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Criminal Fines and Customary Justice in Papua: Socio-Legal Analysis in Child Sexual Intercourse Cases

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Abstract

This study aims to analyze the formulation and application of criminal fines for child sexual intercourse within Papuan Indigenous society. Utilizing a socio-juridical or empirical legal research method, the study examines criminal sanctions, particularly fines, in cases involving child sexual intercourse. Data collected from primary, secondary, and tertiary sources are analyzed qualitatively to draw legal conclusions. The research highlights that customary law, recognized under the 1945 Constitution of Indonesia, plays an essential role in the legal culture of Indigenous communities, including those in Papua. Customary courts, as established by Law Number 21 of 2001 concerning Special Autonomy for Papua Province, are recognized within specific customary law communities. These courts operate based on the respective community's customary law, with provisions allowing for judicial review in formal courts if a party disagrees with the customary Court's ruling. Regarding fines as a criminal sanction, determining the appropriate amount often complicates the resolution of cases. The system is rooted in communal values emphasizing collective rather than individual justice, reflecting principles of kinship, religious beliefs, and societal cohesion in decision-making.

Keywords: Criminal Fines, Child Sexual Intercourse, Papua

Introduction

Indonesia is a country of Law as stipulated in Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia after the amendment (from now on referred to as the 1945 Constitution of the Republic of Indonesia). As a country of Law, Indonesia strictly protects children's rights from the potential or threat of various forms of violence and crime, including sexual crimes. Article 28B, paragraph (2) of the 1945 Constitution of the Republic of Indonesia stipulates that every child has the right to survive, grow, and develop and to protection from violence and discrimination. Legal protection for children was then strengthened through Law of the Republic of Indonesia Number 35 of 2014 concerning Amendments to Law Number 23 of 2002 concerning Child Protection, which Law of the Republic of Indonesia has amended Number 17 of 2016 concerning the Stipulation of Government Regulation instead of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection into Law (from now on referred to as the Child Protection Law).

Children are inseparable from human survival and a nation's and state's sustainability. Therefore, it is necessary to make protection efforts to realize the

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welfare of children by providing guarantees for fulfilling their rights without discriminatory treatment. Through this Law, the state upholds human rights, including children's human rights, which are marked by the guarantee of protection and fulfillment of Children's Rights in the 1945 Constitution of the Republic of Indonesia and several provisions of laws and regulations, both national and international. This guarantee is strengthened through the ratification of the international convention on the Rights of the Child, namely the ratification of the Convention on the Rights of the Child through Presidential Decree Number 36 of 1990 concerning the Ratification of the Convention on *the Rights of the Child*.

Every child has the right to survival, growth, and development, as well as protection from violence and discrimination, as mandated in the 1945 Constitution of the Republic of Indonesia. Children as shot, potential, and young generations who continue the ideals of the nation's struggle have a strategic role, characteristics, and unique nature, so they must be protected from all forms of inhumane treatment that result in violations of human rights. The international community also recognizes children's rights as part of human rights. The Convention on the Rights of the Child was ratified by the United Nations (UN) General Assembly on November 20, 1989, and began to have coercive power (*entered into force*) on September 2, 1990 (Lestari, 2017)*on the* Rights of the Child with Presidential Decree (Keppres) Number 36 of 1996. This Convention on the Rights of the Child is an instrument that formulates universal principles and legal norms regarding the position of children. Therefore, the Convention on the Rights of the Child is an international agreement on human rights, including civil, political, economic, and cultural rights (Prinst, 2003).

Sexual violence in the form of intercourse committed against a minor victim, whether rape or in other forms that rob the child of their honor, is a serious crime because it not only causes severe, prolonged trauma that the victim will bear throughout his life but is also considered a social disgrace in society. The social effects that arise are not only that the victim will be ostracized in the social environment of children of the same age but also in his family. In the context of national policy, 4 (four) directives of President Joko Widodo related to child protection that need to be a national priority include; *first*, increasing the role of mothers and families in the education/care of children; *second*, reducing violence against children; *third*, reducing child labor; *fourth*, preventing child marriage. The directives in question have been followed up by various ministries/institutions and *civil society*, although violations of children's rights are still found in multiple backgrounds.

Despite protection under the 1945 Constitution of the Republic of Indonesia, the Child Protection Law, and the International Convention on the Rights of the Child which has been ratified by Presidential Decree (Keppres) Number 36 of 1996, cases of violence, especially sexual violence against children, continue to occur. The Ministry of Women's Empowerment and Child Protection (from now on referred to as Kemen PA) noted that reports of violence against children have

increased in the last three years (2019-2021). The number of reports of cases of violence against children increased from 11,057 in 2019 to 11,278 cases in 2020 and 14,517 cases in 2021. The number of victims of violence against children also increased from 12,285 in 2019 to 12,425 in 2020 and to 15,972 (Ramadhan & Santosa, 2022).

No exception in Papua Province, cases of sexual violence against children also occur in relatively high numbers, one of which is in Jayapura City. Based on records from the Women's Empowerment and Child Protection Service of Jayapura Regency, throughout 2021, 35 children were victims of sexual violence. The most common cases of violence against minors are rape, followed by violence due to alcohol, and also cases of violence due to parents neglecting their children.11 Meanwhile, data from the Legal Aid Institute of the Indonesian Women's Association for Justice (APIK) Jayapura states that cases of sexual harassment against children have continued to increase from 2019 to 2021. The report received by LBH APIK states that the number of cases of sexual harassment and violence against children was 10 cases in 2019, 14 cases in 2020, and 4 cases from January to March 2021. In total, around 50 children have become victims of sexual harassment and violence from 2019 to March 2021. The average age of the victims is 6-16 years (Costa, 2021).

The results of Pius's (2006) research in Jayapura city showed that the types of violence committed by parents, both physical and psychological violence, including sexual violence, the perpetrators of violence are biological fathers, stepfathers, and mothers also do it. Boys and girls are also victims of violence. The impact of violence experienced by children is in the form of physical injuries, revenge, and aggression; if the child experiences sexual, it will cause deep trauma to the child, even disability, mental wounds, and loss of school opportunities, all of which greatly hinder the child's development (Yoimo et al., 2014) . The cases of children becoming victims of physical and psychological violence in Indonesia are caused by various factors. Among them are the negative influence of technology and information, permissiveness of the socio-cultural environment, poor quality of parenting, family poverty, high unemployment rates, and housing or living conditions that are not child-friendly (Yoimo et al., 2014).

In addition to favorable laws, several indigenous communities in Papua Province also have customary criminal laws to resolve problems. However, this customary criminal law is more about peace efforts, such as imposing fines for money or goods whose value is determined at a customary hearing. In the Child Protection Law, the prohibition against sexual crimes against children is regulated in Articles 76D, 76E, and Article 76I. Article 76D of this Law stipulates that everyone is prohibited from committing violence or threats of violence to force a child to have intercourse with him or with another person. Article 76E stipulates that everyone is not permitted from committing violence or threats of violence, forcing, tricking, telling a series of lies, or persuading a child to commit or allow

indecent acts to be committed. Meanwhile, Article 76I is a prohibition against economic and sexual exploitation of children.

The criminal sanctions norms for perpetrators of sexual crimes against children are regulated in Article 81 paragraph (1) of the Child Protection Law that anyone who violates the provisions as referred to in Article 76D shall be punished with imprisonment of at least 5 (five) years and a maximum of 15 (fifteen) years and a maximum fine of Rp. 5,000,000,000.00 (five billion rupiah). The criminal provisions, as referred to in paragraph (1), also apply to anyone who intentionally commits deception, a series of lies, or persuades a child to have sexual intercourse with him or with another person. In the case of a crime, as referred to in paragraph (1) being committed by a Parent, Guardian, Child caretaker, educator, or education personnel, the penalty is increased by 1/3 (one-third) of the criminal threat as referred to in paragraph (1). This increased penalty should be able to reduce the level of violence or sexual crimes against children and provide justice for children as victims, as well as their families who share in the suffering of the child who is a victim.

In addition, court decisions that impose fines in addition to imprisonment for perpetrators of sexual crimes against children also cause injustice to children as victims and their families. The injustice lies in the imposition of fines, which are regulated to go to the State Treasury as Non-Tax State Revenue (PNBP). Meanwhile, children as victims and their families do not get anything other than knowing that the perpetrator has been sentenced to prison and fined by the Court. Child victims and their families do not receive any restitution as a form of state legal protection for child victims of sexual crimes, while child victims bear the burden of trauma for the rest of their lives, which, of course, dramatically disrupts the growth and development of the child.

In the provinces of Papua and West Papua, the community es, especially the families of child victims of sexual crimes, often assume that they will accept the criminal fines imposed on the perpetrators of sexual crimes. This is because customary Law in Papua so far regarding cases of sexual crimes has always used fines (money or valuables) as restitution (compensation) for the suffering experienced by the victim. After the criminal verdict is issued, the victim's family will go to the Public Prosecutor and ask when the fine will be paid to them. They do not know that the fine will be included as PNPB. If placed in the context of justice and human rights, this is certainly not in line with justice and the legal protection of the State for child victims of sexual crimes.

The imposition of fines as PNBP in cases of sexual crimes against children does not have a solid legal basis, contradicting the nature of PNPB in Law Number 9 of 2018 concerning Non-Tax Revenue (from now on referred to as Law No. 9 of 2018), the same thing is also in the Government Regulation of the Republic of Indonesia Number 5 of 2019 concerning Types and Tariffs for Types of Non-Tax State Revenue Applicable to the Supreme Court and Judicial Bodies (from now on referred to as PP No. 5 of 2019) , the same thing is also in the Decree of the Chief

Justice of the Republic of Indonesia Number: 57 / KMA / SK / III / 2019 concerning Guidelines for the Implementation of Management of Non-Tax State Revenue within the Supreme Court and Judicial Bodies Below It, does not mention it. There is no regulation regarding fines for criminal acts of sexual crimes against children as an object of PNBP.

The court decision that imposed a fine as PNBP only relies on the provisions of Article 4 of PP No. 5 of 2019, which stipulates that all Non-Tax State Revenues applicable to the Supreme Court and the Judicial Bodies under it must be deposited into the State Treasury. The judge's decision based on this provision is weak regarding the ratio legis of the nature of PNPB in Law No. 9 of 2018. Imposing a fine on perpetrators of sexual crimes against children by including the fine as PNBP, while the child victim is not given any restitution as a form of state legal protection for children, is a form of legal injustice against child victims of sexual crimes. Therefore, it is necessary to rearrange the provisions for imposing fines on perpetrators of sexual crimes against children to provide optimal justice and legal protection to child victims of sexual crimes.

Methodology

This research is a socio-juridical or socio-legal research (Salim & Nurbani, 2013), also called empirical legal research (Mahmud Marzuki, 2005). Research with the socio-legal type is directed to examine criminal sanctions in the form of fines in cases of sexual intercourse with minors in the Child Protection Law, the Criminal Code (KUHP), Law Number 9 of 2018 concerning Non-Tax Revenue, and court decisions with permanent legal force that impose criminal sanctions in the form of fines in cases of sexual intercourse with children, in indigenous communities in Papua who have their views and values in interpreting criminal penalties in cases of sexual intercourse with children.

The approaches used in this research are as follows: A philosophical approach is used to explore the nature of criminal punishment. Through sanctions, criminal fines for perpetrators' intercourse child. Approach Constitution done with to examine regulation legislation Which concerned link with issue law Which faced. The theoretical/conceptual approach connects the legislative approach with several legal theories/concepts related to the research issue. The case approach is carried out by taking several decision court powerful law still (*Legal Rights of the Child*) in cases of sexual intercourse with children Court Country Which become sample study.

The legal materials for this research are divided into three; first, primary legal materials, namely laws and regulations related to the research issues, including:

1. The 1945 Constitution of the Republic of Indonesia after the amendment;
2. Law Number 39 of 1999 concerning Human Rights
3. Law Number 17 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection;
4. Law Number 11 of 2012 concerning the Juvenile Criminal Justice System;

5. Law Number 9 of 2018 concerning Non-Tax Revenue
6. Law Number 8 of 1981 concerning the Criminal Procedure Code (KUHAP);
7. Government Regulation of the Republic of Indonesia Number 5 of 2019 Concerning Types and Tariffs for Types of Non-Tax State Revenue Applicable to the Supreme Court and Judicial Bodies
8. Presidential Decree (Keppres) Number 36 of 1996 concerning Ratification of the International Convention on the Rights of the Child;
9. Decree of the Chief Justice of the Republic of Indonesia Number: 57/KMA/SK/III/2019 Concerning Guidelines for the Implementation of Management of Non-Tax State Revenue within the Supreme Court and Judicial Bodies Under It
10. Other related laws and regulations.

Second is secondary legal material in the form of a Public Prosecutor's (JPU) Demand Letter and court decisions containing criminal sanctions in the form of fines in cases of underage sexual intercourse at the District Attorney's Office and District Court in West Papua Province, which are the research samples, as well as the opinions of respondents from the research sample. Third, tertiary legal material in library research *is obtained* and collected from various documented sources: books, accredited scientific journals both nationally and internationally, popular scientific papers, newspapers, and the internet, and other secondary sources related to the research issue.

The data analysis method used in this study uses a descriptive legal thinking pattern. The collected data, both primary and secondary, are then analyzed legally using qualitative methods so that conclusions can be drawn in this study.

Result And Discussion

Children, as the young generation who continue the ideals of the nation's struggle, have a strategic role (Muchtar & Azisa, 2023), whose role cannot be ignored to continue the life of the country and state in all fields and aspects of life (Simbolon, 2016). Child development cannot be separated from the development of community life in the environment where the child is located (Nasrullah, 2023). By Law No. 35 of 2014 concerning Child Protection, a child is a child who is not yet an adult or has not reached or is 18 (eighteen) years old, including children who are still in the womb. This means that he will be categorized as a child if he has not reached the age limit of 18 years (Alputila & Tajuddin, 2020).

Protection of children's interests needs to be a concern both through social care facilities and through the judicial process, which is an absolute part that must be considered in taking criminal law policies and social policies, both existing social institutions and state power institutions (Surayda, 2017). To protect children in Indonesia from various kinds of violence and crime that can interfere with the growth and development of children as the next generation of the nation, the Indonesian Government has established various legal policies and formed ministries and particular service institutions related to child protection issues, namely the

establishment of the State Ministry for Women's Empowerment and Child Protection (PPPA) and the establishment of the Indonesian Child Protection Commission (KPAI). At the level of legal policy, the Government then formed a special law on child protection and child justice, namely Law Number 23 of 2002 concerning Child Protection, as amended for the second time. The first amendment, Law Number 35 of 2014, concerns Amendments to Law Number 23 of 2002 concerning child protection. The second amendment is with Law Number 17 of 2016 concerning the Stipulation of Government Regulation in Lieu of Law Number 1 of 2016 concerning the Second Amendment to Law Number 23 of 2002 concerning Child Protection, Law Number 11 of 2012 concerning the Juvenile Criminal Justice System, and Law Number 12 of 2022 concerning Criminal Acts of Sexual Violence.

Article 81 of Law Number 35 of 2014 stipulates that:

"(1) Any person who violates the provisions as referred to in Article 76D shall be punished with a minimum prison sentence of 5 (five) years and, a maximum of 15 (fifteen) years and a maximum fine of IDR 5,000,000,000.00 (five billion rupiah).

(2) The criminal provisions, as referred to in paragraph (1), also apply to any person who intentionally commits deception, a series of lies, or persuades a child to have sexual intercourse with him or another person.

(3) If the criminal act as referred to in paragraph (1) is committed by a parent, guardian, child caretaker, educator, or education personnel, the penalty shall be increased by 1/3 (one-third) of the criminal threat as referred to in paragraph (1)."

Based on the provisions of the article stated above, there are limitations on sanctions and the application of criminal penalties as a guide for judges in deciding a case of sexual intercourse. Based on the provisions of the Child Protection Law, the minimum that should be given to a person who has committed a sexual intercourse crime is at least five years and, a maximum of 15 years and a maximum fine of 5 billion rupiah.

To fulfill a sense of justice for victims, Law Number 12 of 2022 concerning Criminal Acts of Sexual Violence stipulates that criminal acts of sexual violence cannot be resolved outside the court process unless the perpetrator is a child. As specified in Article 23 of Law Number 12 of 2022 concerning Criminal Acts of Sexual Violence, which states that " *The case of sexual violence crimes cannot be carried out settlement outside the judicial process, except for child perpetrators as regulated in the Law "* ((Sangalang, 2022).

The Republic of Indonesia is a country of Law with a vast territory stretching from Sabang to Merauke. The Republic of Indonesia has characteristics, namely customary values, various tribes, races, religions, and customs that distinguish it from other countries (Fitria *et al*., 2019.). In addition, in community life, Law and society are two things that cannot be separated, such as the adage *ibi ius ibu societas,* which means where there is society, there is Law. These legal rules are written and

unwritten, and these rules apply nationally and regionally both in the fields of public Law and Private Law (Rosdiana & Janah, 2020), which have been rooted for generations and are still used by specific communities (Sofyan, 2017).

The existence of customary Law as a form of Law that is recognized in the life and legal culture of Indonesian society is stated in the 1945 Constitution in Article 18B Paragraph (2) which states that "The State recognizes and respects customary law community units." along with their traditional rights as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia, which are regulated by law". An explanation regarding the recognition of customary Law by the State is also contained in Article 27 paragraph (1) of the 1945 Law which stipulates that "All citizens have equal standing before the law and government and are required to uphold the law and government without exception", based on the formulation of these provisions it can be concluded that both civilians and government officials without exception are required to uphold the laws that apply in the life and legal culture of Indonesian society, be it criminal Law, civil Law, or customary Law (Sofyan, 2017) .

In various regions of Indonesia, including Papua, crimes often occur in multiple types, including the crime of sexual intercourse with children. There are normative differences along with the implementation of special autonomy for Papua to protect and maintain the rights of Indigenous Papuans, then in the Law that regulates special autonomy for Papua clearly mentions the term "Indigenous Papuans," which is defined as a person who comes from the Melanesian racial group consisting of indigenous tribes in Papua Province and people who are accepted and recognized as Indigenous Papuans by the Papuan indigenous community . With the existence of strict regulations related to Indigenous Papuans, in addition to guaranteeing the rights of Indigenous Papuans, on the other hand, the impact that arises is that perpetrators of crimes in Papua can also be classified based on the perpetrators, namely crimes whose perpetrators are Indigenous Papuans and not Indigenous Papuans (Tajuddin & Sunaryo, 2021).

The settlement of customary crimes in each customary law community varies. The mechanisms and methods used, but in general, have the same goal: to restore the original state without any party feeling objections to recreate a state of harmony and harmony in community life. In terms of imposing sanctions, for example, there are quite a few court decisions in our country that pay attention to the customs/habits of the local community. This is due to the diversity of ethnic groups spread from the eastern tip of Merauke Papua to the tip of Sumatra, so their customary criminal sanctions are also different (Martha, 2004) .

After the provisions of Law Number 21 of 2001 concerning Special Autonomy for Papua Province, the existence of customary courts in specific customary law communities is now recognized. These customary courts are arranged according to the provisions of the customary Law of the relevant customary law community. Furthermore, if in the case of one of the parties to the

case objects to the decision that has been taken by the customary Court that examined it, the party who objected has the right to request the first instance court within the competent judicial body to explore and retry the dispute or case in question (Martha, 2004)

In its application, the main measure, according to customary law, is the sense of justice and legal awareness of the community based on developments in circumstances, time, and place. As explained in the provisions of Article 5 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, it states that:

"*Judges and constitutional judges are required to explore, follow, and understand the legal values and sense of justice in society. Then Article 10 paragraph (1) states that the Court is prohibited from refusing to examine, try, and decide a case submitted on the pretext that the Law does not exist or is unclear but is required to examine and try it. Next, the provisions of Article 50 paragraph (1) state that court decisions must not only contain the reasons and basis for the decision but also contain certain articles from the relevant laws and regulations or unwritten legal sources that are used as the basis for judging it*."

Determining the amount of money or fines is also one of the factors that hinder the practice of resolving criminal cases in the pursuit of justice. One example of a case is in the practice of examining criminal acts of sexual intercourse with minors; the victim often asks for a fairly hefty fine, even up to tens of millions, so that it is not uncommon for many perpetrators of criminal acts to be unable to pay (Bakti & Watkat, 2023).

Substantially, this settlement system is based on the values contained in a society characterized by the principles of kinship, religious magic, and community, starting not based on individual justice but collective justice based on the dimensions of dispute resolution that bring harmony, harmony, balance, togetherness and harmonization of the family environment. However, again, for the police to implement the resolution of criminal acts using the concept of restorative justice, it all depends on the parties themselves. In addition, all assessments made by investigators rely heavily on the seriousness of the parties, whether the settlement process is to be carried out in a family manner or not, and the results of the settlement by investigators at the investigation level must receive approval from the Chief of Police Resort (Kapolres), by the stages that have been determined (Bakti & Watkat, 2023).

Conclusion

To protect children in Indonesia from various types of criminal acts including sexual intercourse that can disrupt the growth and development of children as the next generation of the nation, the Indonesian Government has established various legal policies and formed special ministries and agencies related to child protection issues. In Indonesia, the existence of customary Law as a form of Law that is recognized in the life and legal culture of Indonesian society is recognized and stated in the 1945 Constitution, which must be upheld in the life and

legal culture of Indonesian society, including the Law in force in Papua. In addition, based on the provisions of Law Number 21 of 2001 concerning Special Autonomy for Papua Province, the existence of customary courts in certain customary law communities is recognized. These customary courts are arranged according to the provisions of the customary Law of the relevant customary law community. If in the case of one of the parties to the case objects to the decision that has been taken by the customary Court that examined it, the party who objected has the right to request the first instance court within the competent judicial body to explore and re-try the dispute or case in question. Related to fines as one of the sanctions applied, determining the amount of money or fines is also one of the factors that hinders the practice of resolving criminal cases in an effort to achieve justice. Substantially, this settlement system is based on the values contained in a society characterized by the principles of family, religious magic, and community with a starting point not based on individual justice but justice together, based on the dimensions of dispute resolution that bring harmony, balance, togetherness and harmonization of the family environment.

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