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Penal Mediation: Criminal Case Settlement Process Based on the Local Customary Wisdom of Dayak Ngaju

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Abstract *Penal mediation has been a longtime process of criminal settlement used in the Ngaju Dayak indigenous people in Kalimantan. They used the Belom Bahadat philosophy as a form of reform in the field of criminal procedural law stemmed from the politics of criminal law which makes customary law a part of national criminal law. This article is aimed to analyze the concepts of penal mediation in Indonesia and from the international law perspectives; and the settlement process with Belom Bahadat philosophy-based penal mediation in the Dayak indigenous community and its future use in the national criminal procedural law. This qualitative research applied a sociological juridical approach and utilized primary data obtained from interviews with Dayak traditional elders, secondary data comprising customary peace decisions obtained from Dayak customary institutions, and multidisciplinary approach from international law of penal mediation to uphold the strong concept of penal mediation. The results shown that restorative justice is one of the*

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uniqueness in penal mediation internationally, especially in Germany, Spain, and Indonesia. Furthermore, the use of penal mediation in Dayak community is based on the 96 Articles of the Tumbang Anoi Peace Agreement that has existed since 1894. During a settlement, the penal mediation model applied in the Dayak people can be divided into the Victim Offender Mediation model, as well as Family and Community Group Conferences. Consequently, the formulation of this procedure is expected to be a study material in the renewal of criminal law legislation, specifically the Criminal Procedure law provisions in Indonesia.

Keywords Penal Mediation, Local Wisdom, Ngaju Dayak Customs

1. Introduction

Penal mediation is an effective and efficient way to settle criminal cases, is part of Indonesia's culture, and is thick with various influences. A high number of court cases exist, along with a lack of speed in processing them are due to scarcity of time, with the fact that many are low cost, and can be resolved out of court to reduce accumulation[1]. These considerations have led to the emergence of settlements using penal mediation based on restorative justice.

The concept of solving criminal cases in Borneo uses restorative justice-based penal mediation. This is a process where the parties in a lawsuit, including the offenders, victims, and related communities, jointly settle the cases to accommodate the interests of all involved[2]. It is also considered an appropriate formula to protect the rights of victims and obtain support from representatives[3]. Penal mediation facilitates the perpetrator and the victim to communicate with the

[1] Seyyed Ali Marashi, "The Role of Penal Mediation in Dispute Settlement," *European Journal of Social Sciences Studies* 3, no. 1 (2018): 175.

[2] Lieve and Maria Bouverne-De Bradt, "Victim–Offender Mediation as a Social Work Practice," *International Social Work* 52, no. 2 (n.d.): 182.

[3] Christa Pelikan, "Balancing the Debate: On the Professionalisation and Victim Orientation in Restorative Justice," *The International Journal of Restorative Justice* 3, no. 2 (2020): 298.

help of a neutral third party. The needs of the litigants are accommodated, which are the victims attaining his desire, and the perpetrator possessing his actions accountably[4].

Since the late 1990s, several international and supranational organizations have pushed for further development of victim-offender mediation (VOM) and other restorative justice practices. The most important international penal mediation instrument for VOM implementation is Recommendation No. R (99) 19 of the Council of Europe Concerning Mediation in Penal Matters, adopted in September 15, 1999. This implementation was performed in 1999 by the European Forum for Victim-Offender Mediation and Restorative Justice and involved in establishing additional research and experimental agreement for this mediation process by the European Union Commission[5].

Indonesia is yet to set details concerning the process of resolving criminal cases via penal mediation based on the living law and restorative justice. The provisions regarding this law should correspond with the values contained in the *Pancasila*, human rights, and general principles recognized by the people of nations[6]. Meanwhile, the absence of penal mediation rules, according to local wisdom, led the indigenous people of Dayak, Borneo City, to form their customary institutions through Regional Regulation Number 16 of 2008. Borneo Islands are full of customs in the form of meaningful symbols, including the *Batang Garing Belum* (Tree of Life or Humanity). This symbol is equipped with *Dandang Tingang,* which means caring for humans, preserving moral behavior, or humanizing people. The legal phenomenon existing in the Dayak community, for example, is related to the *Belom bahadat* or customary life, which applies *singer* or fines as a

[4] Groenhuijsen MS., "Victim-Offender Mediation: Legal and Procedural Safeguard: Experiments and Legislation in Some European Jurisdictions," in *Victim-Offender Mediation in Europe*, The Europe (Leuven: Unknown publisher, 2000), 69–82.

[5] Ivo and Jolien Willemsens Aertsen, "The European Forum for Victim–Offender Mediation and Restorative Justice," *European Journal on Criminal Policy and Research*, 2001, 292.

[6] Cahya Wulandari, "Penyelesaian Perkara Pidana Melalui Mediasi Penal: Access To Justice Di Tingkat Kepolisian," *Jurnal HUMANI (Hukum Dan Masyarakat Madani)* 8, no. 1 (2018): 91.

form of compensation. Consequently, the Tumbang Anoi Peace Agreement 1894 became the basis for penal mediation, and a fairly well-known case is the trial of *Dayak Maniring Tuntang Menetes Hinting Bunu* against the *Thamrin Amal Amagola*.

According to the agreement, the offenders must take full responsibility for the mistakes and compensate the victim. After the victim apologizes, their situation must be restored by the offender, who must be aware of the mistakes that were made and feel grateful for the apology[7].

Consequently, this research aims to uncover the existing laws in the community, alongside the customary regulations that are firmly adhered to, obeyed by all indigenous people, and bind violators outside the community. After the introduction, penal mediation based on local Dayak customs will be discussed and the process of resolving criminal cases described. Furthermore, this research seeks to find the right concept of penal mediation that corresponds with Indonesian culture, while the last part comprises a conclusion from all the previously stated discussions and analyses.

2. Method

This research discusses the use of penal mediation based on local Dayak customs in Palangka Raya City and the model chosen and applied by the indigenous people during the settlement of criminal acts. Meanwhile, a sociological-juridical approach with qualitative research type was employed. The activity plan began with a data collection of the written rules owned, the customary decisions issued by the National Dayak Indigenous Peoples (MADN), and was supported by interviews with the traditional elders and indigenous apparatus.

[7] Umi Rozah, "Contribution of Restorative Justice in Baduy's Culture Criminal Justice System Reform," in *The First International Conference on Islamic Development Studies 2019* (Bandar Lampung, 2019), 4–7.

3. Result & Discussion

The discussion of penal mediation based on the local wisdom of Dayak customs is inseparable from the enforcement of customary law in Indonesia. Subsequently, the history of the country's Criminal Code enactment entails the post-colonial period events 1940 to 1990, and the Dutch colonial laws for all groups without exception, including Indigenous and Eastern Foreigners [8]. The customary law, which was operational in Indonesia since 1595, was changed to the Dutch criminal law from January 1, 1867, with the arrival of these foreigners (*Wetboek van Strafrecht voor European*). For non-Europeans, however, W*etboek van Strafrecht voor Inlander* began to apply from January 1, 1873, using the concordance principle, with little differences in the European law. After Indonesia's independence in 1945, there was a subsequent change with the issuance of Law Number 1 of 1946, known as the Criminal Code[9].

The Criminal Code/WvS was prepared based on the concordance principles of the criminal law applicable to the Dutch in Article 75, paragraph 1 R.R, later included in Article 131 I.S. At that time, the foreigners did not have their National Criminal Code, as they used the French Penal Code. However, they codified the national criminal law in 1881, according to the concordance principle, and considered the adjustment of *W.v.S voor Europeanen* (W.v.S E), *W.v.S voor Inlanders en daarmedegelijkgestelden* (W.v.S. Inl.), and the codification of the Dutch national law necessary. Although the criminal law codification of the Dutch East Indies was adjusted and planned for each group, particularly *Bumiputera* and Europe, this had changed because the Minister of Colonies, Idenburgh, made a legal unification. This unification, which applied to all population groups, was later promulgated successfully in Indonesia by W.v.S v.N.I and became effective on January 1, 1918[10].

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[8] Soetandyo Wignjosoebroto, *Dari Hukum Kolonial Ke Hukum Nasional* (Jakarta: Raja Grafindo Persada, 1995).

[9] Neni Sri et.al Imaniyati, *Pengantar Hukum Indonesia Sejarah Dan Pokok-Pokok Hukum Indonesia* (Jakarta: Sinar Grafika, 2018).

[10] Barda Nawawi Arief, *Pelengkap Hukum Pidana I* (Semarang: Pustaka Magister Semarang, 2015).

Also, regulations related to criminal law during the colonial period were enforced based on Presidential Regulation Number 2 of 1945, followed by the issuance of Law Number 1 of 1946, which provided boundary signs in terms of implementation. Meanwhile, this law must remain subject to the Indonesian national legal system, as follows: [11]

a. According to Presidential Decree No.2 / 1945: "as long as it does not contradict the Constitution"
b. According to Law No.1 / 1946:
    1) Wholly or partly unworkable
    2) Contrary to the position of Indonesia as an independent country
    3) Has no more meaning

The enforcement is based on Article II of the Transitional Rules of the 1945 Constitution before amendments. This Transitional Regulation is intended to avoid a legal vacuum, meaning the existing regulations during the colonial era still apply. However, their enforcement must be adjusted to Indonesia's position as an independent state and within limits, providing that they do not conflict with the 1945 Constitution. Therefore, the enforcement of criminal laws should adapt to the culture of the Indonesian nation.

Customary criminal law concerns acts that violate legal regulations, as well as the norms of morality, religion, and courtesy, causing shocks that disturb the balance of society (Jaya, 2005). According to Widnyana (2013), it is the unwritten, original law of Indonesia, containing religious elements, which the community continuously follows and adheres to. Therefore, violations of this law result in disruption of the cosmic balance, cause shocks in the community, and lead to a customary reaction or sanction through associated officials.

This criminal law is resolved through related institutions in each community, and customary courts are known by the indigenous peoples for resolving cases that occur. Several courts are scattered throughout Indonesia, including the Peaceful or Gampong Court in Aceh, the National Dayak Adat Council in Central

[11] Barda Nawawi Arief, *Reformasi Sistem Peradilan (Sistem Penegakan Hukum) Di Indonesia* (Semarang: Badan Penerbit UNDIP, 2017).

Kalimantan, the Customary Court in Papua, and the Nagari Adat Court in West Sumatra. Conversely, the tradition implicated in local cases involves conflict resolution, for example, *Dalihan Na Tolu*, *Rumah Betang*, and *Menyama Braya* involve the Tapanuli, Central Kalimantan, and Bali communities, respectively. *Saling Jot* and *Saling Pelarangan* exist in NTB, while *Clan Selupu Lebong* Customary Court is present in Bengkulu [12]. The customary judiciary is an alternative settlement for cases that occur in certain indigenous communities to restore the balance of nature, society, and the surrounding environment, yet disturbed by crime[13].

Citing Von Savigny's opinion, there is an organic relationship between the law and authenticity of a nation's character, which causes a tight integration. This relationship prevents the law from being separated or standing alone outside of the characteristics of a people[14]. Based on the provisions in Article 18 B paragraph (2) of the 1984 Constitution of the Republic of Indonesia, there is recognition and respect for the traditional rights of existing communities that practice customary law. According to Ter Haar, customary law is an entire regulation formulated as decisions of legal functionaries, has authority and influence, and is fulfilled wholeheartedly in its implementation[15]. Soepomo also stated that it lives – in line with the existing in society – and continues to develop and grow with life[16].

Subsequently, the local wisdom of indigenous peoples can apply by adhering to the customary laws in a particular community. Customary criminal law is an unwritten source of criminal law, is the basis for related case settlements, serves as a guideline, and remains valid in resolutions, as considered fair by the people. This is part of its source as an unwritten form of law and extension of the principle

[12] Herlambang P. Wiratraman, "Perkembangan Politik Hukum Peradilan Adat," *Jurnal Mimbar Hukum* 30, no. 3 (2018): 498.

[13] Yance Arizona, "Kedudukan Peradilan Adat Dalam Sistem Hukum Nasional," 2013.

[14] Satjipto Rahardjo, *Hukum Dan Masyarakat* (Bandung: Angkasa, 1980).

[15] Sunarjati Hartono, *Kapita Selekta Perbandingan Hukum* (Bandung: Citra Aditya Bakti, 1991).

[16] Soepomo, *Bab-Bab Tentang Hukum Adat* (Jakarta: Pradnya Paramita, 1989).

of legality, which includes teachings against formal and material law[17]. According to Hilman Hadikusuma, it is a living law, continue to exist, is civilized as long as humans, and cannot be abolished by statutory regulations, as it is essentially closer to anthropology and sociology[18]. Therefore, it is part of the customary law that applies in certain communities.

In Dayak, customary law was used in the *Tumbang Anoi* Peace Agreement 1894. Meanwhile, the process of resolving criminal cases carries the values of the *Belom Bahadat* philosophy as the basic principle for these Indigenous people. This is in line with the values contained in *Pancasila,* including those of God, the horizontal relationship of humans, alongside deliberation and consensus. It also involves the values of peace between parties to break the chain of revenge and justice for the involved people and society.

The process of resolving criminal cases, which prioritizes deliberation, peace, and social justice based on Divinity, as stated in the values of *Pancasila,* is a form of penal mediation. Subsequently, it is executed to provide restorative justice and aimed at accommodating the wishes of the parties involved in a case to ensure that they realize peace in the process of resolution.

The main instrument is the Explanatory Memorandum to the Council of Europe Recommendation concerning Mediation in Penal Matters. This document stated, "Mediation in penal matters is a process whereby the victim and offender are voluntarily enabled to participate in the resolution of matters arising from the crime through the help of an impartial third party or mediator." According to this definition, mediation in Europe for criminal cases has been performed by involving law enforcement officials and prioritizes the active participation of the litigants. During the process, victims and offenders are actively participated in

[17] Ani Triwati, "Hukum Pidana Adat Sebagai Sarana Mewujudkan Nilai Keadilan Pancasila," in *Revitalisasi Hukum Pidana Adat Dan Kriminologi Kontemporer* (Yogyakarta: Genta Publishing, 2018), 4–5.

[18] Hilman Hadikusuma, *Hukum Pidana Adat* (Bandung: Alumni, 1979).

solving problems arising from crimes through the help of third parties or impartial mediators[19].

Furthermore, penal mediation is defined as the practice of "seeking solutions through third-party intervention freely negotiated between parties to conflicts arising from a violation." For this process to occur, at least three conditions must be met, namely the existence of a material crime through a complaint, clearly identified parties, and their agreement to resolve the conflict amicably. Therefore, penal mediation should not draw material from a case classified by a lack of identification of the offender and/or inadequate characterization of the offense[20].

Correctly conducting a restorative justice-based mediation positively impacts the relationship between the parties, psychological strengthening of victims, and rehabilitation of offenders. Also, volunteerism and confidentiality mean that mediation can achieve impossible events from court proceedings. However, the mediator must ensure that the victim's participation is personally desired and not solely because of an agreement with the offender's request [21].

In addition, penal mediation opens a compromise process between the victim and the offender in the presence of a third person called a mediator to resolve disputes over the crime[22]. Consequently, the results showed that compared to official judicial authorities, people have more trust in *penatua* or customary elders and those that resolve disputes and withdraw their rights. Penal mediation is a very effective method for the settlement of disputes and the realization of the parties' rights. It can also be considered as one of the main weapons of the provincial judicial authorities, helping with the mitigation and reduction in the

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[19] Groenhuijsen M.S., *Victim-Offender Mediation : Legal and Procedural Safeguard : Experiments and Legislation in Some European Jurisdictions* (Leuven: Unknown publisher, 2000).

[20] Paul MBANZOULOU, *La Mediation Penale* (Paris: L'Harmattan, 2002).

[21] Olga Dominika Bek & Anna Jaworska-Wieloch Sitarz, "Mediation and Domestic Violence: Theoretical Reflection on the Polish Background," *International Journal of Criminal Justice Sciences (IJCJS) – Official Journal of the South Asian Society of Criminology and Victimology (SASCV* 13, no. 2 (2018): 361.

[22] Seyyed Ali Marashi, "The Role of Penal Mediation in Dispute Settlement." *European Journal pf Social Sciences Studies*, 3 (1) (2018), 175

volume of cases [23]. Meanwhile, the criminal case settlement model applies the principle of case handling, including conflict management, process orientation, informal proceeding, as well as active and autonomous participation.

A. Settlement of Criminal Cases Based on Local Dayak Customary Wisdom

The actual legal fundamentals lie in the community's access to the basic fundamental rules that authorize certain people or groups to make laws. Therefore, the legal proposition is not solely based on the orders of authorities but more fundamentally on conventions that represent society's acceptance of the rules scheme that empowers a person or group to create laws [24].

Restorative justice-based mediation conducted correctly will positively impact the relationship between the parties, psychological strengthening of victims, and rehabilitation of offenders. Volunteerism and confidentiality mean that mediation can achieve impossible goals from court proceedings. However, the mediator must ensure that the victim participates in the mediation due to a personal desire and not solely because of an agreement with the offender's request[25]. Restorative justice began with Howard Zehr's work in 1990 on dispute resolution for victims and community satisfaction. This idea does not abandon the concept of punishment, which is applied as a tool to achieve goals and restore relations between parties and not an objective[26].

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[23] Seyyed Ali Marashi, "European Journal of Social Sciences Studies," *European Journal of Social Sciences Studies* 3, no. 1 (2018): 179.

[24] Ronald Dworkin, *Law's Empire*, eleventh (United States of America: Belknap press of Harvard University Press, 2000).

[25] Sitarz, O.D.B. & A.J.W. "Mediation and Domestic Violence: Theoretical Reflection on the Polish Background." *International Journal of Criminal Justice Sciences (IJCJS) – Official Journal of the South Asian Society of Criminology and Victimology (SASCV*, *13*(2) (2018): 361.

[26] Andrea & Tomas Gabris Kluknavska, "Criminal Law Between The Capitalist and Socialist Paradigm?," *Russian Law Journal* 5, no. 4 (2017): 66.

This form of settlement has several advantages, including saving time when compared to the judicial process, effectiveness, and efficiency while still realizing justice and legal certainty for the parties involved[27]. Meanwhile, the criminal case settlement model applies the principle of case handling, including conflict management, process orientation, informal proceeding, as well as active and autonomous participation.

Based on the results, several cases entered as criminal acts employed the settlement process using the customary local wisdom of Ngaju Dayak listed in the Tumbang Anoi Peace Agreement 1894. The resolution process is performed to make peace between the litigants, meet the needs of the concerned parties, restore the balance of the cosmos in society, and prevent revenge. Existing cases include defamation, abuse, sexual harassment, domestic violence, traffic accidents, land burning, and adultery crimes, all of which were resolved through amicable channels between the litigants. Their resolution involved the assistance of the Mantir Let Peace of Custom, Damang, the Customary Leader, and the Chairman of the Dayak Customary Council, depending on the level at which the case was resolved.

During the case settlement process, the Customary Leader acts as an impartial mediator and accommodates the parties' needs by basing the settlement on the elimination of corporal punishment for the perpetrator. The customary law upholds peace in the resolution of cases by using traditional ceremonies to deter revenge, for example, the Manetes Hinting Bunu ceremony was utilized during the Thamrin Amal Tomagola case to end all disputes with the Dayak Indigenous peoples. Traditional peace ceremonies and customary obligations should be fulfilled through the payment of customary fines (*singer*) by the Infringer of Customs. Likewise, the customary settlement process in other cases concludes with a traditional peace ceremony and the payment of customary obligations or

[27] Koerniawaty Sjarif, "The Role of Penal Mediation To Resolve Criminal Acts That Cause Harms to Others In Indonesian Military Court," *Journal of Legal, Ethical and Regulatory* 22, no. 2 (2019): 2.

fines to eradicate grudges between the parties. This is consistent with the meaning of the *Belom Bahadat* philosophy of the Dayak Indigenous people.

Consequently, the process of resolving crimes in the Ngaju Dayak Indigenous tribe aims to reconcile the litigants, avert revenge, and restore the conditions of the parties to their original state before the occurrence of a case. It is in line with the concept of restorative justice, which aims to return the litigants, namely the perpetrators and victims, to the positions before the occurrence of the case. This aim is achieved by the provision of compensation from the perpetrator to the victim or other desired forms of reparation to facilitate the perpetrator's entry back into society.

Restorative justice is undoubtedly successful in society, as people recognize the benefits of nonviolent conflict resolution[28]. Also, it should completely voluntary, without any element of coercion, and should be a service based on request and not provided automatically[29]. The settlement of criminal cases through penal mediation based on local wisdom is closer to the realization of restorative justice. This process is similar to providing compensation for the victim, repairing the damage, and facilitating the regretting offender, who is more focused on restoring the victim's situation. Offenders are motivated to be aware of the mistakes they committed and understand the consequences[30]. With compensation, they accept the wrongdoing, show general respect for the rights of others and permanent norms, and demonstrate the difference between their wrong actions and their person.

The orientation of the settlement in the process of resolving criminal cases that aim at restorative justice is to reconcile the situation accompanied by the

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[28] Dieter Rössner, "Mediation as a Basic Element of Crime Control-Theoretical and Empirical Comments," *Buffalo Criminal Law Review*, 1998, 214.

[29] Adam Crawford & Emily Gray Shapland, Joanna & Daniel Burn, "From Victimisation to Restorative Justice: Developing the Offer of Restorative Justice," *The International Journal of Restorative Justice* 3, no. 2 (2020): 195.

[30] Donald H.J. Hermann, "Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the Search for Justice," *Seattle Journal for Social Justice* 16, no. 1 (2017): 81.

awareness and conviction of the parties in social life [31]. Discussions between the parties demand an active role from the perpetrator and the victim, alongside criminal justice officials as representatives of society or the state. This is a form of penal mediation that is oriented towards resolving community cases, such as family group conferences[32].

Finally, an apology should be offered without defense, with a key aspect being the vulnerability involved. Effective apologies are acceptable, but as Erving Goffman (1971) stated, forgiveness may be asked for, but it may be offered or rejected. Although the wrongdoer can admit to the mistake, it does not guarantee the acceptance of the apology by the offended party or victim, who can ignore or punish the offender for the crime. However, the victims occasionally feel that the violation, though acknowledged, is incalculable, not great, simple, and forgivable[33].

In 1999, the German Criminal Procedure Code amended Articles 155 a and b to increase the use of VOM regulations in daily criminal justice practice, hence, prosecutors and judges are required to consider the use of VOM in appropriate cases. They are expected to instruct victims and/or defendants about relevant possibilities in cases where the offenders do not appear to have sufficient knowledge of what to initiate. "Should," according to German legal terminology, is an obligation, and this regulation is only canceled if and when the victim refuses the VOM offer. With Article 155b, the exchange of data and information between the court and the personal VOM-project has a strong legal basis in terms of privacy and data protection laws. Although there is no direct effect of the law on the number and quality of cases in currently available data, support with legal approval from VOM should not be underestimated. Consequently, the most

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[31] Kristian and Christine Tanuwijaya, "Penyelesaian Perkara Pidana Dengan Konsep Keadilan Restoratif (Restorative Justice) Dalam Sistem Peradilan Pidana Terpadu Di Indonesia," *Jurnal Mimbar Justisia* 1, no. 2 (2015): 592–607.

[32] Aertsen, "The European Forum for Victim–Offender Mediation and Restorative Justice."

[33] Carl D. Schneider, "What It Means to Be Sorry: The Power of Apology in Mediation," *Conflict Resolution Quartelty* 17, no. 3 (2000): 267.

important factor for development appears to be the trusting relationship between prosecutors, judges, and mediators [34].

B. The Penal Mediation Model of the Ngaju Dayak Indigenous Peoples

Legal positivism has rigidly placed the law as a line of words in articles that should be read textually without adjusting the context to the situation and conditions of society. The positivistic view results in law enforcement officers that depend solely on statutory regulations without exploring social values. In fact, the community frequently considers the law unable to settle cases fairly due to its static nature, which prevents its concurrent existence with the rapid developments in society [35]. Based on observations and the empirical studies of habits, Ehrlich (1862-1922) developed a perspective on the law as a rule of behavior in accordance with social norms that exist in society and not merely follow the official state law [36]. Laws are based on recognized regulations as well as ignored, bypassed, and even unapproved legislation[37].

Concerning The Living Law, Brian Tamanaha, in a paper entitled *''Menyelamatkan Ehrlich dari Living Law''* (Rescuing Ehrlich from Living Law), argued that Ehrlich's conception of the law of life led him into a conceptual quagmire [38]. This investigation concluded that law and justice cannot simply be separated and relate to society through the concept called living law, which is

[34] Arthur Hartmann / Hans-Jürgen Kerner, "Victim-Offender-Mediation in Germany," *E-Journal ERCES –Online Quarterly Review of Crime, Ethics and Social Philosophy* 1, no. 2 (2004).

[35] Winarsih & Cahya Wulandari, "Relevansi Yuridis Mediasi Penal Dalam Penyelesaian Tidak Pidana Pada Masyarakat Suku Samin," *Indonesian Journal of Criminal Law Studies (IJCLS)* 1, no. 1 (2018): 19.

[36] Marc Hertogh, "Rescuing Living Law From Jurisprudence," *Jurisprudence: An International Journal of Legal and Political Thought 1* 1 (2012): 7.

[37] David Nelken, "Eugen Ehrlich, Living Law, and Plural Legalities," *Theoretical Inquiries in Law* 9, no. 2 (2008).

[38] Brian Z. Tamanaha, "A Vision of Social-Legal Change: Rescuing Ehrlich from Living Law," *Law & Social Inquiry*, 2011, 315.

studied by social scientists and legal theorists who reveal the weaknesses of state law.

Meanwhile, Paul McCold introduced the concept of "harmony for social justice," that "every country and culture can take the principle, make it theirs, and discover their historical roots that have restorative principles at the basis"[39] (McCold, 2005). Penal mediation is an old practice that has become a tradition in Sulawesi, West Sumatra, Papua, Bali, East Nusa Tenggara, West Nusa Tenggara, and Aceh communities[40]. The settling of criminal cases using customary law is also widely practiced in the Tengger, Baduy tribes, alongside the Dayak community, of which Borneo Island, commonly referred to as Kalimantan, has the largest number in the country. Customary law is a legal rule or provision obeyed, born, and developed in a community that is not a product of state institutions and is mostly in the form of unwritten laws[41].

The process of resolving cases within the Ngaju Dayak Indigenous people through Dayak customary institutions is legally contained in Central Kalimantan Provincial Regulation Number 10 of 2010 concerning Amendments to Central Kalimantan Province Regional Regulation Number 16 of 2008 concerning Dayak Customary Institutions in Central Kalimantan. Sociologically, the obtained cases show that customary criminal law is inseparable from the living law and is still obeyed by the community, where violations of these regulations are considered to disturb the balance in society[42]. This customary law is local and traditional and serves as a guide for certain ancient communities[43]. Meanwhile, the traditional

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[39] Paul McCold, "The Eleventh United Nations Congress on Criminal Prevention and Criminal Justice" (Bangkok Thailand, 2005).

[40] Lilik Mulyadi, "Mediasi Penal Dalam Sistem Peradilan Pidana Indonesia: Pengkajian Asas, Norma, Teori Dan Praktik," *Jurnal Yustisia* 2, no. 1 (2013): 5.

[41] Sahrina Safiuddin, "Hak Ulayat Masyarakat Hukum Adat Dan Hak Menguasai Negara Di Taman Nasional Rawa Aopa Watumohai," *Jurnal Mimbar Hukum* 30, no. 1 (2018): 66.

[42] Kastubi, "Tindak Pidana Adat 'Logika Sanggraha' Di Bali," *Jurnal Spektrum Hukum* 15, no. 1 (2018): 114.

[43] Galuh Faradhilah Yuni Astuti, "Relevansi Hukum Pidana Adat Dalam Pembaharuan Hukum Pidana Di Indonesia," *Jurnal Pandecta* 10, no. 2 (2015): 200.

rights of indigenous peoples are recognized in Article 18 B of the 1945 Constitution.

Also, it is often used in the settlement of cases in local indigenous communities, apart from formal justice. Customary justice is an alternative mechanism that offers many benefits, especially for local cases related to violations of certain laws, and is socially capable of providing a substantive sense of justice, tranquility, peace, and order[44]. The settlement between the parties is based on the principle of restorative justice, involving an agreement with traditional legal characteristics, alongside moral and religious values, through customary courts[45]. According to Damang Simpei Ilon, a member of the National Dayak Council of Palangka Raya City, settlement of cases through this method via customary mechanisms is considered more effective and efficient and provides justice as desired by the involved parties.

The settlement of minor criminal cases does not reach the tribunal court proceedings but is performed through the mediation process in the community. Meanwhile, the penal mediation model involved in criminal case settlements for the Dayak indigenous people of Palangka Raya City is divided into two (2) types. First, the Victim-Offender Mediation, which involves the offender, victim, and customary stakeholders as mediators in the completion process. Second, family and community group conferences, comprising the parties mentioned above, as well as the families of the victims or offenders. The second model is usually used for cases with certain characteristics, for example, when the offender or victim is still a minor, or a woman, or a child that experienced trauma as a result of the crime. It is also commonly used to solve cases involving dead victims, such as murder cases. Basically, the model used in the settlement of criminal cases is not a

[44] Herlambang P. Wiratraman, "Perkembangan Politik Hukum Peradilan Adat," *Jurnal Mimbar Hukum* 30, no. 3 (2018): 501.

[45] Nur & Rahmi Dwi Sutanti Rochaeti, "Kontribusi Peradilan Adat Dan Keadilan Restoratif Dalam Pembaruan Hukum Pidana Di Indonesia," *Jurnal Masalah-Masalah Hukum* 47, no. 3 (2018): 198.

significant problem, as long as the agreement reached is accepted by the involved parties.

This penal mediation settlement model is in accordance with the concept in the new Draft Criminal Code in Indonesia. Article 2 mentions a law that lives in society as one of the sources of law, which is explained in this research to be customary criminal law. Following the idea of balance in the purpose of punishment, it is aimed at fostering the perpetrators and liberating the guilt. Also, the law strives to prevent crimes from being committed by enforcing the law, resolving conflicts caused by these acts, restoring balance, and bringing a sense of peace to society[46]. The purpose of punishment is to guide perpetrators and diminish guilt as a preventive measure for committing a crime, restore the situation, and re-establish peace and balance in society[47]. Consequently, the use of penal mediation is contained in Law Number 11 of 2021 concerning Amendments to Law Number 16 of 2004 concerning the Prosecutor's Office of Indonesia.

4. Conclusion

The settlement of criminal cases in Dayak Indigenous Community, Central Kalimantan, is performed through customary institutions at the subdistrict/village (Mantir Let Adat), Regency (Damang Customary Leader), City (Dayak Customary Council), and provincial levels (National Dayak Customary Council). The process is based on local wisdom as stated in the 1894 Tumbang Anoi Peace Agreement, which consists of 96 articles filled with the philosophy of *Belom Bahadat* or customary life. In Indonesia, the existence of indigenous people and their traditional rights are recognized in Article 18 B of the 1945 Constitution.

[46] Adiansyah & Eko Soponyono Nurahman, "Asas Keseimbangan Dalam Rancangan Kitab Undang-Undang Hukum Pidana Sebagai Upaya Pembaharuan Hukum Pidana Yang Berkeadilan," *Jurnal Pandecta* 13, no. 2 (2019): 102.

[47] Ira Alia Maerani, "Implementasi Ide Keseimbangan Dalam Pembangunan Hukum Pidana Indonesia Berbasis Nilai-Nilai Pancasila," *Jurnal Pembaharuan Hukum* 2, no. 2 (2015): 334.

Meanwhile, the customary law enforced in Central Kalimantan applies sociologically through norms or rules of behavior. It also applies juridically, based on the Regional Regulations of Central Kalimantan Province, Number 10 of 2010 concerning Amendments to Regional Regulation of Central Kalimantan Province, and Number 16 of 2008 concerning Dayak Customary Institutions in Central Kalimantan. Several criminal cases are resolved through customary institutions by ensuring the concept of peace between the parties, restoring the original condition and balance, and deterring revenge. During the criminal case settlement process, two (2) penal mediation models are used by the indigenous peoples, namely Victim-Offender Mediation, alongside Family and Community Group Conferences. These models involve the role of the offender, victim, family, or other community members, entail giving sanctions of customary fines or *singer*, and demand a feeling of guilt in the offender. Furthermore, penal mediation based on the local wisdom of Dayak customs corresponds with the concept in the new Draft of Criminal Code in Indonesia, which discusses the idea of balancing and avoiding revenge between parties in litigation. Therefore, further procedures related to the settlement of criminal cases through penal mediation should be formulated based on the legal culture of each indigenous Indonesian community as a form of renewal of the national criminal procedural law.

5. Declaration of Conflicting Interests

The authors state that there is no conflict of interest in the publication of this article.

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