

THE CUSTOMARY LAW DILEMMA IN PROVIDING LEGAL PROTECTION TO CHILD LABORERS IN WEST PAPUA

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ABSTRACT

Child laborers, notably in informal sectors, are often exploited and received physical violence. Indeed, they often come from low-income families with parents undergoing highly economically challenged situations and other limitations (low education, minimum wages, malnutrition, and low healthiness). The research used juridical-normative and juridical-empirical methods. The research shows that the role of custom in West Papua has not been beneficial in protecting children who are victims of exploitation. The admitted customary leaders do not have the legal power to be adhered to. Indonesian positive law that has and should ensure legal certainty has not also been enforced well in West Papua Societies. Law Number 23 of 2002 concerning Child Protection, Article 13, Paragraph 1b, has not been firmly implemented in Indonesia's remote areas. This is because the number of law enforcement personnel is limited. Customs can be given a role in providing legal protection by introducing customary institutions admitted by the government. With a partnership of customary people and the government, legal fairness will occur in every detail of Indonesia and be felt by all Indonesian people.

KEYWORDS: Customs, Legal Protection, Child Labor, West Papua.

INTRODUCTION

Indonesia is a country that enforces four types of laws, customary laws, Islamic law, civil law, and common law [1]. The first stems from Indonesian culture and permeates Indonesian society, affecting the current Indonesian legal reception and condition. According to Indonesia's Constitution of 1945 (UUD 1945), Article 1, Paragraph 3, Indonesia is a country of law [2]. Therefore, the country should respect and protect individual human rights as the backbone of the concept to ensure that each individual will not get arbitrary repression from another individual or institution like the government [3].

The government's obligation to protect human rights is written in the fourth paragraph of the introduction of UUD 1945, particularly in Article 28B, paragraph 2, and Article 34, UUD 1945. The articles motivated Indonesian ratification of the Convention of Children Rights by the United Nations on November 20, 1990, through Presidential Regulation Number 36 of 1990. Following the recommendation of the convention to initiate a child committee that oversees the progress of the country fulfilling the convention issues, the Indonesian Child Protection Commission was established as instructed in article 74, demonstrating Indonesia's strong concern nationally on children's rights [4]. The Indonesian government has attempted various measures to decrease the number of Indonesian children laborers through programs enhancing the quality of education [5]. For example, it is done by partnering with International Labour Organization (ILO), establishing the Committee of National Actions, and conducting School Operational Aid (BOS). Nevertheless, children still undergo several

regrettable issues in practice, ranging from being trafficked and tortured to being deserted. Indeed, some of them are propelled to be sexual commodities as prostitutes or work in different jobs with inappropriate facilities in high-risk locations [6].

Many children exploitation cases occur in some Indonesian provinces. For example, in East Java, 30% of prostitutes in 2003 were children forced to perform it. In Aceh, parents let their children work to contribute 20-25% of the family income, exploiting them economically [7]. Similarly, In West Papua, economic exploitation also takes place. Children aged 10 to 12 years that work accounts for 11,47%, coupled with 25,62% for aged 13 to 14 years old, and 62,91% for aged 15 to 17 years old [8]. The causes may be related to interests that are not concerned about children's future.

Abuse of children can be in the forms of physical, emotional, or sexual. Additionally, many Indonesian children are also victims of human trafficking. However, an issue that needs special treatment is child labor. It is a global issue with many children entering the workforce in the school age. The significance of child labor for the family's livelihood is undeniable since most children's wages are given to the parents. Almost 44% of child laborers contribute to family income between 20% to 75%. 16,6% of them contribute 75% or more to their parents' income [9]. The parents' workload and economic pressure can drop by letting, asking, or enforcing the children to work [10].

Any attempt to protect children should espouse a principle and aim that maximally pursue the target. Child protection cries out the partnership of various parties because child protection is a common responsibility. Parents, families, communities, governments, and countries have their portions, ability, and capability in safeguarding children in different situations. The Indonesian Child Protection Commission establishment aims to solve issues related to children's rights, but, over time, children's problems in Indonesia still keep increasing [11].

In this case, it is worth considering a province in Indonesia that is highly adherent to their customs, West Papua. Local people in the province are still led by the head of the Customary Council, which regulates all tribes. Meanwhile, in each city, there is also a customary leader that figures in solving social issues based on entrenched customs and norms of each tribe. The condition of West Papua society that reverses the customary council and customary leader makes law enforcement, in this case, the police, often prioritize a problem-solving measure through custom way first. The local people still follow customary decisions than positive laws, such as existing laws.

The situation raises a question regarding children exploitation in West Papua mentioned above. Laws Number 23 of 2002 that had been revised to Laws Number 35 of 2004 have been deemed successful in recognizing cultural product and civilization of society. However, it does not automatically erase the economic exploitation of children, whether in big cities or remote countryside's. Meanwhile, a statement that says that customary communities can help the government protect communities and children in a simple way and without institutionalized regulation is often heard.

LITERATURE REVIEW:

Legal Protection

The principles of legal protection for Indonesian people are based on Pancasila as Indonesia's ideology and philosophy [12]. According to Hadjon that principles of legal protection for people from the government based on Pancasila are: (1) the principles of legal protection that are inspired by the concept regarding recognition and protection towards human rights, and (2) the principle that stems from the conception of the government of law [13]. Meanwhile, according to Rasjidi and Putra [11], laws can be functioned to realize adaptive, flexible, predictive, and anticipative protection[14].

In this research, protection is defined legally towards child workers in informal sectors. Children's rights protection is directly related to statutory regulations and can be split into two types, juridical and non-juridical protections. The former includes legal protection in public and customary laws, while the latter includes protection in social fields, particularly health and education.

Legal Pluralism

Legal pluralism indicates more than one regulation in one social life. In Indonesia, legal pluralism is born due to historical factors, notably, diversity in ethnicity, language, culture, religion, and race [15]. Although pluralism has different meanings, they recognize one thing that diversity is a fact. Similarly, legal pluralism in Indonesia aims for one thing: justice and the benefits for the nation. According to Griffiths that's the legal condition of Indonesia is legal pluralism [16], and Hooker points out that various laws mentioned should interact [17]. This pluralism is also accurate to refer to Indonesian legal systems which recognize customs [18].

Generally, the Indonesian legal system adopts pluralistic systems. At least five legal systems flourish globally today, common law, civil law, customary law, Islamic law, and communist or socialist applied in countries like China. The five legal systems above, Indonesia only adopts 3 (three), namely customary, Islamic, and Western laws. The three laws above are linked. Despite the differences in the content of their law, they can go hand-in-hand to achieve the same thing in the process.

Child Age Limitation and The Children Rights in The Laws

According to Article 1 of the Convention of Children Rights, Law Number 39 of 1999 [14], Presidential Regulation Number 12 of 2001, Law Number 23 of 2002, Law Number 21 of 2007, and Law Number 44 of 2008, a child is anyone under 18 years old. Meanwhile, according to the Indonesian Civil Code (Kitab Undang-Undang Hukum Perdata), children are anyone before 21 years old [15]. The Indonesian Criminal Code (Kita Undang-Undang Hukum Pidana) defines people who have not been adults as under 17 years old [16] with 15 years old as the minimum limit. In this present research, a child is defined according to Law Number 6 of 2013, concerning Changes in Law Number 23 of 2002 concerning Child Protection. There, a child is anyone under 18 years old.

Regulation created by the Indonesian government regarding children's rights in Indonesia has developed since Law Number 23 of 2002. The law is based on four principles of the Convention of Children's Rights: non-discrimination, devotion to the best interest of the child, the right to live, survival and development, and the right to participate. In the law, children's rights are made more specific to protect children from many problems. Children's rights are specified in several articles, especially from Articles 4 to 18. Besides rights in Law Number 23 of 2002, for example, in Law Number 13 of 2003, child laborers also have rights to receive an appropriate salary, reasonable work hours, sufficient rest times and leaves, proper education, and occupational health and safety.

General Picture of the Economic Exploitation toward Children in West Papua

Many children aged 7 to 17 years old in various provinces in Indonesia do not have education but do economic activities. West Papua is in the first position regarding the number of cases of children that do not go to schools but become child workers. Central Java occupies second place. This data is justified by integrated data issued by the National Team of Accelerating Poverty Eradication (TNP2K) regarding Very Poor Households (RTSM) in 2012. The data shows that in RTSM, 177.374 children do not get an education but work in agriculture, fishery, commerce, services, and others.

Based on the researcher's observation in West Papua, it was found that most children work as beggars, parking attendants, domestic workers, farmers, construction workers, or simply helping their parents collect mountain stones to be sold. Indeed, some children are employed to be a prostitute. Some work in the school hours, the others work till midnight. According to the researcher's observation, the age of most child workers is in the level of primary school or junior high school.

In an interview, Silas Ongge Kalami, as the Head of Customary Council of Malamoi of West Papua, said that if the government has provided well a regulation through protection, what is left is the implementation in society. Not everyone read the law regarding children. Furthermore, Kalami said that employing children by parents is relatively normal, although it is not for routine income. Meanwhile, from the customary laws of West Papua, Silas Ongge Kalami points out that there will be a sanction for parents that employ their children as a form of custom protection. However, it highly depends on the type of jobs given to the children. Enforcing child workers violates children's rights written in Law Number 23 of 2002 chapter 13: *very child, so long as he/she is under parents' care, guardians', or any other party's responsible of caregiving, is entitled to have protection and treatment of: a. discrimination; b. exploitation, be it economic or sexual; c. abandonment; d. cruelty, violence, and molestation; e. injustice; and f. other mistreatment*, Law Number 12 of 2003, and the general principle of the Convention of Children Rights.

Working children are caused by many things, such as lack of parents' education and people's lack of understanding of child workers. Usually, parents think that working is children's responsibility to obey their parents. Another factor is children's lack of interest in carrying out education at schools and their high interest in working immediately. Economic factor in a low-income family, therefore, plays a significant role

RESEARCH METHODOLOGY

The research used juridical-normative methods. The researchers also saw the problem through a statutory, conceptual, and comparative approach. The approaches mentioned were coupled with a descriptive-analytical approach. The latter provides a comprehensive picture regarding children's legal protection in informal sections before analyzing the problems based on legal norms, legal theory, and legal interpretation, balancing the philosophical, juridical, and sociological aspects.

The legal material used in the normative research is primary, secondary, and tertiary materials. It includes Law Number 23 of 2002 *juncto* Law Number 35 of 2012 concerning Changes in Law Number 23 of 2012 regarding Child protection. The materials include textbooks, legal dictionaries, legal journals, commentaries of court verdicts, bills, interviews with related parties concerning children, encyclopedias, and websites. The collection of legal materials (whether in the forms of primary, secondary, or tertiary materials) needed for this research is based on the problems that have been comprehensively classified by sources and hierarchy

RESEARCH RESULTS

Law Enforcement Toward the Victims of Child Economic Exploitation in Customary Laws and Positive Laws in West Papua

A number of laws principally have protected child developments. The protection is made to protect the next generation of the nation. Many laws have also firmly regulated the sanctions for the offenders of child exploitations. The legal basis of child exploitation can be found in (1) Indonesian Constitution of 1945 (UUD 1945), (2) Indonesian Criminal Code (KUHP), (3) Law Number 39 of 1999 concerning

Human Rights, (4) Law Number 21 of 2007 concerning Eradicating Human Trafficking, (5) Law Number 13 of 2003 concerning Human Efforts, (6) Law Number 23 of 2004 regarding Eradicating Domestic Violence, (7) Law Number 35 of 2014 concerning Changes in Law Number 23 of 2002 concerning Child Protection

Indonesia set a limit for child workers, namely 15 years old. This age limit is the same as the age for compulsory study in Indonesia and is instructed by Law Number 20 of 1999, which refers to ILO Convention Number 138 concerning the minimum work age. Principally, employing children is prohibited, but in Law Number 13 of 2003, there is an exception in Article 69, paragraphs 1 and 2, and Article 72. In the law, the juridical definition of child labor is not mentioned. However, from the points of exception toward prohibition in employing children, it has provided the definition indirectly.

From a legal point of view, children with their biological and psychological incapability have the same rights as adults in any aspect of their lives, whether social, cultural, economic, political, or legal. In Law Number 39 of 1999, child exploitation is explained, notably in Articles 64 and 65. It is written clearly *that children's rights should not be exploited*. Children are a time when they can develop and grow in the studying process. Additionally, Law Number 13 of 2003, Article 68 to 75, also *regulates child labor*, and in Law Number 35 of 2014, Article 66, *children exploited economically are explained*.

Although a set of regulations protects children from the danger of economic exploitation, the quality has become more complex. Recently, the works tend to be more exploitative and imperil the development and growth of children's physique, mental, moral, social, and intelligence. Inappropriate jobs done by children have been easier to find, such as prostitution, mining workers, or work on the street and child trafficking. These cases happen in West Papua, notably Manokwari (the capital of West Papua), Sorong, and Kaimana.

Interaction in the micro and macro levels, ranging from economy, social, culture to politics, is considered the main factor causing economic exploitations toward children. Specifically, according to the Network of Child Labor Mitigation, poverty, urbanization, socio-cultural, and education are the factors and drivers. Economic factors are the main factors of the economic exploitation of children. Changes in economic conditions play a huge role in enabling felonies [19].

There are several ways to disguise child exploitation. However, whatever methods they use all takes advantage of the weakness and hopelessness of children. Child exploitation is caused by a lack of protection, while they still cry out for protection. Poverty doubles their vulnerability and their families. They also do not have other choices. Millions of children are subject to the situation. This periphery situation also makes them only care about surviving without thinking that they benefit people who exploit them. Child protection should be done as early as possible, if possible since embryonic stage. It departs from a conception of complete, thorough, and comprehensive child protection.

Child protection attempts for children in the family and society are still partial. Each segment of society has its function and is thus limited. In enforcing children's rights, the problems can be partitioned into external and internal factors. The external factor is mostly political will from the government to create and run development programs sensitive to children's interests. Meanwhile, the internal factors include:

1. Legal regulations that are highly associated with how the regulations are created, including: (a) juridical methods and requirements of creating regulations, (b) the consistency of the legal materials with the spirits, values, principles, and legal rules of children, and (c) the readiness of regulations and implementations to face legal vacuum.

2. Law enforcement that participates directly and is expected to understand the children's rights and be capable of enforcing them.
3. The legal culture of the society, which comprises of the social structure and cultural perspective of the people regarding law and its enforcement.
4. The legal communities, which become the place of law in daily lives, including public concern and people adherence to law enforcement [20].

The central government is not the only body that has a strong concern about protecting children. In West Papua, the regional governments have also contributed to legally protecting child laborers by issuing Regional Regulations of West Papua Number 11 of 2013 concerning Woman and Child Protection from Violence. The custom in West Papua have customary laws adhered to by the people that children should not be employed, but the laws are verbal and not written. At the level of regencies, regional governments have issued regional regulations concerning protection toward the customs of MOI tribes. The regulation is issued in Regional Regulations Number 10 of 2017 concerning Protection toward Moi Tribe. The regulation specifies the rights and obligations of the Moi Tribe, but it does not discuss child protections.

The second subsystem in the legal system is the legal structure. Some articles regulate child protection institutions and commissions in some laws and Regional Regulation Number 11 of 2013. The central government realized it by establishing KPAI and the regional government realized it by establishing Child Protection Institution (LPA). Through the articles mentioned above, KPAI and LPA are expected to provide legal protection to children.

As law enforcement, KPAI and LPA have not functioned well in West Papua. One of the main reasons is that KPAI does not have a representative at the level of province, and woman and child protection institutions can only be found at the province level. Accordingly, child laborers are still relatively easy to find. As the law enforcement, the police have also not functioned effectively due to insufficient personnel. Lack of reports and Litigation cases concerning child laborers also shows that the police have not worked effectively. Customs in West Papua have also not given enough legal protection to child laborers. Customary institutions of West Papua in the province, city, and regency focus more on protecting customary rights (*hak ulayat*).

Legal culture as one of the three legal subsystems is a factor that protects child laborers legally in West Papua. The government has specifically regulated certain articles not to employ children, let alone exploit them economically. The problem is that child workers are often seen as a normal thing by people in West Papua. Indeed, some parents of child laborers are aware of the prohibition of employing children. Researcher interviews with the customary leader found that child protection is seen as normal. The researcher also found that no child laborer cases are given customary sanction until the article is written.

For Indonesian people, the reliability of law enforcement determines the perception of legal certainty. If law enforcement is weak, society will perceive laws as absent and lead them to think that they live in the wild. By contrast, if law enforcement is strong and consistent, people will see the law exists and adhere to it. Reliable law enforcement in Indonesia is required. Indonesia is still far from a society where laws have been internalized in individual behaviors. Otherwise, law enforcement should not be done anytime anywhere [21]. This is why cultural values (customs) should always be considered in regulations, laws, and law enforcement. Therefore, just and impartial laws for all in society can be realized.

Legal Protection Towards Child Laborers by Custom in The Future

Giving sufficient legal protection to children that undergo economic exploitation is the obligation of all people. Legal protection can be given by the family, the surrounding society, and the government. This is because each child has basic needs that should be fulfilled to develop and grow normally and healthily. Fulfilling these basic needs is highly essential since it will affect the developmental tasks that children should do in their childhood. According to Collins that the developmental tasks are physical, cognitive, and social aspects [22].

Children with unfulfilled rights will not grow optimally, and their development will be affected. In society, there is a tradition that wishes that the children work earlier so that when they are adults, they are capable and skillful in doing their jobs. Meanwhile, in a family with economically challenged situations, the parents often involve the children to support the household.

Law Number 35 of 2014 concerning Changes in Law Number 23 of 2002 has not been effective and maximally applied. There are many cases of exploitation of child laborers. Considering the children are the successor of the nation's generations, protecting them from child exploitation should be done as early as possible. Some of the ways are through supervisory, development, and protection. It needs community roles, whether through child protection institutions, religious institutions, non-government organizations, people organizations, social organizations, business entities, mass media, or educational institutions. The contribution of each will be very helpful in preventing child exploitation.

In Sorong, West Papua, many children are still found exploited. The ignorance makes child labor for helping parents normal. They argue that it is done to help the economy of the family. Based on an interview, some parents in Saoka village and Tarsa village in West Papua said that their customs do not problematize child labor for helping their parents. As long as the child has no problem with working, no further explanation about specified pre-work is necessary.

In other words, legal protection against child protection cannot be separated from authorities and fields that customary leaders control. This is because there is no strict distinction of authority between public and civil laws in the area. People in West Papua do not recognize the distinction. Also, considering customary institutions are not complicated, it makes sense that no complicated bureau systems with a number of apparatus like the government regarding child protection is established.

The customary courts that prioritize peace invite more customary people of West Papua to solve conflicts regarding child protection against economic exploitation in their regions with the courts. Based on the researcher's field study, only a few people solve conflict through judiciary owned by the government, especially for regions that are remote from urban areas. Apart from the fact that it may have different processes and results, the procedure is also costly. It becomes the reason why people do not go to public courts. Recognition and acceptance of people toward tradition and customs and, therefore, conflict resolution institutions are the basis of authority.

Three factors cause children to work. Firstly, the government does not implement poverty eradication programs and provides sufficient laws for children and low-income families. Secondly, economically challenged families do not have other choices but employ their children to help support the family. Thirdly, there is a practice of deeming that children should pitch in family financial problems by working when they are still young.

Meanwhile, there is also an essential question of why the business owners let children works. There are also three factors. Firstly, children are not capable of standing up for their rights. Secondly, they are easy to be manipulated because they are still young. Their incapability, obedience makes them easy to be manipulated, such as by threatening. With that, they are usually instructed to do works that adult

don't want to do. Another interesting factor is that maybe children are cheap. They can be employed without healthcare and other benefits. They are also easy to be laid off if the companies do not demand additional workers anymore.

Children's legal protection needs to be done as early as possible, namely from embryos until get to 18 years old. Based on the concept of complete, thorough, and comprehensive protection, Law Number 23 of 2002 states that the obligations to protect children should be based on the principle of non-discrimination, devotion to the best interest of the child, the right to live, and survival and development, and respects for the views of the child. Giving protection to children is advisable because children belong to vulnerable groups together with other vulnerable groups, such as refugees, internally displaced people, national minorities, migrant workers, indigenous people, and women.

Protection towards children becomes very important because violation towards it is a violation of human rights. It will impede the development of the child greatly. Children who undergo violence, exploitation, negligence, misraising will have risks, such as short life expectancy, poor mental and physical conditions, educational problems, including dropping out, lack of skills as a parent, being homeless, and being expelled from their place.

Protection towards children is highly needed because many factors cause children to be prone to or vulnerable to risks related to violence, negligence, exploitation, and other inadvisable treatments. Some of them are between generation violence for raising children, poverty that causes urbanization, lifestyle changes, the quality of life expectancy, exploitative and discriminatory understanding in society (for example, children are commodity), and legal systems that do not support child protection.

The partnership between families, communities, and government should be done well to safeguard children from violence. Additionally, law enforcement should work well. To enforce laws, elements in the legal systems should be fulfilled. There are three elements in the legal systems: substance (legal regulations), that should be repaired; law enforcement that should improve its knowledge, understanding, and supports to children rights; and the legal cultures that should be built to prioritize child interests.

From the researcher's point of view, legal protection toward child laborers can be seen from several angles, such as child age limitation, the government's and the country's obligation and responsibility, and the role of communities. As the researchers discussed in two chapters, one of the real roles of the community in giving child protection is the establishment of the National Commission of Child Protection. The roles and functions of National Commission of Child Protection in protecting children are done by being a supervisory institution, a place for complaints regarding children, research institution for policy and laws on children, education institution, introductory and dissemination information of children. Additionally, it also works as an institution that oversees the implementation of children's rights and the institution that officiates KPAI that is independent.

The government regulation that is not well-distributed to all regions in Indonesia is caused by a lack of human resources that optimize protection to children. For example, in West Papua, no institution gives protection to children. Police divisions that specifically protect children and women are not always established in remote areas. With this in mind, the government definitely needs supports from communities, including customary communities. They can be appointed to give protection to children. Customary institutions that are modernized according to the need of the times should not omit the features of Indonesian identity. Incorporating concepts and principles of custom to new legal institutions from foreign law to enrich and develop national law should not contradict Pancasila and the Constitution of 1945. In the guidance of laws of the national treasure, the custom is one element,

while in the guidance of family laws and laws of national inheritance, the custom is the core. With the establishment of national laws that contain customary elements, the places and the roles of customs have been absorbed in the national laws[23]

Policies to protect children from working have not been effective. Many of the problems originate in the field, such as social values, historical values, traditions, habits, social environment, social culture composed of a structured pattern, and the weakness of supervisory system done by Divisions of Employment Supervision, a body of Bureau of Human Efforts and Transmigration.

Legal protection in Indonesia is a tall order. The process needs a long time and demands a serious partnership between central and regional governments. As Indonesian indigenous laws, by giving opportunities to customs in West Papua whose people have a strong loyalty to it, the customs can be a solution for the government to reach people in West Papua that live in unreachable regions or regions that lack attention. If the role of customs is to be involved in providing a guarantee of legal protection and same is applied in any region with sheer connection with customs, it will reach children in remote areas of Indonesia where the government cannot reach due to lack of law enforcement staff. It will also help institutions concerned about child protection that are not always established in all regions.

CONCLUSION

In ensuring justice, certainty, and benefits of the law for all citizens, the government obliges to protect anyone in any issue that has legal consequences, including children. As regards child labor in West Papua, the law enforcement has not been maximum, whether in terms of customs or legal positives. West Papua that still teems with custom, has not maximally protected the children. One of the causes of this problem is the leaders' role in customary institutions. They have not been involved much in giving protection to child laborers. Customary leaders lack knowledge regarding the regulation of legal protection for children working in informal sectors. For some people in West Papua, children that work are relatively normal and are seen as a responsibility to help their parents. Besides lack of knowledge regarding regulations on child protection, customary leaders in West Papua have not received full authority to protect child laborers.

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