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CRITICAL STUDY OF ESTABLISHMENT OF CHILD SPECIAL CUSTOM CRIMINAL JUSTICE IN THE CHILD CRIMINAL JUSTICE SYSTEM

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ABSTRACT

Hugo Grotius is recognized as one of the influential figures in the development of world law, especially in the context of international law so that with his rational and humanist rationale, the criminal justice system in particular has shifted its paradigm to a modern aspect. It is a logical consequence that the progress of juvenile criminal justice also accommodates customary law, especially in West Kalimantan and Indonesia recognizes the existence of customary justice as an effort to handle cases that occur in their environment, as well as cases related to children. In substance, customary law and its legal sanctions still apply to indigenous peoples. These legal values then become an action that is considered good by the community which is then used as a principle in carrying out social activities. These values will then form a norm that guides behavior. legal space to give power to jurors to explore, follow, and understand customary law and use it as a basis for consideration in deciding cases handled. Therefore, it is necessary that a customary court which currently applies strongly to the indigenous Dayak community has a mechanism of customary justice that is able to resolve community problems based on mutual agreement and various existing sanctions indicating that customary justice in society is able to provide a sense of justice.

Keywords: *Legal Formation, Customary Justice, Children, Juvenile Criminal Justice System*

ABSTRAK

Hugo Grotius dikenali sebagai salah satu tokoh yang berpengaruh pada perkembangan hukum dunia, terutama dalam konteks hukum internasional sehingga dengan dasar pemikirannya yang bersifat rasional dan humanis menjadikan sistem peradilan pidana khususnya terjadi pergeseran paradigma ke aspek modern. Menjadi konsekwensi logis adanya progresivitas peradilan pidana anak juga mengakomodir hukum adat khususnya di Kalimantan Barat dan Indonesia mengakui

keberadaan peradilan adat sebagai upaya penanganan kasus yang terjadi di lingkungannya, serta kasus terkait anak. Secara substansi hukum adat beserta sanksi hukumnya masih berlaku bagi masyarakat adat. nilai-nilai hukum tersebut kemudian menjadi suatu tindakan yang dianggap baik oleh masyarakat yang kemudian di jadikan prinsip dalam melakukan aktivitas sosial. Nilai-nilai tersebut kemudian akan membentuk suatu norma yang menjadi pedoman dalam berperilaku. ruang hukum untuk memberikan kekuatan kepada juri untuk mengeksplorasi, mengikuti, dan memahami hukum adat dan menjadikannya sebagai dasar pertimbangan dalam memutuskan perkara yang ditangani. Oleh sebab itu diperlukan pengadilan adat yang saat ini berlaku kuat terhadap masyarakat adat Dayak memiliki mekanisme peradilan adat yang mampu menyelesaikan permasalahan masyarakat berdasarkan kesepakatan bersama dan berbagai sanksi yang ada menunjukkan bahwa keadilan adat dalam masyarakat mampu memberikan rasa keadilan

Kata Kunci: Pembentukan Hukum, Peradilan Adat, Anak, Sistem Peradilan Pidana Anak

INTRODUCTION

The character Hugo Grotius and his thoughts are related to the laws of nature. In the study of legal philosophy, Grotius is recognized as a rational natural law thinker. His thoughts on law are interesting to review, considering his existence during the transitional period of the Middle Ages and the tendency for shifts or changes in knowledge at that time. The role of reason and the ability to think logically, which became increasingly prominent at that time, had an influence on Grotius' model of legal development so that it was more rational, humanist and secular.¹ In the discourse on legal thought, Hugo Grotius is recognized as one of the influential figures in the development of world law, especially in the context of international law. Grotius has his own talent and a different perspective on the laws of the social-historical context around him, leading Grotius to an interesting finding. Grotius maintained that the main source in law is reason, not God. In this condition, including the secularization of natural law addressed to him.²

Based on the thoughts of Hugo who has progressiveness as a philosophical figure, a new paradigm emerges that the source of law is reason. Therefore this paper was born with a new paradigm in mind in providing rationality and humanism, especially the values of customary law which currently must be given a modern legal development model, namely the existence of customary criminal justice specifically for children as part of the justice system in Indonesia in order to provide legal compliance with legal issues concerning children. Based on the humanistic nature of Hugo's thought above, it must be agreed that in social life, society cannot be separated from the legal aspect. The social life contained in society has legal values contained therein. So these legal values then become an action that is considered good by the community which is then used as a principle in carrying out social activities. These values will then form a norm that guides behavior. So that the behavior of the community will later reflect the law. Based on this, it has shown that law actually lives in the midst of community life which is formed by itself.

¹ Aulia Rahmat, 2019. "Rasionalisasi Hukum Alam oleh Hugo Grotius: Dari Humanisasi Menuju Sekularisasi", Undang: *Jurnal Hukum*, 2(2), pp. 433-470, h. 435

² *Ibid.*, hlm. 435

Law has become a necessity in society because in the beginning law was due to experiences and/or actions which then formed a legal habit.³ Based on these human actions and experiences, written laws and unwritten laws emerge. Usually this unwritten law applies to indigenous peoples who make habits the basis for behavior, so don't be surprised if Indonesia is the only country that has customary law as a recognized legal product. Then the written law is in the form of a legal product of statutory regulations which then becomes the basis for society to take legal action as is the case in enforcing laws against indigenous peoples.⁴ The legal basis for the existence of indigenous peoples is recognized and regulated in Article 18B of the 1945 Constitution of the Republic of Indonesia, namely (1) The state recognizes and respects special or extraordinary regional government units regulated by law. paragraph (2) The state recognizes and respects the customary law community units and their traditional rights as long as they live and are in accordance with community development and the principles of the Unitary State of the Republic of Indonesia which are regulated by law.⁵

In the implementation of the criminal justice system, especially those related to specific aspects of the juvenile justice system, it is necessary to have the role of the community in the concept of a criminal justice system in the juvenile justice system, which is very important, because basically it is an embodiment of the system of "legal cultural values", from an understanding of implementation. Restorative justice will even fail if society does not participate in implementation. Restorative justice in Indonesia has a different basis from its development in the Western world because this is an idea in an effort to reduce child delinquency based on local wisdom, moral values that have so far been a guideline for people in behavior that prioritizes achieving approval of Law Number 11 of the Year 2012 concerning the Juvenile Criminal Justice System explains how the law is.

Based on the description of the background above, a problem arises which will be the focus of this research related to the urgency in establishing customary criminal justice in Indonesia and studying the implementation of the customary criminal justice system specifically for children applicable in Indonesia.

RESEARCH METHOD

The legal research method used in this study uses normative juridical. This method uses laws and regulations as the basis for analysis to answer problems.⁶ The type of research used in this study uses normative legal research. This research makes legislation as a product of positive law in Indonesia as the main legal basis or reference for analyzing an existing problem. The legal approach used in this research is conceptual based on the doctrine of legal experts to answer and discuss legal problems and issues.⁷

³ Arliman, Laurensius, 2018. "Hukum Adat Di Indonesia Dalam Pandangan Para Ahli dan Konsep Pemberlakuannya Di Indonesia". *Jurnal Selat*, 5(2), 177-190. h. 181

⁴ *Ibid.* h. 183

⁵ Jamin, Mohammad. 2014. *Peradilan Adat; Pergeseran Politik Hukum, Perspektif Undang-Undang Otonomi Khusus Papua*. Yogyakarta: Graha Ilmu. h. 18

⁶ Peter Mahmud Marzuki, 2011, *Penelitian Hukum*, Jakarta: Kencana Prenada Media Group., h.110.

⁷ *Ibid.* hlm. 139

DISCUSSIONS

The Urgency of Establishing Customary Criminal Courts in Indonesia

The urgency of forming customary criminal justice law products specifically for children born from Hugo's humanist thinking provides a modern judicial model to provide progressivity that can be applied specifically to areas that make customary law a guideline in people's lives, especially in the Kalimantan region where there is a tribe called the Dayak. as one of the hundreds of Dayak sub-tribes who inhabit the island of Borneo. In customary law, the Dayaks have a single territorial unit called binua. Binua is an area consisting of several villages. Each binua has its own autonomy, so that one binua community cannot interfere with the custom.

Each binua is led by a timanggong (head of chief). Timanggong has subordinates. They are Pasirah (traditional leader) and traditional lawyer. The three pillars are Dayak customary institutions. Dayak verbal traditions are the same as all the customs that apply to life. This habit covers all aspects of life and influences people's lives. It governs the lives of people in interaction. When the Dayak people violate customary laws, they will feel more ashamed than when they violate government regulations. Because custom is a rule inherited from ancestors that is universal and binding.⁸ By not respecting custom means "uncivilized". Even though a Dayak is uncivilized, they are not considered a Dayak. These things are the reason why verbal traditions and customs are highly respected and upheld in people's lives.

Dayak oral traditions are closely related to ceremonies. All social, behavioral and ceremonial orders in the Dayak community are regulated according to custom and there will be sanctions for any violations. The traditional criminal procedure is to provide sanctions for violations committed by a person/group of people in the local community itself. For example, the fire brick custom, the balaki-babini sakamarkapala custom. The punishment or sanction is in the form of goods and animals, especially chickens and pigs. However, now it is slowly turning into money. This is because it's hard to find items nowadays.

Oral traditions play an important role in conveying the values, norms, and knowledge needed to carry out the social order and behavior in the Dayak community. Traditional ceremonies are a means to practice and strengthen this oral tradition. In the Dayak community, customs and rules governing daily life are strictly enforced. Every member of society has an obligation to comply with established customs and norms. Violation of these customs and norms will result in sanctions, both in the form of physical and social punishment. Traditional criminal procedures in the Dayak community are carried out as a form of enforcing rules and resolving conflicts. Sanctions are given as a form of warning and learning for violators so they don't repeat their actions. These sanctions can be in the form of physical punishment, such as fulfilling certain tasks or demands, or social sanctions, such as ostracism or ostracism from society. Through oral traditions and traditional ceremonial practices, the Dayak community maintains the continuity of existing customs and norms, and ensures that every member of the community

⁸ Darmadi, Hamid. 2016. *Dayak Asal-Usul dan Penyebarannya di Bumi Borneo*. *Sosial horizon: Jurnal Pendidikan Sosial*, 3(2), 322-340. h. 336

complies with applicable rules. It also plays an important role in building awareness of Dayak cultural identity and continuity.

Implementation of the Special Customary Criminal Justice System for Children in Indonesia

Implementation of the customary criminal justice system for handling child cases The Juvenile Criminal Justice System is a form of progressivity towards the system for handling juvenile offenders, which consists of institutions that handle Child Investigations, Child Prosecution, Juvenile Courts, Juvenile Correctional Services. The Juvenile Criminal Justice System is carried out while still paying attention to the welfare of children, because children are the potential and successors of the nation in which the foundations of previous generations have been built. In order for every child to be able to assume their responsibilities it is necessary to have the opportunity to grow, and develop naturally. In society, there are children who experience obstacles in their well-being physically, mentally, socially and economically. The children couldn't defend themselves yet. This barrier can be eliminated only if the welfare of the child is ensured

Reformists argue that a juvenile court settlement cannot overcome crime. The abolitionist group considers that criminal justice only imposes decisions, based on the interpretation of norms and values produced by consensus, which are considered the most correct (consensus model). Criminal justice based on this model has never created understanding, for perpetrators and for victims.⁹ Criminal law is only harsh on people, but not against crime. Based on the Convention on the Rights of the Child Article 40 there is a principle of protecting the rights of children who violate the law which generally emphasizes the principle of child welfare and proportionality. Prosperity can be realized by carrying out the judicial process without physical and psychological violence, either during the examination process or after undergoing a court decision.

Within the scope of criminal law system reform includes: a) Legal substance (substantial system), including reform of material criminal law, formal criminal law, and criminal law enforcement; b) Legal culture (cultural system), including reforming the morals of the perpetrators, as well as legal education in criminal law; c) The legal structure (structural system), including reform of the investigative body, the prosecutor's body, the court body, and the criminal execution and court body.¹⁰ Based on this, reform of the criminal law system includes three main aspects, namely legal substance, legal culture and legal structure. Legal Substance (Substantial System) is related to the reform of the criminal law system which includes the renewal of criminal law in terms of its substance or material. This involves revisions or changes in criminal laws to accommodate social changes, societal values, and demands for justice. Renewal of material criminal law aims to ensure that existing criminal laws are in accordance with the times and provide effective protection for society. Apart from that, reform of the

⁹ A. Wahyono, Rahayu, Siti, 1993. *Tinjauan tentang Peradilan Anak di Indonesia*, Jakarta: Sinar Grafika. h. 46

¹⁰ *Ibid.* h. 62

substance of criminal law also includes renewal in terms of formal criminal law, namely the rules regarding the criminal justice process. The purpose of this reform is to ensure that the criminal justice process runs fairly, transparently and efficiently. Renewal may also involve legal aspects of criminal implementation, such as rehabilitation mechanisms, alternatives to sentencing, or changes in the correctional system.

Legal culture related to reform of the criminal law system also involves aspects of legal culture, namely changes in the morals and attitudes of perpetrators as well as legal education related to criminal law. This involves efforts to build moral awareness, responsibility and ethics in society in order to respect the criminal law and avoid unlawful behavior. In addition, a good legal education is also important in forming a correct understanding of criminal law, the consequences of violations, as well as rights and obligations in the context of criminal law and the legal structure, including changes in the legal structure related to criminal law enforcement. This includes reforming the investigative body, the prosecutor's body, the court body, as well as the criminal execution mechanism.¹¹ Renewal of the legal structure aims to increase the effectiveness, independence and accountability of these institutions in carrying out their duties and authorities. Changes in legal structures may also involve improvements in professionalism, performance appraisal, and oversight systems to prevent abuse of power or corruption in criminal law enforcement.

based on the description above that the Customary Courts and Judicial Courts emphasize the importance of restoring local wisdom values, cultural diversity, and customs in handling children involved in delinquency using a juridical restorative justice approach. Friedman's theory argues that the formal legal system is often unable to accommodate the wealth of culture and local wisdom in dealing with the problem of children involved in delinquency. Therefore, through the Customary Courts and Judicial Courts, traditional values, cultural norms and local legal practices can be incorporated into the judicial process as an alternative that is more responsive to the needs and social context of these children.¹² The Customary Courts and the Judiciary apply a restorative justice approach, which focuses on restoring damaged social relations and resolving conflicts through social reconciliation, rehabilitation and reintegration. This approach aims to help children understand the negative impact of their actions, take responsibility for their actions, and improve relationships with the affected community and victims. In a juridical context, Friedman's theory encourages the application of the Customary Courts and the Judiciary as mechanisms that are legally recognized and integrated into the formal justice system. Thus, the values of local wisdom and customs can be the basis for decision-making processes involving children who are involved in delinquency.¹³ The application of Friedman's theory is expected to produce a justice system that is more inclusive, based on restorative justice, and respects cultural diversity and local wisdom in handling children who are involved in delinquency.

¹¹ Jan Marinka, 2018, *Reformasi Kejaksaan dalam Sistem Hukum Nasional*, Bandung: Sinar Grafika, h. 39

¹² Romli Atmasasmita, 2010. *Sistem Peradilan Pidana Kontemporer*. Jakarta: Kencana. h. 27

¹³ Muladi, 2001. *Kapita Selekta Sistem Peradilan Pidana*. Semarang: Badan Penerbit Universitas Diponegoro. h. Viii Dan 18

Based on the legal theory of the criminal justice system that the Customary Courts and Judicial Courts are an attempt to rediscover local wisdom values, cultural diversity, and customs as the basis for handling future delinquents using restorative justice at the juridical level, as well as implementing more measures concrete, implementing noble cultural values in customary law as a characteristic of Indonesia which is an effort to protect and prosper the community. Customary justice specifically for children as a form of progressivity in the context of providing legal needs for children as those who use customary law as a legal product of community life, therefore the existence of special customary justice for children as an effort to realize a national legal system which includes the development of legal substance, both written and unwritten law writing, improving the legal order for the best efficiency and benefit for children in Indonesia. The Indonesian juvenile justice system, and the involvement of all components of society support the development of a law that is just and based on Pancasila moral values.

There is a legal space to give power to jurors to explore, follow, and understand customary law and use it as a basis for consideration in deciding cases handled. However, there is still a need for a customary justice mechanism that is given independent authority to handle cases, especially children's cases, which are related to the best benefit for the child with a non-penal process and non-stigma decisions. Even though it's a crime now. The justice system needs restorative justice, this is important to do to revitalize customary justice as a sub-system in the juvenile justice system.

CONCLUSION

The birth of customary courts regarding the position and status of children is based on Hugi's rationale which focuses on aspects of humanism and rationality so that there is a paradigm shift as a form of progressivity provided by the 1945 Constitution of the Republic of Indonesia that the State recognizes and respects community customary law community units and their traditional rights during they live and are in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia which are regulated by law. so that in the legal culture, the community continues to respect and follow the decisions given through the customary courts. Dayak indigenous peoples have a customary justice mechanism that is able to resolve community problems based on mutual agreements and various existing sanctions indicating that customary justice in society is able to provide a sense of justice in handling cases that occur in the community.

The criminal justice system, especially related to juvenile justice, is based on Hugi's humanist thinking, so the existence of this judiciary provides progress in fulfilling the law as a logical consequence of a paradigm shift towards legal values, namely that indigenous peoples in West Kalimantan and Indonesia recognize the existence of customary justice as an effort to address cases that occur in their environment, as well as cases related to children. In substance, customary law and its legal sanctions still apply to indigenous peoples. Structurally, the customary justice mechanism is still being implemented and its existence is acknowledged. so that the government, through the DPR, actually makes the establishment of special customary

justice for children part of the regulation of a special law which in the criminal justice system is a concrete form of respect for the existence of indigenous peoples to provide a legal umbrella related to the establishment of special customary justice for children so as to create legal certainty.

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