craving of substantial justice in every settlement of criminal cases.

Examples of cases have attracted public or laypeople (the men in the street's) attention. The case of PritaMulyasari in Tangerang, is the first one to mention here. In this case, Prita a housewife who was accused of defamation via e-mail or a reader's letter to the Omni International Hospital. The case begun from hospital authorities reported PritaMulyasari on two cases at once. Namely civil and criminal cases. In the civil case, PritaMulyasari was found guilty and required to pay compensation of Rp. 300,000,000. The decision on appeal obliged Prita to pay a fine of Rp. 204,000,000. In addition, there was also a case of Minah, a grandmother in Banyumas. The Gramma who was suspected of stealing three cacao was finally sentenced to one and a half months in prison with a probation period of three months.

Furthermore, there is also Tabrijicase in SerangBanten. Tabriji who stole two ducks were sentenced to seven months in prison. Basar and KholilCase, where stole a watermelon in Kediri were sentenced to fifteen days in prison with a probation period of threemonth.SarjoCase, who stole two bars of bath soap and a packet of peanuts worth Rp. 13,000in a convenience store in Cirebon, was sentenced to twelve days in prison after serving a period of fourteen days in detention. The five cases as mentioned above has been regarded by the public as a bit of an ironic picture of the enforcement of criminal law in Indonesia. The Law appears to defgrage humanity, especialy against the poor or the disadvantages and marginalised.

The repressive handling of the police, procedural and formal prosecutions by the prosecutor, as well as the imposition of criminal decisions by judges who are only mouths for the law gas been regarded as seriously hurt and threatening public justice. The handling of criminal cases by law enforcers by functioning of criminal law as the main mechanism in the settlement of criminal cases in formalistic ways shows that there are mistakes in thinking, rigidity of thinking and stagnation of thinking among law enforcers. It seems that law enforcers are reluctant or unwilling to follow developments in law enforcement practices, especially in the criminal sector in developed countries.

At this point, the law dictates that the system must be reformed. However, in the eyes of the public in general, the concept of penal mediation has not been regulated in Indonesia as an alternative in the settlement of criminal cases. The Criminal Code and Criminal Procedure Code as well as other laws and regulations in the field of criminal law as the primary legal basis have not yet regulated penal mediation. This is where, for the men in the street, a legal vacuum occurs.

This article argues that the law, in the Pancasila Legal System otherwise regulating criminal case settlement through penal mediation as a complement to legal action by law enforcement officers. These law officers may step through discretion and deponeering rights recognised in the criminal law enforcement system in the Dignified Justice Indonesia Legal System based on Pancasila.

On that basis, this study on penal mediationhas been conducted, in order to see the development of penal mediation in Indonesia today. This research sees the extent to which the legal values and virtues that live in the Indonesia Volksgeist, or int he society can be used as a reference. The values and virtues within the Indonesian Law

(Pancvasila) should be used in resolving criminal cases in society. Penal mediation is the rationale for the need and the types of dignified Indonesian criminal laws that can be use to mitigate as well as reform the penal system. In this study, the author will focus on solving criminal cases through penal mediation in the state of investigation conducted by the Police. Considering that the investigation process is the first process in the criminal law enforcement system in Indonesia. However, in order for the research to be more complete, of course here in there it will still be associated with the settlement of penal mediation by other law enforcement officials.

Research Method:-

The research approach used in this research has been a purely juridical-normative. In some sense, this reseach perhasps would be regarded as has been Socio-criminological but subject to criminal law dictations. This legal research approach could be regarded as a theoretical framework for some non-doctrinal legal research, or sociological. In this research this method is understood as a normative empirical. The sources are mainly regulation and some secondary sources such as texts books on Criminal Law.

The Ideas of Restorative Justice in the Pancasila Legal System:

Indonesian criminal law process recognising the inquisitoir system. In this system, the suspect/accused is seen as an object in the examination of the inspectors with a higher position in an examination police department. In this system, the examination conducted behind closed doors. However, the system is combine with another system called the accusatoir system. This latest system is the opposite of the inquisitoir one. In the accusatoir system of the criminal case settlement process or criminal procedure process the public prosecutor and the defendant is given equal rights.

Both is having a legal battle (rectsstrijd) before a judge who not taking sides. At the same time in the principle of inquisitoir the judge himself takes action to investigate. The judge himself acts as the person who accuses. Therefore, the duties of the person who sues, the person accusing and the judge are united in one person. The dichotomy in the criminal justice system which has been used as a comparative study for centuries, in its current development has lost its sharpness of distinction.

This is even more prominent with the discovery of the mixed type system in the criminal justice system, so that the definition betweenthe inquisitor system and the accumulation system can no longer be clearly seen. To avoid confusion, it seems that now in mainland Europe, especially in countries that adhere to the Common Law System, the criminal justice system recognizes two models, namely: (1). “the adversary model” and (2). “the non-adversary model”.

The adversary model in the criminal justice system adheres to the following principles. The criminal justice procedure must be a “dispute” between the two parties (the accused and the public prosecutor) in the same position (theoretically) before the court. The main purpose (procedure) is to resolve disputes that arise due to the incidence of crimes. The use of methods for filing rebuttals or statements (pleadings) and the existence of a guarantee and negotiation institution. The parties or contestants have a clear and autonomous function; the role of public prosecutors is to prosecute; the role of the accused is to reject or refute the accusation.

Meanwhile, the “non-adversary model” adheres to the principles as follows. The inspection process should be more formal, sustainable and implemented based on the presumption that a crime was committed or the presumption of guilt;Its main purpose is to determine whether in reality the act was a criminal case, and whether the imposition of punishment can be justified because of it;Research on the facts submitted by the parties (public prosecutor and accused) by the judge can be unlimited and does not depend on or does not require obtaining the consent of the parties.The position of each party (public prosecutor and accused) is no longer autonomous and equal; Sources of reliable information can be used for the purposes of preliminary examination or in court. The accused is the main object in the examination.

The justice model, the justice approach or the just desert model is based on two theories about the purpose of punishment, iethe Prevention and Retribution. Thes has given birht to the concept of restorative justice that are thriving today. Restorative Justice Theory can be summarized in several characteristics as follows Crime is primarily conflict between individuals resulting in injuries to victims, communities and the offenders themselves. Law breaking is a secondary.

Crimes bynature/primer is a conflict between individuals. The conflicts is resulted in injury to the victim, the community and the offender himself. As stated above, the violation of law is secondary only. The overarching aim of the criminal justice process should be a reconsiliation.

It reparates the injuries caused by crimes. The overall objective ofthe criminal justice process must be to reconcile the parties in conflict/dispute, as well as repair the wounds caused by crimes.The criminal justice process should facilitate active participation by victims, offenders and their communities. It should not be dominated by government to the exclusion of others.

This Restorative Justice Model is proposed by law reformers who reject coercive means in the form of penal or litigation facilities and are replaced by non-penal/non-litigation facilities through reparative means. It is the idea and understanding in the Criminal Law reform that considers the criminal justice system to contain structural problems or defects so that the basic structure of the system must be changed relatively. In the context of the criminal sanction system, the values that underlie this idean in the law is still make sense to seek alternative sanctions that are more feasible and effective than institutions such as prisons.

As the characteristic of restorative justice it puts a higher value on the direct involvement of the parties in question or conflict. Victims must be able to restore the element of control.

Perpetrators are encouraged to take responsibility as a step in correcting the mistakes caused by crimes and in building their social value system. Community or community involvement actively strengthens the community/society itself and binds the community/society to values for respect and mutual love.

The role of the government is substantially reduced in monopolizing the current judicial process. Restorative justice requires cooperative efforts from the community and the government to create a condition where victims and perpetrators can reconcile the conflict and repair the wounds of each party to the dispute.

Restorative justice returns conflicts to the most influential parties, including victims, perpetrators and “community interests” or society and gives priority to the interests of the parties. Restorative justice also emphasizes human rights and the need to recognize the impact of social injustice and in simple ways to restore litigants rather than simply giving perpetrators to formal or legal justice processes and victims not getting any justice. In restorative justice effort is made torestore the security of victims, providing personal honor, dignity.

Restorative justice is a systematic response to the problems of criminal andother conflict-related securitywhich emphasizes the recovery for damages suffered by victims and/or communities as a result of the occurrence of the problem or conflict.

Restorative justice emphasizes restoration efforts and not solely to provide punishment as in court handling. Restorative justice will respond to problems, criminal acts, conflicts and others related to security and order issues by identifying and taking steps to correct the losses created, involving all related parties (stake holders) and efforts to transform existing relationships.

The idea of restorative justice, as mentioned above is very much needed. This research has found that this is the idea of reforming Indonesian criminal law in the Pancasila Legal System. The idea providing the best solution in solving criminal cases involving victims, perpetrators and the community in the context of recovery for the injured party and the realization of a sense of togetherness (persatuan Indonesia) so that justice is deliver to all parties (Keadilan sosial).

If it is related to the existing criminal justice system, the idea of restorative justice is very suitable to be used in the settlement of criminal cases out of or perhaps involving the court, but legaly justified and dignified. This means that the settlement of criminal cases which so far can only be resolved through penal means or litigation means, namely through a process starting from the stage of investigation, prosecution, examination in court and execution of sentences in prisons, can also be resolved through non-penal/non-litigation means.

Settlement of criminal cases through non-penal means can be said to be the settlement of criminal cases outside the court, meaning that the settlement of criminal cases is carried out without going through the stages of examination in

court. However, the settlement of the case is still possible during the investigation and prosecution stages. Even the settlement of the case can take place before the examination is carried out in court or at the stage of implementing the sentence.

The use of the idea of restorative justice that are integrated and aligned to the criminal justice system in order to realize principle of simple, fast, quick and low cost. As well as to reduce the accumulation case (backlock). This writer suggests that it takes political will of the government and the legislature through the criminal policy by adopting the values that exist and develop in Indonesian society (in the Volksgeist/Pancasila).

In this restorative idea, existing within the dignified justice perspective in the Pancasila, it is necessary to settle criminal cases carried out using this restorative justice model. Sinceit is more healing, more resolutive and without any party losing face or acieve an elegant solution with improving human dignity. In addition, it is also the fulfiling the desire to have a substantive justice for citizens and the achievement of legal objectives. It wil reach the purpose of the law, i.e., the legal certainty, justice and eficaces simultaneously.

Restorative Justice in the Dignified Deliberation to Reach a Consensus:
Justice that is expected to be accepted by all parties. This is the idea of substantive justice that is expected in an effort to solve problems. Therefore the study of the use of alternative ways towards substantive justice from any conflict resolution efforts continues to develop. This is in line with the dignified justice ide in Indonesia as a rule of law. It is an ideally obliged to use legal methods, including the penal mediation in handling criminal acts that occur. Therefore in cases of conflict that occur, especially conflicts or cases involving individuals, even though there is an element of criminal action, if it is resolved by formal law, or strict letter of the law, it will create new vulnerabilities.

This is in line with what Manning said in his study of the police in hadling the criminal case at the investigation stage, that: ”The law simply does not cover every situation that a police officer encounters in field. In cases where the law may be clear, it might be more prudent for the officer to ignore the strict letter-of-the law interpretations”. In other words, in all stateg in the criminal process, particularly in the investigation stage, the law sometimes is silent in accommodating every form of situation that exists. With the existence of several obstacles that occur in the judicial process criminal formally led efforts to resolve problems that not satisfy the requirement of dignified justice or substantive law.

In practice, in Indonesian society, according to the Pancasila legal culture inherent in solving problems or conflicts that have occurred, using the deliberation principle, in the fourth tenet of the Pancasila have long been the institution in the daily life. The tendency of the people to refuse to make a fuss and the desire to always live in harmony and solve every problem in deliberation to reach a consensus has been around for a long time, or has been the norm in the structure of the Indonesian nation.

It could be argued therefore that as the finding of this this legal research, the idea of restorativejustice is naturaly has already been existing in the order of life of the Indonesian nation, or in the Volksgeist of the Indonesia. This idea of justice has been settling in Indonesia as potential for conflict in the Indonesian society is very hight. Indonesia consists of various ethnic groups and the various obstacles and problems that can lead to conflict is still very open chances.

In the emergence of a conflict, it first begins with a community that is prone to conflict. This society is good for those who have high knowledge to the masses who have low knowledge, even radical groups. All can be involved as actors as triggers and perpetrators of existing conflicts. It can be likened to a dry husk which when ignited by a fire will easily burn. After burning, if there is a hot wind gust, it will make the conflict that was small will quickly become big.

The idea of restorative justice can be used in resolving existing conflicts and criminal cases by studying conflict building or criminal cases in society, analyzing and observing settlement mechanisms so that they can be resolved peacefully driven by community leaders, religious leaders, traditional leaders, academics and non-governmental organizations for the creation of a permanent peace building.

The concept of restorative justice gives weight to a systematic response to the occurrence of an event or conflict in society and emphasized on the recovery for damages suffered by victims and/or communities as a result of events of criminal offenses. In this regard, restorative justice must run immediately if there occurs a small incident that has the potential for a larger conflict. Even restorative justice is immediately when there is a crime in the form of a criminal act committed by the perpetrator against the victim either light crime, complaint offense, including crimes involving children.

The imidiate response in the restoraive justice is aim at finding out about an incident, empowering the role of the community. Restorative justice is implemented as to respond to a problem, the incidence of criminal acts, conflicts is identifying by taking steps by steps to repair for damages. It will involve all stakeholders and seeks to transform the existing relationship over time between the public and the government to respond any possible conflict that would have been greater.

Handling criminal cases with a restorative justice approach offers different views and approaches in understanding a criminal act. In the view of restorative justice, the meaning of criminal acts is basically the same as the view of criminal law in general, namely attacks on individuals and society and social relations. However, in the restorative justice approach, the main victim of a criminal act is not the state, as in the current criminal justice system.

Therefore, crime creates an obligation to fix the damaged relationship as a result of a criminal act. Meanwhile, justice is interpreted as a process of finding solutions to problems that occur in a criminal case in which the involvement of the victim, the community and the perpetrator is important in efforts to improve, reconcile and guarantee the continuity of the repair effort.

Penal mediation is mediation in criminal cases or settlement of criminal cases through deliberation with the help of neutral mediators, attended by victims and perpetrators both individually and with their families and community representatives (religious leaders, community leaders, traditional leaders, etc.), carried out voluntarily, with the aim of restoring victims, perpetrators and the community.

Mediation in the case of criminal can be done in the form of direct or indirect. Mediation conducted by mediators separately (both sides are not met in person). Aprofessional mediator or trained volunteers is involved. Mediation can also be carried out under the supervision of a criminal justice institution or an independent community-based organization and then the results of the penal mediation are reported to the criminal justice authority.

The relationship between penal mediation with restorative justice is that the teaching of restorative justice is the underlying doctrine penal mediation. Meaning of restorative justice (as a paradigm that embodies the mediation mechanism or penal mediation. Restorative justice approach is a paradigm that can be used as a frame of criminal case management strategy aimed at answering the dissatisfaction on the workings of the criminal justice system that exists today. Thus the idea of restorative justice can be applied to implement penal mediation mechanism.

Philosophical Basis of Penal Mediation in Criminal Case Resulutions:

Indonesia is a rule of law. This is the philosophical basis of the penal mediation in every criminal case resulutions. This is stated between the line of the Article 1 section (3) of the 4th Amendment of the 1945 Constitution of the Republic of Indonesia. Law is a mental infrastructure for the community to actualize human potential and social instincts in order to live in a safe and dignified manner. This is one of the postulate of the theory of Dignified Justice. In its implementation, the law must always run effectively. It dictates the the community to accept the law and implement it in the life of society, nation and state accordingly.

Therefore, the government has established various kinds of regulations to ensure legal certainty of the penal mediation. This is done considering that the government has an obligation to provide protection and and prosperity (happiness) to its citizens. With this there will be no problem that the achievement of legal objectives in the criminal justice system has only been legal certainty without paying attention to justice and legal benefits. In this Dignified Jurisprudence, one of the goals of law that is in accordance with existing values in Indonesia, mus bemaximally achieved.

This is slightly different with the associated legal objectives in general or universal proposeed by Gustav Radbruch. For Radbruch the priority of principles can be used in three somewhat antinomie basic values of law or as legal

objectives, each of which is justice, benefit and legal certainty for achieving the expected legal goals. Justice as the forst principle of priority put forward by Gustav Radbruch. It must first prioritize compare to the other such us to benefit and finally legal certainty. Ideally, efforts are made so that every legal decision, whether made by judges, prosecutors, lawyers or other legal officials, it is better if the three basic values of the law can be realized together, but if this is not possible, justice, benefit and legal certainty must be prioritized.

With the implementation of this priority principle, Indonesia system can remain upright spared from internal conflict that could destroy her. To achieve the goal of the law that creates the peace, tranquility and order in the community, especially the complex and multicultures societyas in Indonesia, then what are expressed is realistic if it adheres to the principle of priority casuistry that when the purpose of the law prioritized according to the cases faced by the community, so that in certain cases one of the three principles can be prioritized as long as it does not disturb peace and peace is the ultimate goal of the law itself.

Thus, if it is associated with penal mediation, the three values in the legal objectives (justice, benefit and legal certainty) can be used as a philosophical basis, and it is also, according to the theory of Dignified Justice as mentioned above is recognised in the Pancasila Legal System as mentioned in the Article 1 section (3) of the Indonesian Constitution stipulated above. In the application of penal mediation, so that the settlement of criminal cases through the mediation mechanism of penal can realize the three values in the legal objectives especially to achieve justice for the parties in litigation.

In addition, the values contained in Pancasila can be used as the basis for the need for a penal mediation mechanism in the settlement of criminal cases to be applied in Indonesia Criminal Justice System. In the rule of law concept juxtaposed with the basic idea of balance and a model of protecting that the development of a national criminal law system is part of the development of the national legal system and the national development itself.

The development of a national criminal law system requires a basic idea that starts from the idea of balance and the concept of protection. Indonesia as a Pancasila state, then any development of the legal system always leads to the basic idea of Pancasila as the basis for the national legal system and the balance of national development goals.

The basic idea of Pancasila should be understood as values that are reflected in the principles of Pancasila such as the ideas of the divine paradigm (believe in God Almighty), the humanistic paradigm, the national paradigm (unity), the democratic /democratic paradigm, and paradigm of social justice.

The guardianship model and the balance model are realistic models inspired by the idea of the personality of the Indonesian nation which originates from Indonesian nature and culture and is imbued with the noble values of Pancasila. According to BardaNawawiArief, this balance model or the idea monodualistik balances the various interests to be protected by the criminal law. Namely the balance between the public interest or the individual interest; between the protection or the interests of actors, victims; between "objective" andsubjectiveperson/inner/mental attitude) factors. Balancing the interests "daad-daderstrafrecht".

It also balancing between "formal" and material" criteria ; between legal certainty, "flexibility/elasticity, and "justice"; between national values and global/international/universal values.

Regarding the balance of interests model, the various interests that must be protected by criminal law must consider the interests of the state, the public interest, the interests of the perpetrators and the interests of crime victims. Meanwhile, the protection model can be said to be the purpose of criminal law to protect the interests protected by the criminal law.

The protection here includes efforts to create order, order, true peace, justice, welfare and social justice for members of the community as long as they do not violate their rights and harm others. Good law enforcement is when the criminal justice system works objectively and impartially and takes into account and considers carefully the values that live and develop in society as well as existing legal interests, both the interests of the state, the interests of the people, the interests of the perpetrators and the interests of the actors, victims and other interests.

The concept of shelter is as introduced by Sahardjo that match the conditions of society Indonesia is complex and multycultures. According to Sahardjo, the purpose of law in the concept of protection is to actively protect human

interests (to obtain humane social conditions in a process that takes place naturally) and to protect human interests passively (to seek to prevent arbitrary actions and abuse of rights).

Furthermore, this protection model is outlined in the concept of the objectives of Indonesian punishment as stipulated in Article 54 paragraph (1) of the concept of the 2008 Criminal Code, namely punishment aims to: a. prevent the committing of a criminal act by upholding legal norms for the protection of society; b. socialize the convict by providing guidance so that he becomes a good and useful person; c. resolve conflicts caused by criminal acts, restore balance and bring a sense of peace in society; d. relieve the guilt of the convict.

Implementation of the idea of balance and the concept aegis above relating to the mediation penal (as the philosophical basis is the implementation of the idea of balance-oriented criminal on protection and protection of society, victims and perpetrators (humanity) in addition to the idea of restorative justice as previously explained. While the values of philosophy that underlies the need for mediation penal which reflected da lam precepts of Pancasila is hardly reflected in all the precepts, but the most important and mainly lies in the paradigm ofdemocracy and justice paradigm included in values of society (nationalistic, democratic, justice sosial), and paradigms or human values (humanistic).

If it is related to the integrated criminal justice system in Indonesia, the concept of protection is also used in the implementation of the duties and functions of the police as the front line of criminal law enforcement in the integrated criminal justice system.

The police function as stipulated in Article 2 of Law Number 2 of 2002 concerning Polri is one of the functions of the state government in the field of maintaining public security and order, law enforcement, protection, protection, and services to the public. Meanwhile, the main duties of the National Police are regulated in Article 13 of Law no. 2 of 2002. Community policing can be used as the basis for joint efforts between the police and the community in solving problems that exist in society. So that community policing is a policing concepts that do not to fight crime, but to seek and eradicate the source of evil. The success of community policing is not only in reducing the crime rate, but the measure is when crime does not occur.

In carrying out law enforcement duties, especially in the settlement of criminal cases, of course the police will use penal or litigation facilities in the criminal justice system that has been carried out so far. In the framework of criminal law enforcement, the National Police as the front guard will enforce the law in accordance with the prevailing laws and regulations as in the existing criminal procedural law (KUHAP).

Here, of course, the National Police in the criminal law enforcement process must not deviate from the existing provisions on every criminal case it handles. Even though in reality there is a settlement of criminal cases by the police through a mediation process in criminal cases and other peace processes which are carried out without being continued through a court process as in the existing criminal justice system. However, the settlement of criminal cases through penal mediation has no legal basis in the Indonesian criminal justice system, exept in the Pancasila as the Highest Law.

The task of law enforcement and protection can be run simultaneously by the police with the provision of legal protection in the context of the completion of the criminal case, especially in the stage of investigation through mediation mechanism penal. Of course, in the settlement of criminal cases through penal mediation mechanism will involve various parties, both the offender, victim as well as the community or society. Furthermore, the government through the police and other independent parties functions as a mediator.

Mediation penal is mediation in criminal cases or completion of the criminal case through consultation with the assistance of a neutral mediator, was attended by the victims and the perpetrators either on their own or with their families and community representatives (religious leaders, community leaders, traditional leaders, etc.), which is done voluntarily, with the aim of recovery for victims, perpetrators and the community.

When associated with the values contained in Pancasila, it can be concluded that the value of deliberation in penal mediation is inspired and based on democratic values in the 4th Precepts of Pancasila which reads “democracy led by wisdom in deliberation/representative ”.

The goal of recovery for victims, perpetrators and society through the concept of restorative justice is values oriented towards protecting the community, victims and perpetrators (humanistic values) which are based on the 2nd Principle of Pancasila, which reads "fair and civilized humanity". While the legal objectives to be achieved through the mediation of penalis justice which is one of social justice that inspired/based on the principle of the 5th Pancasila reading social justice for all the people of Indonesia.

Regarding to justice, RifyalKa'bah stated that there are three forms of justice that must be realized: Legal Justice, Moral Justice and Social Justice.

Morality comes from various sources, the most important of which is religion. Social Justice as one of the foundations of the State (the fifth principle of Pancasila) is described in threeforms of social justice which include economic justice, people's welfare and justice that is realized by the majority of the developing people. Ideally, a decision should reflect these three forms of justice. State legal justice which represents moral justice and social justice that exists in Indonesian society. But the problem does not stop there, aligning the three forms of justice that a decision is not impossible, but in practice it is very difficult to realize.

Resolution of criminal cases out of court through mediation penal is in the realm of criminal law implications began to apply its dimensions are private to the domain of public law. On the dimension of penal mediation is achieved not formal justice or procedural fairness/bureaucratic via sub-system of criminal justice are regulated in a formal legal nature. However, what is wanted to be achieved in the concept of penal mediation is substantial justice. Given what has happened in the existing criminal justice system is that bureaucratic/procedural justice still dominates compared to the fulfilment of substantive justice for citizens.

Criminal law is one of the areas of the national legal system, which within its framework is part of the criminal justice system. Criminal law tends to complement other legal regulations in the limit of ultimumremidium. It is used in resolving a conflict arising from there is a shift in rights between communities. On the one hand, criminal law will protect a person's rights, but on the other hand it also limits and even seizes the rights of another person by using formal justice as described above.

Conclusion:-

The rationale for the concept of penal mediation in the settlement or resolution of criminal cases in the concept of the Indonesian criminal justice system in the future, especially at the stage of investigation has been the norm and the formal reality in the Pancasila Legal System.

The settlement of criminal cases which so far can only be resolved through penal means or litigation means, namely through a process starting from the stage of investigation, prosecution, examination in court and execution of sentences in prisons, can also be resolved through non-penal or non-litigation means. Settlement of criminal cases through non-penal means can be said to be the settlement of criminal cases out of court, meaning that settlement of criminal cases is carried out without going through the stages of examination in court. However, the settlement of the case is still possible during the investigation and prosecution stages. Even the settlement or resolution of any some criminal case can take place before an examination is carried out in court, but it must be legalised by the Court. This is the genuine penal mediation as an alternative resolution in the indonesian criminal justice system the restorative justice perspective in the Pancasila Legal System.

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