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Penal Mediation in Settlement of Disputes of Hurt Dayak Ngaju Traditional Law

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Abstract

Penal mediation in the settlement of disputes regarding insults to the Dayak tribe under the customary law of the Ngaju Dayak as stipulated in the Tumbang Anoi Agreement of 1894. Meaning Penal mediation in the settlement of criminal cases of insulting the Dayak Ngaju customary law are (1) The implementation of penal mediation in the settlement of disputes over insulting the Dayak Ngaju customs is an effort to preserve culture through customary law owned by the Dayak tribe as stipulated in the Tumbang Anoi agreement of 1894, as for the procession settlement of insult disputes, namely by means of mediation between the perpetrator and the victim after it is decided by the damangan and (2) the decision by the customary institution addressed to the perpetrator can be in the form of Tandahan Randah, article 50 Singer Tandahan Randah (customary fines, haphazard accusations) is prohibited from insulting, demeaning , vilify or slander others; Sala Basa, article 63 Singer Karak Sirat Dahiang (traditional fines for destroying a good sirat or self-concept), are prohibited from mocking or destroying people's foreheads, and making people's hearts unhappy; Kasukup Singer Belom Bahadat, Article 96 Kasukup Singer Belom Bahadat (complement of customary fines for living with decency or ethics or high morals), belom bahadat is a principle of life for the indigenous Dayak Ngaju community which means living well in accordance with the rules and the truth. Penal mediation in the settlement of insult disputes through customary institutions is expected to be able to continue along with the times.

Keywords
penal mediation; dispute; humiliation; Ngaju Dayak customary law

I. Introduction

Settlement of insult cases can be resolved through customary law mechanisms without only having to be resolved by national law (criminal), as an alternative to customary law settlement this is very possible because long before Indonesia became independent each region or tribe in Indonesia already had its customary law. each, moreover it has been confirmed in Article 18 B Paragraph (2) and Article 28 I Paragraph (3) of the 1945 Constitution of the Republic of Indonesia, the more recognition of the existence of customary law in the 1945 Constitution of the Republic of Indonesia is then increasingly recognized. The Central Kalimantan Provincial Government issued Central Kalimantan Provincial Regulation Number 1 of 2010 concerning Amendments to Central Kalimantan Provincial Regulation Number 16 of 2008 concerning Dayak Indigenous Institutions in Central Kalimantan to resolve customary issues, this is a very clear and strong legal hierarchy, but who said According to Article 2 paragraph (3) of the Republic of Indonesia Law Number 48 Year 2009 concerning Judicial Power, it is stated that "all courts in the entire territory of the Republic of Indonesia are state courts which are regulated by law. The law", text and context in Law Number 48 of 2009 concerning

Judicial Power Article 2 paragraph (3) requires access to justice to be placed on the basis of legal centralism (Marc Galanter, 1993), this can be suspected of bringing a harbinger of death for a judiciary outside the jurisdiction of the state judiciary (Ahmad Ubbe, 2013). On the one hand, long before Indonesia's independence, each tribe already had customs, especially Dayak customary law with the concept of customary justice not violating and breaking through the judiciary as in the judicial law, because customs have cultural values and are carried out by themselves without entering the system structure in government organizations. However, it cannot be separated from the support from the central and regional governments and cannot be separated from the single diversity and legal sources such as Pancasila and the 1945 Constitution.

The process of settling the insult dispute in the Thamrin Amal Tomagola case uses customary courts, with the mechanism of the concept of penal mediation with the aim of resolving both side agreement. The Constitution of the Republic of Indonesia has recognized the existence of customary law in Indonesia, it does not mean that it recognizes the customary courts that have been known since Indonesia's independence. This condition has the potential to give rise to legal dualism or the legal system that applies in Indonesia, but what is interesting is that the traditional courts have the concept of penal mediation which is very different from general courts.

For this reason, it is necessary to find and discuss the concept of penal mediation in the settlement of insult disputes which are settled under the Ngaju Dayak customary law so that it is integrated with Article 18 B Paragraph (2) and Article 28 I Paragraph (3) of the 1945 Constitution of the Republic of Indonesia which recognize the existence of customary law.

II. Research Methods

Based on the problems studied, the empirical legal research method was used. The method used in this study is a descriptive qualitative research method, which is based on where the researcher is placed as the key instrument, by triangulation with the technique of checking the validity of the data by comparing the results of interviews with objects research or observational data.

III. Results and Discussion

3.1 Dayak Ngaju Customary Law as the Basis for Resolving Insult Disputes

The birth of Dayak customary law began with an association between Dayak indigenous peoples in Tumbang Anoi Village which gave birth to the 1894 Tumbang Anoi agreement as law for the Ngaju Dayak indigenous peoples in Kalimantan, in the implementation of dispute resolution for indigenous peoples, the chairman Adat uses customary justice as a means and legal basis for the imposition of punishment, adhering to the 1894 Tubang Anoi agreement which consists of 96 articles.

In the case of insults that were settled according to the Ngaju Dayak custom, the perpetrator was deemed to have violated the written Ngaju Dayak customary law which was formulated in the Tumbang Anoi agreement of 1894, namely, as follows:

1. *Tandahan Randah*, article 50 *Singer Tandahan Randah* (custom fines, gratuitous accusations) are prohibited from insulting, demeaning, vilifying or slandering other people;

2. *Sala Basa,* article 63 Singer Karak Sirat Dahiang (customary fines for destroying a good sirat or self-concept), prohibited from mocking or destroying people's foreheads, and making people's hearts unhappy;
3. *Kasukup Singer Belom Bahadat*, Article 96 *Kasukup Singer Belom Bahadat* (complete with fines for the custom of living with decency or ethics or high morals), Belom bahadat is a principle of life for the indigenous Dayak Ngaju community which means living well in accordance with the rules and the truth.

In carrying out customary institutions (kedamangan) in solving traditional problems in the province of Central Kalimantan, they usually use thehouse *betang* (traditional house) as a means of settlement to the decision on customary sanctions under the Ngaju Dayak customary law, this is clearly different from the general court process. more to penalization or punishment.

As one example, namely the existence of customary dispute settlements through a Dayak customary trial against Prof. Dr. Thamrin Amal Tomagola, a sociologist at the University of Indonesia, which was held on Saturday, January 22, 2011 at the Betang House in the city of Palangka Raya, and on November 14, 2020, the traditional peace process was conducted through a customary trial against Dimas N Hartono, the Executive Director of the Central Kalimantan Walhi, which was held at *Betang Harudut* , Palangka City. Raya. Against both, namely Prof. Dr. Thamrin Amal Tomagola and Dimas N Hartono the peace was settled by using Dayak customary law, where that day became a very important milestone in the history of the Dayak people and Prof. Dr. Thamrin Amal Tomagola and Dimas N Hartono himself. He brought Prof. Dr. Thamrin Amal Tomagola in front of the Dayak customary trial began with his statement when he became an expert in the immoral case of Nazriel Ilham, an artist of the Peterpan band at the Bandung District Court on Thursday, December 2, 2010. When Prof. Dr. Thamrin Amal Tomagola was invited by lecturers from the University of Palangka Raya to present the results of his research at the University of Palangka Raya, Prof. Dr. Thamrin Amal Tomagola answered "no time". This means that he views insults against an ethnic collective in this country as unimportant and there is no need to provide special time to resolve them, even though it can affect the indigenous peoples of Bumi Tambun Bungai, Central Kalimantan, this is the second form of insult. The third insult he did was when he hoped that the customary fine on him would not be too large because he was only a lecturer.

Peace through the Dayak customary trial against Prof. Dr. This Thamrin charity Tomagola was named the Dayakcustomary trial *Maniring Tuntang Manetes Hinting Bunulong-standing*, which literally means breaking thegrudge in the direction of peace towards a better direction between the Dayak people and the articles imposed on Prof. Dr. Thamrin Amal Tomagola was appointed by Mantir Hai (supreme judge) which consisted of Mantir-mantir from Central Kalimantan, South Kalimantan, West Kalimantan and East Kalimantan. A leader of the Dayak indigenous people, namely Dr. A. Teras Narang, SH, who at that time served as Governor of Central Kalimantan as well as President of the National Dayak Customary Council (MADN), this Ngaju Dayak Customary Court will be taken from the Dayak customary law agreed in Tumbang Anoi in 1894 which is accepted and applies to all Dayak Tribes throughout the island of Borneo including Sabah and Sarawak. In the Mantir Hai customary trial, they will hear the demands of theTeam *Jahawen* (six) consisting of Lukas Tingkes, Sabran Ahmad, Marthin Ludjen, Inun Maseh (late), Dr. Guntur Talajan and Dr. Siun Jarias (late).

Meanwhile, the bringing of Dimas N Hartono to the Dayak customary assembly started with his words which were written on social media on the Central Kalimantan Walhi account which Andre Elia let us pray for you to keep your health and sanity, the

article used the name of a person who was none other than Andri Elia, Chairman of the City Council Daily. Indigenous Dayak (DAD) Mambang I Tubil said that according to Dayak people the words or phrases "keep sanity" were someone who was affected by a mental disorder and then treated, but according to Dimas N Hartono, taking care of health and keeping sanity was once used by the Minister of Religion but there was no problem What appeared, Dimas N Hartono conveyed that there was no intention or desire, whether intentionally or unintentionally insulting or harassing other people, he intended to convey the intention to pray for each other and remind each other to always be healthy both mentally and physically especially in the midst of thepandemic *covid-19* such as recently.

Settlement by means of a Dayak customary trial against Dimas N Hartono through *Mantir Basara Hai was* carried out with the aim of *Mgettu Hinting Bunu* in the sense that prejudice or bad feelings about an event no longer existed, the traditional procession was led by Cardinal Tarung as chairman of Let Peace It is a custom where at the end of the trial both parties who disagree with each other feed *pulut* (glutinous rice) to each other as a symbol of re-gluing good relations, dividing the heart of a chicken as a symbol of uniting hearts, drinking water from one source as a symbol of the basic elements of life, wearing a traditional bracelet as a symbol of reminder in order to always keep their actions and words in the future, then they carry out a bargaining ceremony and end with a meal together.

3.2 Penal Mediation in the Settlement of Criminal Cases of Legal Insult to the Ngaju Dayak Adat

According to Muzlih MZ in Ridwan Mansyur (2013), Mediation is a process of settling the conflicting parties to reach to satisfy the conflicting parties to reach a satisfactory settlement through a neutral third party (the mediator). Sociocultural theory of mind developed by Vygotsky (1896-1934) argued that learner's complex forms of thinking have their origins in the learner's social interactions [through mediation] rather than in the learner's private explorations: A learner acquires new cognitive skills when receiving guidance from teachers or more capable peers (Sams in Ameri, 2020). Barda Nawawi Arief (2008) stated that Penal mediation is known as *mediation in criminal cases*, *mediation in penal matters*, *victim offenders mediation*, *offender victim arrangement* (English), *straf bemiddeling* (Dutch), *der Aubergerichtliche Tatausgleich* (Germany), *de mediation Penale* (France).

The ideas and principles of Penal Mediation are (Stefanie Tränkle, 2011):

1. (*Conflict Handling Conflict Handling*/*Bearbeitung Conflict*): The task of the mediator is to make the parties forget the legal framework and encourage them to be involved in the communication process. It is based on the idea that crime has created interpersonal conflict. That conflict is aimed at by the mediation process.
2. Process Orientation (Process Orientation): Penal mediation is more oriented to the quality of the process than results, namely making the perpetrators of criminal acts aware of their mistakes, resolving conflict needs, calming victims from fear and so on.
3. Informal Process (Informal Proceeding/Informalität): Penal mediation is an informal process, not bureaucratic in nature, avoiding strict legal procedures.

In the old paradigm that criminal cases cannot be resolved outside the court process, the practice of law enforcement in the settlement of criminal cases in Indonesia is in fact not infrequently resolved outside the court process in Indonesia, for example, through the discretion of law enforcement officers with a peace mechanism such as the Attorney General's Office as an attorney. dominus litis (case controller) has implemented restorative justice whose concept uses penal mediation in the settlement of criminal cases. This policy is contained in the Attorney General's Regulation Number 15 of 2020 concerning the

termination of prosecution, which allows public prosecutors to become facilitators to seek peace in certain criminal cases. also followed by the Supreme Court with the issuance of the Decree of the Director General of the General Judiciary Agency of the Supreme Court of the Republic of Indonesia Number: 1691/DJU/SK/PS.00/12/2020 concerning the Enforcement of Guidelines for the Implementation of Restorative Justice (*restorative justice*), in addition to national law. In this case, which adheres to restorative justice, indigenous peoples through their customary law also adhere to a penal mediation mechanism through Dayak customary law which is carried out by customary institutions in resolving cases, one of which is the case of insults such as in Central Kalimantan Province.

Restorative justice today is better known as *restorative justice* which is an approach in resolving criminal cases as a response to the criminal justice system which is considered less able to accommodate the aspirations of victims and perpetrators (Eva Achjani Zulfa, 2014).

The fundamental difference from this restorative justice approach is that when compared to the criminal justice system, this approach puts forward the concept of reconciliation and mediation as a mechanism for resolving disputes or conflicts in the event of a crime, something that has not been recognized in the criminal justice system.

The concept of restorative justice prioritizes improving the relationship between the victim and the perpetrator of a crime. With this concept, it is hoped that it can provide a solution in the settlement for perpetrators and victims. Some understandings of the concept of restorative justice include the following:

1. Understanding of criminal acts with restorative justice which will ultimately explain why in the criminal justice system criminal sanctions are always imposed as a deterrent effect, for example imprisonment, whereas in traditional courts sanctions can only be in the form of restoration of good name to victims who are harmed and to perpetrators are usually subject to sanctions by traditional elders and replace material losses to victims as an apology.
2. There is an alternative mechanism for arestorative justice approach *non-litigation* (better known in civil cases than in criminal cases) that involves the perpetrators and victims directly in the settlement of disputes that lead to peace.
3. The criminal law in general does not clearly regulate the legal force of the peace agreement between the perpetrator and the victim and the respective authorities of the sub-systems both within the criminal justice system (police, prosecutors, judges) and outside the criminal justice system. namely the community and customary institutions to apply a restorative justice approach in the event that there is a dispute that leads to a criminal act.

In the case of children themselves, what has been regulated in law number 11 of 2012 concerning the Juvenile Justice System, and since the issuance of the Decree of the Director General of the General Court of Justice of the Supreme Court of the Republic of Indonesia concerning the Enforcement of Guidelines for the Implementation of Restorative Justice (restorative justice) law enforcers such as the Police. and the Prosecutor's Office can apply restorative justice to criminal cases. Regarding the close relationship between businesses through the application of criminal law and non-penal efforts. Barda Nawawi Arief (1982) said that:

Thus the main problem is to identify and harmonize non-penal and penal activities or policies towards suppressing or reducing potential factors for the growth of crime. With this integral policy approach, it is hoped that *Social defense planning* will truly succeed.

Crime prevention and control must be carried out with an integral approach, there is a balance between penal and non-penal means. From the point of view of criminal politics,

the most strategic policy is through non-penal means because it is more preventive in nature and because the penal policy has limitations/weaknesses (Barda Nawawi Arief, 2001).

The most strategic non-penal efforts are all efforts to make society a social environment and a healthy (material and immaterial) social environment fromfactors *criminogenic*.

So it is necessary to explore and develop all the potential for community support and participation in an effort to streamline and develop extra-legal systems or informal and traditional systems that exist in the community (Barda Nawawi Arief, 2001).

Means non-penal covers an area of crime prevention*(crimeprevention)*is very broad and includes both policy (policy) or practice*(practice).*These policies vary from country to country in relation to the cultural, political and intellectual backgrounds of each society (Muladi, 1996).

Judiciary is used as *The First and The Last Resort* in dispute resolution. It is as if only the judiciary is considered capable of providing a fair solution. This situation requires us to look for other alternatives in resolving a dispute that is more beneficial to the 2 (two) disputing parties.

Mas Achmad Santosa (1995) stated that In the Indonesian context, the institutionalization and correction of ADR (more often known or used in civil cases) has various opportunities based on various supporting factors such as:

1. Political and cultural factors, confrontational and compromise values in the resolution of conflicts and disputes arise everywhere in Indonesia (especially in traditional societies).
2. Alternative Dispute Resolution (ADR) is not new; because its utilization, especially by the business community in Indonesia, has been done long ago through arbitration institutions.
3. Alternative Dispute Resolution (ADR) is not purely a concept of a foreign country or a developed country. Because for indigenous peoples in Indonesia, alternative dispute resolution has long been known, namely by using customary settlement mechanisms. In the settlement process which is usually led by traditional leaders or leaders, the disputing parties will be brought together to resolve the dispute based on the customary law of the local community.

Daniel S Lev in his review of the legal culture in Indonesia, stated that conflict resolution methods have their own characteristics due to the support of certain values, compromise and peace, which are values that have strong support from the community.

Law is a concretization of values formed from the culture of a society, because every society always produces culture, so law is always present in every society and appears with its own peculiarities.

Mechanism for resolving cases of humiliation under the customary law of the Ngaju Dayak is sufficient to use the concept of penal mediation, there is no need to use the customary justice mechanism, unless there are statutory provisions governing customary justice, this is in accordance with the theory of restorative justice.

IV. Conclusion

By looking at the philosophy of the principle of life belom bahadat as the basic principle of life of indigenous peoples in the province of Central Kalimantan, then the Dayak customary law contained in the Tumbang Anoi agreement of 1894 and from the aspect of the provisions of the articles in the 1945 Constitution of the Republic of Indonesia which recognizes the existence of customary law , then the authority or penal

mediation mechanism in the settlement of insult disputes can be carried out through customary institutions without having to continuously use the positive law of the general judiciary which is a burden to the state, but customary law settlements are only limited to resolving minor cases such as insult disputes. Penal mediation in the settlement of disputes over insults to the Dayak tribe under the customary law of the Ngaju Dayak as stipulated in the Tumbang Anoi Agreement of 1894. Meaning Penal mediation in the settlement of criminal cases of insulting the Ngaju Dayak customary law are (1) the implementation of penal mediation in the settlement of disputes on insulting Ngaju Dayak customs is an effort to preserve culture through customary law owned by the Dayak tribe as stipulated in the Tumbang Anoi agreement of 1894, as for the procession settlement of insult disputes, namely by means of mediation between the perpetrator and the victim after it is decided by the damangan and (2) the decision by the customary institution addressed to the perpetrator can be in the form of Tandahan Randah, article 50 Singer Tandahan Randah (customary fines, haphazard accusations) is prohibited from insulting, demeaning, vilify or slander others; Sala Basa, article 63 Singer Karak Sirat Dahiang (traditional fines for destroying a good sirat or self-concept), are prohibited from mocking or destroying people's foreheads, and making people's hearts unhappy; Kasukup Singer Belom Bahadat, Article 96 Kasukup Singer Belom Bahadat (complement of customary fines for living with decency or ethics or high morals), belom bahadat is a principle of life for the indigenous Dayak Ngaju community which means living well in accordance with the rules and the truth. Penal mediation in the settlement of insult disputes through customary institutions is expected to be able to continue along with the times.

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