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Criminal mediation and customary sanctions: a reflection of the forms of legal protection for children facing the law

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Abstract

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The diversified concept of restorative justice is the primary way to resolve a child's case facing the law. The reflection of the protection of children faced with the law is done through criminal mediation and the application of customary sanctions carried out using the family community group model. This model of criminal family group mediation will involve all parties, starting with victims, victim families, perpetrators, indigenous communities, and law enforcement. Everyone involved in such a criminal mediation model prepares and brings together victims and perpetrators to discuss crimes, losses incurred, and measures necessary to remedy them. The perpetrators compensate for their faults through sincere apologies and regrets, offer restitution, and execute customary sanctions established by the local customary elders.



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INTRODUCTION

Children under the age of 18 who behave in accordance with the legal or moral standards of society are called bad children. This nasty kid ends up facing the law

because his deeds disrupt the school environment, the home, and the community. The phenomenon of poor children is a social symptom that occurs in various regions of Indonesia. Deputy Special Protection Child Ministry of Women's Empowerment and Child Protection (K. P. P. dan P. A. R. Indonesia, 2023) states that there are three categories of children facing the law, namely;

- (1) children as perpetrators, the number of which reaches 5,237 children,
- (2) children as victims, of which the number reached 4,980 children, and
- (3) children as witnesses, which the number reached 4,243.

This study deals with children as perpetrators of criminal acts. Based on the data, the category of children as perpetrators of criminal acts reaches a very large number. Children as perpetrators usually come from families whose patterns of parenting are less optimal, lack affection, and eventually make the wrong choice of friends in their social circle. In addition to these factors, children are involved in crime and conflict with the law due to physical factors, mental factors, household conditions, school conditions, and environmental conditions. It cannot be denied that in some cases of child crimes, the community plays a role. Rather than blaming and labeling the child as a bad child, it is better to take a specific approach to the child improvement.

The 1945 Basic Law provides in Article 28 D, paragraph 2, that every child has the right to survival, growth, and development, as well as protection from violence and discrimination. The law affirms children's rights to protection when they are subjected to the law. "Every child has the right to legal protection from all forms of physical or mental violence, transfer, ill-treatment, and sexual harassment while under the custody of his or her parents or guardians, or any other person responsible for the child's custody," states Article 58 para. 1 of Act No. 39 of 1999 on Human Rights. It confirms that parents are responsible for giving the greatest foster care and legal protection to their children.

Article 28 D, paragraph 2, of the 1945 Basic Law states that every child has the right to survival, growth, and development and to protection from violence and discrimination. The law affirms the rights of children facing the law to protection. Article 58 para. 1 of Act No. 39 of 1999 on Human Rights states that "Every child has the right to legal protection from all forms of physical or mental violence, transfer, ill-treatment, and sexual harassment while under the custody of his or her parents or guardians, or any other person responsible for the child's custody". It becomes an affirmation that parents are responsible for providing the best foster care and providing legal protection to the child.

Indonesian Children's Protection Commission (K. P. A. R. Indonesia, 2021) mentioned that from 2016 until 2020, the number of cases of child complaints facing the law reached 6,500 reports. The cluster of child reporting faced with the law consists of: 1) children as perpetrators of physical violence; 2) children of psychological violence; 3) children of sexual violence; 4) children of sodomy or pedophilia; 5)

children of murder; 6) children of theft; 7) children of traffic accidents; 8) children as possessors of sharp weapons; 9) children of abduction; 8) children of abortion; and 9) children as terrorists.

A cluster of reporting children who commit crimes and conflict with the law cites sensitive issues because these children are capable of committing crimes out of sight. Children's misconduct is essentially a product of their social conditions and all the social changes in them. Child abuse today has lost its flagrant character and has led to brutal acts, leading to criminal acts and endangering the safety, both property and the lives of others. (Muh Alwi Hidayat, Muhadar, n.d.) ²³

Handling a nasty child requires special attention. The Convention on the Rights of the Child states that children facing the law are not subject to litigation. Criminal proceedings are carried out as the ultimum remedium or last resort to protecting the rights of children. The fall of criminal sanctions and criminal proceedings by litigation through judicial processes would have a negative impact on the child. Child custody is a form of law enforcement; it is an affirmation that everyone has the same position in the eyes of the law. Therefore, anyone who commits a legal act by committing a violation or abuse of the law will be subject to criminal sanctions.

Law enforcement means carrying out prosecution activities against any violation or deviation from the rule of law through criminal justice proceedings involving the role of law-enforcement agencies. Lawrence M. Friedman mentioned that the legal system is a legal unit consisting of three elements: the legal structure, the legal substance, and the legal culture. While Muladi mentions that the purpose of funding is to make an effort of synchronization of physical nature that starts from the structural, sub-thancial, and cultural aspects of society. (Muladi, 1995). These three elements of the legal system often result in gaps in the handling of criminal offenses committed by children.

Indonesia, as a legal state composed of islands of various religions, languages, tribes, and races, has its own rules relating to the execution of every crime committed in its territory. Some of the crimes that occurred were often settled by customary law in the territory. On the one hand, law enforcement must act in accordance with the rules of the laws in force, but the same must be thought of as the customary law in force, which is usually used to solve problems that occur in society.

Researchers estimate that there are still legal gaps that occur in society when solving crimes. In accordance with the rule of law, every offender must be prosecuted according to the rules of law in force. Nevertheless, as a plural nation with different tribes and cultures, the handling of a crime is often settled through local customary law.

Daly, in his research, also mentions that ¹ Gaps more often arise in areas outside the control of the coordinators and police officers, where organisational, cultural, and individual constraints place limits on what can be achieved. I turn now to discuss these

gaps: (1) the containment of justice ideals by organisational routines, (2) new justice scripts and the legal consciousness and moral development of participants, (3) the comparative ease of achieving fairness over restorativeness, and (4) moderate positive effects and the nirvana story (Daly, 2014). These four gaps are an idea for researchers to develop a model of fair treatment for children facing the law.

METHOD

This study uses normative doctrinal research that refers to the regulation of child protection law, the law of the child criminal justice system, and the law on arbitration and dispute resolution supplemented with the customary crimes of the three tribes, namely the Lampung, Minangkabau, and Bali. This research is linked to the phenomenon of child crime handling using criminal mediation and customary criminal sanctions. Normative law research is conducted prescriptively by looking at the law as the norm. (Mukhti Fajar & Achmad, 2015). This research includes research on the legal basis and research with a level of synchronization both vertically and horizontally, as well as using the IRAC method. (Issue, Rule, Analysis, and Conclusion) The data in this study uses library research by conducting a search of legal literature that is used as secondary data. The steps in the library research are carried out through the results of previous research published in various scientific articles to obtain an overview of the mechanisms of child settlement in the indigenous society in each child's settlement.

RESULTS AND DISCUSSION

Some Cases of Settlement of Indigenous Criminal Matters

1. ³⁴at Megou Pak Tulang Bawang Lampung

The indigenous people of Lampung have the pride of being the "Megou Pak Tulang Bawang," which is the privilege or jurai of four descendants. They were four: the Moon, the Tegamoan, the Umpu, and the Aji. These indigenous peoples, in their respective local neighborhoods, inhabit a number of places in the region of Tulang Bawang. The presence of maras and buai-buai in the Tulang Bawang, among them, is characterized by the indigenous village of the people of Lampung, the language of the area they use daily, as well as the culture of the local tribes of the descending tribes. In the customs of the local people, the four heritages of the native peoples of Tulang Bawang are in the past. It is estimated that it began to flourish in the 18th-century area of the Tulang Bawang, along with the Right Way and the White Way (Pubian). (Samudra, 2018).

One of the cases involving children facing the law was found in the ruling of the State Court of Menggala number 10/Pid.Sus-Anak/2018/PN Mgl of June 8, 2018. A child named Juanda Als Wanda Bin Junaidi Jaya was accused of committing an

act of bullying that resulted in her death. In the judgment, the accused Juanda said to have fulfilled all elements of Article 170 paragraph (1) paragraph (2) of the 3rd Code of Criminal Procedure, and then the judge concludes that the child has been legitimately proved and convinced guilty of the criminal act as alleged in the indictment of the Prosecutor General in the primary indictments to be sentenced to 3 (three) years in prison. (Direktori et al., 2018) The judgment revealed that the accused child was sentenced to imprisonment and did not use the child's crime in settling the case.

Hendri Pratama (Pratama, 2017) In his research, he mentioned the use of Article 42 verses (11) of the Book of Pilatoeran along the boundary of the Lampung, which state that: *"Siapa bikin matiken orang berpangkat mega, maka jang matikan itoe bajar bangoen artinja mengganti djinwa jang mati tadi f 450 dan dia kena denda lagi 30 rial dan 1 kerbau barga 10 rial, ditangoeng olib pepadoen jang matiken tadi"*. It was explained that someone who committed the murder would be fined after a deal was reached with the family. The penalty also applies to a child who commits murder. The penalty is a mediation effort for peace between the murderer's son and the victim's family.

2. **Basandi Syarak dan Syarak Basandi Kitabullah Minangkabau**

Basandi Syarak and Syarak Basandi Kitabullah it is a customary principle of the Minangkabau community. Both customs are consistent with customary norms and must conform to the teachings of Islamic law. (Nurlinda Yenti, 2017). The adultery of the Minangkabau people means that they have violated the teachings of Islamic law and the provisions of Basandi Syarak and Basandi Kitabullah Syarak.

One of the children's cases was investigated under the judgment of the Field State Court No. 247/Pid/B/2012/PN.Pdg, which sentenced the defendant to three months' imprisonment for having legitimately convicted the child of having committed a crime of adultery. The general prosecutor's indictment (first and second indictments) in the judgment states that the defendant's child is unproven and states that he should be released from the charge, but thus the accused remains convicted of imprisonment. (Aria Zurnetti, 2015)

3. Customary Decency in Bali

Conflicts that have occurred in the Bali community are resolved through Sangkepan (a village meeting led by the village chief), but do not exclude the possibility of being resolved in accordance with the rules of the laws in force in the formal courts if they cannot be resolved by mutual agreement. Conventional conflicts that lead to criminal or so-called customary crimes are passed through formal court proceedings, such as customary debris of humiliation (wakparusya), some customary holes of consciousness (lokika sanggraha, amandel paragama, gamia gamana, drati krama), and theft of sacred religious objects. (Rasta, 2018) Such

custom, in the view of the Bali people, has resulted in unholy conditions in its territory. The unholy condition (cuntaka) is a state of unholiness in Hinduism. Cuntaka is also called Sebel. It is said that there is a cause of death, of menstruation, of childbirth, of abortion, of sickness, of marriage, of uncertainty, of misconduct, of a pregnant woman without wages, of an unwilling woman with a wage, and of a wicked woman with an unlawful wage. (Badung, 1970)

Child punishment under Act No. 11 of 2012 on the Child Criminal Justice System

Some articles in the Act No. 35 of 2014 on Amendments to the Law No. 23 of 2002 on the Protection of the Child mandate and give responsibility to respect the fulfillment of the rights of the child without distinction of tribe, religion, race, group, gender, ethnicity, culture and language, social status of birth order, and physical and/or mental condition, as well as protecting the children's rights and accountability in the formulation and implementation of policies in the field of child protection. The local government is obliged to support, implement, and support national policies through development in child-friendly districts and cities, providing support for means, facilities, and the availability of human resources in the maintenance of child protection.

The Trust of the Child Protection Act states that the protection, maintenance, and well-being of children, taking into account the rights and obligations of parents to exercise supervision over the child, legal responsibility, monitoring of child protection, and guaranteeing the rights of the child to exercise his or her opinion in accordance with the child's age and intelligence, include ensuring that education is provided to children of at least nine years of age, providing extensive opportunities for access to education, providing education or free-of-charge assistance, and providing special services for disabled children, children displaced, and children living in remote areas.

The most important thing about giving protection to a child is that it must also be done when a child is in conflict with the law until he finally has to face the law. Article 1, paragraph 1, and article 2 of the Children's Criminal Justice System Act No. 11 of 2012 state that the process of settling children's cases facing the law, ranging from detention to the level of guidance, must be based on protection, justice, non-discrimination, the best interests of the child, respect for children, survival and child growth, proposals, deprivation of liberty, and mediation, which are the ultimate attempts to avoid retaliation.

The most basic substance of the Child Criminal Justice System Act is the concept of restorative and diversified justice arrangements for children facing the law. Article 1, paragraph 7, of the Child Criminal Justice System Act states that diversion is a transfer of the settlement of a child's case from a criminal court process to a non-criminal court process. The diversified concept is used to shift the settlement of cases

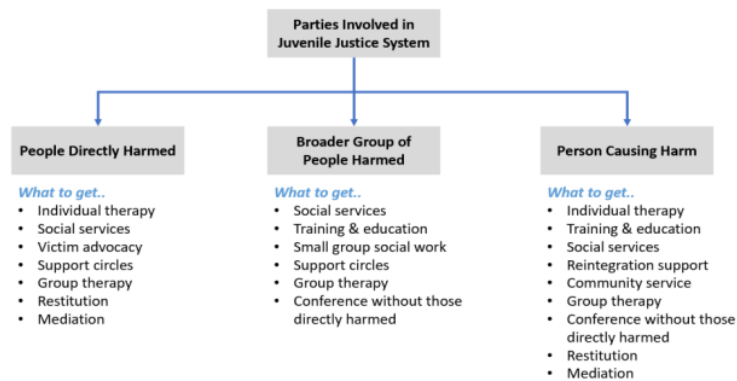
of children suspected of committing a particular criminal offense from formal criminal proceedings to peaceful settlement between the suspect, accused, or criminal perpetrator and the victim, facilitated by the family and/or community, the child counselor, the police, the prosecutor, or the judge. The concept of diversion is done so that the child can return to his social environment without fear and get labeled as a nasty child.

The reversal of the settlement of a child's case by imposing a different concept is carried out on the condition that the crime committed is punishable by a penalty of imprisonment of less than seven years and does not constitute repeat of the crime. If a child commits a criminal offense and is charged with seven years or more imprisonment in the form of a subsidiarity, alternative, cumulative or combined indictment, punishment is imposed in accordance with Article 7 of Supreme Court Regulation No. 4 of 2014 on Diversity Implementation Guidelines in the Child Justice System. The diversion is done through an agreement between the perpetrators, the victims, and the victim's families. Diversion is done by involving diversified facilitators, social guides, and social workers through a restorative justice approach. This means that the settlement of criminal cases is carried out by involving the perpetrators, victims, and other parties involved in obtaining a fair settlement and emphasizing recovery to return to the original state of affairs.

In its implementation, the restorative justice process is often inconsistent between theory and practice. Not everyone understands the concept of restorative justice, especially in the settlement of cases carried out by poor children. The public does not have an understanding of the concept of restorative justice for dealing with a case that results in any crime committed being settled in litigation. The philosophy of restorative justice is a process, idea, theory, and invention that emphasizes the perpetrator of a crime through compensation for the loss suffered by the victim. Treatment of crimes through litigation normally follow the standards set by the state through positive law. The idea of the concept of restorative justice can be found in the basic philosophical foundation of the fourth Pancasila, that is, to make a discourse in every decision-making. The restorative justice approach is an alternative mechanism for resolving criminal cases that is expected to cover the shortcomings in the criminal justice system by involving the victims and perpetrators directly. (Maulidar, 2022)

The thing to bear in mind when pursuing the concept of restorative justice is to map out what is needed by those who are in conflict and why such rehabilitation and restorative justice are needed by anyone. Based on previous cases, children in conflict with the law in their indigenous societies often have to undergo mediation because diversified concepts and restorative justice are not being implemented. It can be said that the mediation process sought to fail so that the nasty children would undergo a normal judicial process.

In the traditions of Megou Tulang Bawang Lampung, Basandi Syarak, Syarak Basandi Kitabullah Minangkabau, and customary law in Bali emphasized that criminal matters that occurred in their territory would be resolved according to the customary criminal law in force. The settlement of such customary criminal matters must, of course, involve many parties to support the implementation of child protection. The involvement of indigenous peoples in solving malignant child matters can be done on the basis of the following chart:



Source : (YWCA, 2019)

Taking into account the above chart, the parties involved in the criminal child justice system consist of investigators appointed on the basis of the decision of the head of police or other officials appointed by the chief of police of the Indonesian Republic, the prosecutor general appointed according to the decision of the attorney general or other officers designated by the chief prosecutor, the community director, the social welfare force of parents or guardians of children, and the leader of the local customary village. In the case of an evil child, the parties must identify three things: (1) the victims; (2) the group of victims; and (3) the persons who caused the loss.

The injured must be assured of access to therapy, social services, advocacy for victims, a supportive environment, therapeutic groups, restitution, and mediation. While in the disadvantaged group, it must be ensured to get social services, training and education, social worker groups, a supportive environment, and conferences, although not directly harmed. The last is the group of people who caused the occurrence of losses, i.e., obtaining 1) individual therapy, 2) training and education, 3) social services, 4) support for return to society, 5) group therapies, 6) conferences, although not directly damaged, 7) restitution, and 8) mediation.

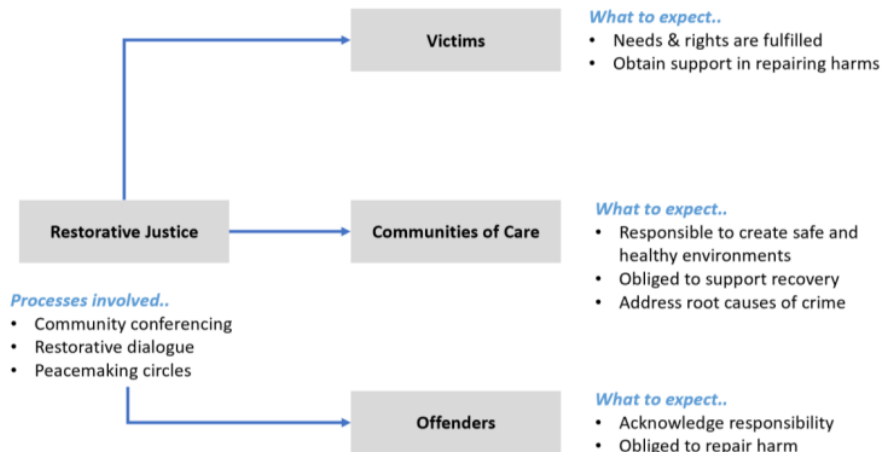
Regarding the granting of damages, in the customary Lampung criminal case, Minangkabau has mentioned that the perpetrator must pay a fine and pay damages to

the victim and his family. In Law No. 35 of 2014, the issue of restitution is regulated in one section, namely in Article 71 D⁸ which states that:

- (1) Every child who becomes a victim as referred to in Article 59, Paragraph 2, Letters B, D, F, H, I, and J has the right to apply to the court for the right of restitution, ⁸ which is the responsibility of the offender;
- (2) Further provisions concerning the implementation of restitution as referred to in paragraph (1) shall be governed by government regulations.

Restitution is the payment of damages incurred by the offender on the basis of a judgment of a court of permanent jurisdiction for the material and or immaterial loss suffered by the victim or his heir. Especially for children facing the law who are entitled to reimbursement, the victim's children The granting and determination of such damages is somewhat mediated⁴⁰ by customary elders. If there's a deal, then the bad boy's case is settled using the concept of restorative justice. What if the offer of mediation and reimbursement is rejected by the victim or his family?

Rejection is usually due to improper communication in the mediation process. One thing to keep in mind in the restorative justice process is to pay attention²⁰ to the people involved in the mediation process. The principles and methods of restorative justice can be seen in the following chart:



Source : (Provincial Court of Alberta, 2022)

The way restorative works begins with the community of communities that engage in dialogue about restorative practices and make agreements about the cycle of peace. Restorative justice will work with the victims, the local community, and the perpetrators. Communication with the victim has to pay attention to the needs and rights it will receive and provide support to repair the damage that has occurred. While community groups play a role in creating a safe and healthy environment, they are

obliged to support the recovery and find out the root causes of crime in their surroundings. For the perpetrators, the way restorative justice works is that they are expected to be responsible for their actions and obliged to support the victim's recovery process.

It is not uncommon for child matters to be resolved using two legal systems, namely positive law and customary law. Faced with the dualism of this legal system, customary decisions are considered "binding" to the parties involved, but such decisions are only a "discretion" for the legal system if a dispute is processed in a formal system. (Trisno Raharjo, 2013)

The concept of penalization is not just about the provisions of criminal law, either formally or materially. In parenting against children, the concept of restorative justice also speaks of parenting systems. The communities and customary law systems in force in each region should be at the discretion of the law enforcement agencies to resolve the case of the unrighteous child. In order to avoid inequalities of perception among law enforcement authorities in the implementation of the Child Criminal Justice System Act, which is an attempt to protect the treatment of children facing the law, all parties involved in the process must have the same understanding. The culture of the community remains the guiding principle in dealing with child abuse, so that obstacles to the handling of child crimes can change the public's view that children have shared responsibilities. Society has an important role that can be seen in the concept of restorative justice because society is tasked with carrying out the process of reunifying children facing the law in their environment.

Criminal mediation for children facing the law

It's not an easy thing to settle a child's criminal case. Not all parties can easily apologize for the ill treatment they suffered. The philosophy of settling child crimes is to guarantee the protection of children's rights, whether as perpetrators, victims, or the community in which they live. In the reform of criminal law known as criminal mediation.

The concept of Penal Meditation in the settlement of traffic crimes committed by children in the past will be based on Pancasila's values as the nation's view of life in reforming the legal system in the Juvenile Criminal Court by taking into account the balance of the interests of the community, victims' interests, and perpetrators' interests of criminal acts, which can be carried out at the investigation stage, prosecution stage, and stag stage. (Rohman Hakim Basuki Rekso Wibowo, Krisnadi Nasution, 2020)

According to Act No. 30 of 1999 on Arbitration and Dispute Resolution, criminal mediation is used to reconcile the perpetrator and the victim. The resolution of juvenile offenses by the eradication of customary criminal consequences is a concept of local knowledge that exists in Indonesian society. Such local wisdom can be used to

eliminate crime or to imprison people.²² Von Savigny remarked that "the law must be viewed as a soul or spiritual infusion of a nation." There is always a connection between the law and the personality of a nation." (volkgeist) (Abdul Wahid dan Anang Sulistyono, 1997). Savigny further states that the law is a cultural product that evolves over time and history and flourishes alongside the culture that inhabits it.

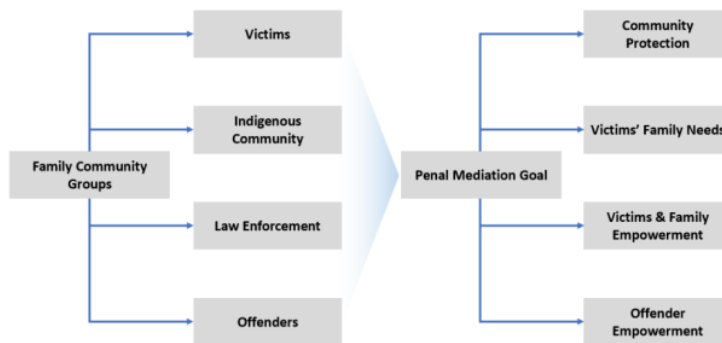
The customary law that lives in society is also affirmed in Law No. 1 of 2023 on the Code of Criminal Law. Article 2, paragraph (1) of the Covenant refers to customary law and states that it does not diminish the validity of the law living in a society that determines that a person deserves to be punished even if such acts are not regulated by this law. The article on living law is an affirmation that Code of Criminal Law is committed to preserving the customary law that exists in Indonesia. Article 2 (2) also stipulates that the law living in a society, as referred to in paragraph (1), shall apply in the place where the law is living, as long as it is not regulated in this law and in accordance with the values contained in the Pancasila, the Basic Law of the State of the Republic of Civilized People.

⁴¹ The model of criminal mediation in the settlement of criminal cases is a model that supports settlement using customary sanctions carried out by society. Some of the parties involved in dealing with child crimes have done a number of things to get the perpetrators to apologize and be able to make atonement for their crimes to the victims and their families. A child's criminal case can be settled with an apology and a confession of regret. Both child offenders provide restitution, in which the offender pays back the victim through financial payments, return or replacement of property, rendering direct service to the victims, or in any way agreed by the parties. The third is to do community service by giving free services to charities or the government. This and other measures to repair losses (if the definition of restorative justice is widely used) are considered restorative results.

Toni Peters mentions in Barda Nawawi that criminal mediation can be carried out within the framework of criminal law. In some European countries, the regulatory framework is used as part of (1) the Children's Court Laws (Austria, Germany, Finland, and Poland), 2). Placed in the Code of Criminal Procedure (Austria, Belgium, Finland, France, and Poland), 3) Placed into the Criminum Code (Finland, Germany, and Poland) 4) d. Autonomously regulated in the Mediation Act (Norway). (Mulyadi, 2013)

The use of criminal mediation as an alternative to criminal justice, especially in the case of child perpetrators who violate customary law, has become a necessity to keep pace with the developments of the times and the need to satisfy the sense of justice for the victims. Criminal mediation has become a legal breakthrough in customary criminal matters because it is an attempt to find a settlement for the parties. The settlement of customary criminal matters for the Indonesian people will stick to the values of family with the principle of making divorce and mutual agreement. The

model of criminal mediation can be selected and customized using the model of family and community group conferences. Morris and Maxwell point out that the model family community group conferences are one form of criminal settlement carried out through the process of compromise between perpetrators and victims to find a settlement of criminal acts within the community. (Febriansari & Cahyaningtyas, 2021). Nevertheless, the family community group model also does not exclude the possibility of the mediation process as the parties do not reach an agreement on the settlement of the matter. If the mediation fails, then at the investigation stage, at the judicial stage, it only becomes the judge's consideration in the fall of the judgment and does not directly stop the ongoing legal process. A model family community group in criminal customs can be done in a manner according to the following chart:



Source: Research 2023

CONCLUSION

Based on a number of issues related to the settlement of criminal matters carried out by the child through litigation processes, the child did not obtain his rights. The diversified concepts and usage of the concept of restorative justice do not work well due to differences in interpretation by law enforcement agencies and society. The concept of criminal law that presupposes retaliation today is no longer relevant. Therefore, with the evolution of the times, the concept of criminal law enforcement for child affairs should be done with a restorative approach to providing recovery to the victim. The concept of restorative justice is carried out through criminal mediation by preventing the granting of customary sanctions. Such a legal action is expected to satisfy a sense of justice, both for victims, perpetrators, and society.

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