



The Role of Customary Criminal Law in Resolving Cases Involving Children

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Abstract. *The process of resolving cases of children involved in legal problems should be different from adults. The procedure must be carried out carefully, so that children continue to receive maximum protection. In fact, no matter how good the formal justice arrangements are for children, it is believed that it will never have a good impact on children because it will cause trauma, stigmatization and the risk of experiencing violence and exploitation. This is different from indigenous communities that have their own customary law characteristics. This writing aims to find out and explain the role of customary criminal law in resolving cases involving children. The research method is juridical-normative, with a legislative approach and a conceptual approach to analyze the legal issues raised. The results of the study conclude that Customary Criminal Law in Resolving Cases Where the perpetrators are Children, namely the customary resolution process carried out in criminal cases involving children, whether cases of violence, harassment, naughty children, are resolved peacefully by the customary leader, both from the victim and the perpetrator. After each party gathers, a traditional ceremony is held starting with a preface. Then discuss the existing problems to find the core of the problem so that it is clear. After the process continues, an agreement is reached where each party feels satisfied and comfortable. Meanwhile, Customary Criminal Law in Resolving Cases in which the victim is a Child, namely the process of imposing sanctions begins with the payment of a certain amount of fine to the customary leader, then the perpetrator's family provides a yellow arbor (tumpang) and a certain number of animals, such as cows, goats. After all is complete, the village cleaning procession begins and continues with the reading of the decision on sanctions against the perpetrator. All stages in the customary trial that have been explained above are led by the customary leader.*

Keywords: Customary Criminal Law, Children

1. Introduction

Customary criminal law is one of the areas of customary law, as a unified system with customary law, so customary criminal law cannot be separated from the cosmic mind that lives in Indonesian society which is very different from the mind that dominates the western legal system ("European Continental"). Even though national legal politics is moving towards legal unification, customary law as a law that lives in Indonesian society is a reality that still applies in customary law community units. Customary criminal law is still in force in several customary law communities in Indonesia. In judicial practice, customary criminal law has been recognized based on Article 5 paragraph (3) b of Emergency Law Number 1 of 1951 as its formal juridical basis. In enforcing customary criminal law, judges often view customary criminal acts as ordinary criminal incidents, paying little attention to the souls and minds of people who are religious, magical and cosmic. This situation causes a sense of dissatisfaction among the community and they believe that the judge's decision does not fulfill the

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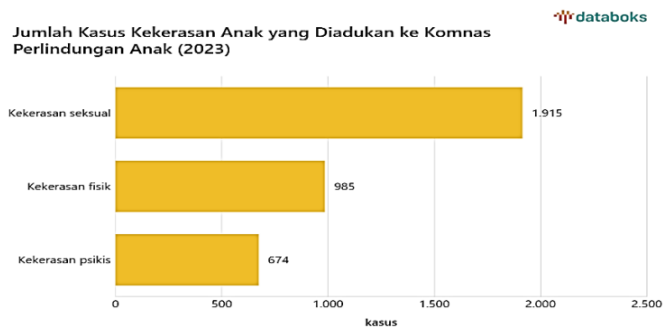
community's sense of justice and encourages the community to take action against the judge themselves which they feel is fairer.¹

Soeripto believes that customary law is a cornerstone of life that has bound Indonesian society for a long time, even though it is not in written form. The existence of coercive measures and threats of sanctions in customary law is intended to create awareness and a feeling of general justice in order to maintain these rules. ²The existence of customary law sanctions is more intended as a deterrent effect against perpetrators of acts that are contrary to customary values as well as preventing these acts from happening again. Sanctions are considered as a coercive tool to continue to comply with values and norms that are respected for their validity in society.³

In the context of customary law like this, customary law can be used to overcome violations of any law, just like state law. Customary law is considered suitable for use in assessing situations related to acts that violate moral values such as sexual harassment which is currently widespread. ⁴Sexuality is now understood not only in biological dimensions, but also psychological and socio-cultural as an element of civilized humanity. However, it is still impossible to separate the negative paradigm and stigma that is taboo for some people regarding sexuality, a correlation that is not in line with its essential elements ultimately gives rise to sexual abuse itself. In law number 12 of 2022 concerning the Crime of Sexual Violence, it is stated that the meaning of sexual abuse or violence can be acts of exploitation, harassment, rape or other sexual treatment that targets the body and/or reproductive organs in an inhumane manner.

Sexual harassment does not only happen to adult women but can occur from various ages and backgrounds and often occurs in offices, campuses or places that are considered to be respected, but instead something like this happens. Women and children in various parts of the world still experience sexual violence committed by people who have the potential to do so regardless of status, job or religion, therefore since decades ago issues about human rights have begun to be raised and issues Women are not spared from that part, even though they are sometimes overlooked or prioritized.

The following are the number of child abuse cases reported to the National Commission for Child Protection in 2023:



Sumber: Komisi Nasional Perlindungan Anak (Komnas PA)

Informasi Lain:

¹ Ayu Putu Nantri, *Hukum Pidana Adat dalam Konsep Rancangan KUHP Tahun 1991/1992 dan Peranan Hakim ke depan*, Majalah Kertha Patrika, Vol. No. 2, Juli 2004, page 79.

² Sigit Sapto Nugroho, 2016, *Pengantar Hukum Adat Indonesia*, Solo : Pustaka Iltizam, page 37

³ Pipin Syarifin, 2008, *Hukum Pidana di Indonesia*, Bandung : Pustaka Setia, page 48

⁴ Anggi Purnama Harahap, Devrian Ali Putra, Ardian Kurniawan, Muhammad Aiman, *Sanksi Adat Penyelesaian Kasus Pelecehan Seksual Di Desa Kungkai Kabupaten Merangin Jambi*. Jurnal Wajah Hukum, Volume 6(2), Oktober 2022, Page 295

Based on data from the National Commission for Child Protection (Komnas PA), there were 3,547 complaints of cases of violence against children received throughout 2023. These complaints were collected from a number of channels, from direct complaints, hotline services, to electronic messages. This number of complaints increased from the previous year.⁵

In this case, children are not only victims of crime but also sometimes perpetrators of crime, because the perpetrators of crime are not only adults but also sometimes involve children, especially those approaching adulthood. The following is data on children who are in conflict with the law as perpetrators from 2016 to 2020.



The Indonesian Child Protection Commission (KPAI) noted that during the 2016-2020 period there were 655 children who had to face the law because they were perpetrators of violence. In detail, 506 children committed physical violence and 149 children committed psychological violence.⁶

Even though modern life has penetrated the lives of people in rural areas, life is related to their customs and beliefs and is still believed to have been passed down from generation to generation. Likewise, the existence of customary law is still used to resolve customary criminal offenses that occur within their territory, including resolving customary criminal offenses committed by children.⁷

Based on the explanation above, the author takes the main issue related to the role of customary criminal law in resolving cases involving children both as victims of crime and as perpetrators of crime.

2. Research Methods

The type of legal research used in this research is normative legal research, namely legal research carried out by examining secondary data consisting of primary legal materials, secondary legal materials and tertiary legal materials.⁸

This research also uses a legal anthropology approach. The legal anthropology approach is considered the most appropriate because it can examine and examine dispute resolution mechanisms that often occur in both traditional and modern communities.

⁵<https://databoks.katadata.co.id/datapublish/2023/12/29/komnas-pa-ada-3547-kasus-kekerasan-anak-2023-terbanyak-kekerasan-seksual>

⁶<https://databoks.katadata.co.id/datapublish/2022/07/29/ini-jumlah-anak-anak-yang-jadi-pelaku-kekerasan-di-indonesia>

⁷ Sri Ismawati, *Mekanisme Penyelesaian Perkara Anak Yang Berhadapan Dengan Hukum Pada Masyarakat Dayak Kanayatn (Kajian Perbandingan Terhadap Sistem Peradilan Pidana Anak)* Jurnal Mimbar Hukum, Vol. 13 No. 2 Mei 2013. Page 199

⁸ Peter Mahmud Marzuki. 2021. *Penelitian Hukum Edisi Revisi*. Jakarta: Kencana.

According to Bachtiar, quoting Hoebel's opinion, he explains that the legal anthropology approach has three strands, namely (i) ideology, (ii) descriptive, and (iii) studying tensions, disputes, troubles and complaints. In ideological studies, it is analyzed and studied by identifying general rules that apply in society and are perceived as guidelines for behavior which then become valid as they should be.⁹

3. Discussion

Customary Criminal Law In Resolving Cases Where The Perpetrators Are Children

Based on law number 11 of 2012 concerning the juvenile criminal justice system, Article 1 determines that the juvenile criminal justice system is the entire process of resolving cases of children in conflict with the law, from the investigation stage to the guidance stage after serving the sentence. Apart from these formal provisions, many areas in Indonesia where there are indigenous communities also have a legal system that continues to exist and is guided by in resolving problems in community life. The firmness of the community which continues to maintain living law is based on the nature and characteristics of this informal law which is more in line with the philosophy, personality and soul of the community, with the principles that are contained and have meaning in the resolution of every case that arises.

Laurentius Gawing wrote that as a legal system that lives and develops in society, traditional justice actually plays an important role in the civilization of traditional communities in Indonesia. Especially because of its function as a pillar that maintains the balance of social relations and local wisdom behavior of indigenous communities, such as maintaining harmonious relations between society and nature.¹⁰ In this way, customary justice no longer only functions as a balancing pillar, but has transformed into a cultural entity of indigenous communities. so that customary law is not formed by the state but is born from the traditions of the community as a statement of its culture.¹¹

Most cases are resolved using traditional approaches. Every violation committed by a child is resolved through a customary forum involving all parties, including traditional functionaries, the child perpetrator and his family, the victim and his family, as well as witnesses who know about the incident. Settlement of children's cases which are resolved through forums as practiced by the Dayak Kanayatn community is relatively similar to the case resolution model in restorative justice.¹² which is supported and recommended by many experts and institutions that are committed to child protection.

In general, the customary resolution process carried out in criminal cases involving children, whether cases of violence, abuse or naughty children, is resolved peacefully by traditional elders, both victims and perpetrators. After each party gathered, a traditional ceremony was held starting with an introduction. Then discuss the existing problems to find the core of the problem so that it is clear. After the process continues, an agreement is reached where each party feels satisfied and comfortable, the consequences of the results of the discussions will be implemented.¹³

The problem resolution process is not through law or litigation, if the victim can accept, but if the person concerned does not accept, then after the customary process (customary payment) is resolved legally, so that the implementation of custom and law can conflict along with the process being carried out (custom trumps law positive). In addition, the suspect's actions can be borne by another party to be fully responsible for the process and resolution of the problem.

⁹ Bachtiar, 2019, *Metode Penelitian Hukum*, Pamulang : Unpam Press, Page 91.

¹⁰ Laurentius Gawing, 2010, *Peradilan Adat: Keadilan Yang Ternafikan*, Majalah Forum, edisi Tahunan, Page 1

¹¹ Syamsudin, *Beban Masyarakat Adat Menghadapi Hukum Negara*, Jurnal Hukum, No. 3 Volume 15 Juli 2008, Page. 340.

¹² Noeke Sri Wardhani, *Penerapan Pidana Alternatif Bagi Anak Pelaku Tindak Pidana di PN Bengkulu*, Jurnal Kriminologi Indonesia, Vol. V No.11 Agustus 2009, Page 48.

¹³ Maladi, Y. 2011. *Eksistensi Hukum Adat Dalam Konstitusi Negara Pasca Amandemen*. Jurnal Mimbar Hukum, Vol. 41, (No.3), page 421–439

In this process, if there is a dispute between the parties in expressing the problem or solving it, the end of all discussions will be decided as something that must be implemented by both parties involved in the problem (both the perpetrator, the victim and the family) because after having a final decision which is binding on the parties. , then there is no longer any reason for the issue to be brought up again, considering that it has been mutually agreed upon and is of course an applicable customary decision. Automatically, both parties must forgive each other and promise to be better by not bringing up the problem. In the sense that there is no element of holding grudges by the parties (no retaliation).¹⁴

The Role Of Customary Criminal Law In Resolving Cases Where The Victims Are Children

Victims of crime are people or parties who are harmed or suffer as a result of crime. It is important to pay attention to the legal status of crime victims in an effort to provide justice and protect victims. In fact, criminal justice often focuses more on punitive justice, namely convicting or punishing the perpetrator for the crimes they have committed. However, the idea of restorative justice which focuses more on restoring relationships between perpetrators, victims and society is also increasingly being considered and accepted in criminal law practice.

Everyone has the same right to be treated fairly and in accordance with the law, without discrimination or unfair treatment. Therefore, in resolving criminal cases, efforts need to be made to ensure justice for all parties involved, including victims, perpetrators and the community.¹⁵

In general, customary court processes are carried out to provide sanctions against perpetrators of norm violations, led by the traditional leader. The process of giving sanctions starts with paying a certain amount of fine to the traditional leader, then the perpetrator's family provides a yellow arbor (tumpeng) and a certain number of animals, such as cows and goats. Once everything is completed, the village clean-up procession begins and continues with the reading of the decision on sanctions against the perpetrator. All stages of the customary trial described above are led by the traditional leader. Based on the results of researchers' interviews, in several indigenous communities in Indonesia. After these stages have been carried out, the traditional village clean ceremony is carried out. The traditional hamlet clean-up ceremony led by the traditional leader or elders aims to restore balance in the community which was disturbed due to a violation of norms committed by one of the residents of the traditional village. The process of providing sanctions for perpetrators of rape in traditional areas usually does not only involve the perpetrator's family and the victim's family. Traditional village communities, village heads and traditional leaders are involved in the process of giving customary sanctions to perpetrators of rape in certain traditional villages.

That in customary criminal law, customary law in resolving cases does not differentiate or separate civil and criminal cases, likewise in the customary trial process it does not distinguish between juvenile and adult perpetrators. In Indonesian customary law, basically when imposing sanctions in the form of compensation, the size depends on the agreement between the victim and the perpetrator, involving the traditional leader. Sometimes, even though they have compensated the victim, there are usually other punishments such as expulsion or being ostracized by local residents if the mistake has usually been repeated many times, so that according to indigenous peoples in Indonesia, most

¹⁴ Hadibah Z. Wadjo, *Penerapan Hukum Adat dalam Penyelesaian Perkara Anak*, jurnal Pembangunan Hukum Indonesia, Volume 5, Nomor 1, Tahun 2022, Page 7

¹⁵ Muhammad Gerald Ars dan Wiwin Yulianingsih. 2023. *Undang-Undang Tindak Pidana Kekerasan Seksual dalam Pemenuhan Hak Korban*. ALADALAH: Jurnal Politik, Sosial, Hukum, dan Humaniora Vol.1, No.3 Juli 2023. Page.01-09.

of them are afraid of curses in their territory if they allow people who have committed disturbing acts. social or natural balance.

4. Conclusion

Customary Criminal Law in Resolving Cases in Which the Perpetrator is a customary settlement process that is carried out in criminal cases involving children, whether cases of violence, understanding, naughty children are resolved peacefully by the customary leader, both from the victim and the perpetrator. After each party gathers, a customary ceremony is held starting with a preface. Then discuss the existing problems to find the core of the problem so that it is clear. After the process continues, an agreement is reached where each party feels satisfied and comfortable, the consequences of the results of the discussion will be implemented. While Customary Criminal Law in Resolving Cases in Which the Victim is a Child, namely the process of imposing sanctions starting from paying a fine of a certain amount to the customary leader, then the perpetrator's family provides a yellow arbor (tumpang) and a certain number of animals, such as cows, goats. After all is complete, the process of cleaning the hamlet begins and continues with the reading of the decision on sanctions against the perpetrator. All stages in the customary conference that have been explained above are led by the customary leader.

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