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Alternative Dispute Resolution for Customary Land Through Customary Courts

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ABSTRACT

The recognition of the customary rights of indigenous peoples is enshrined in the Basic Agrarian Law, specifically in Article 3 of the UUPA, which mandates that the implementation of these rights must align with national interests and not conflict with higher laws. Customary rights are respected as living law within indigenous communities, provided they do not contradict the spirit of national law. Although customary courts are not explicitly mentioned in formal judicial regulations, they remain acknowledged and respected, with their decisions influencing formal courts, particularly in disputes related to customary law. This research aims to analyze the role of customary courts in resolving land disputes within indigenous communities, particularly when decisions from these courts are challenged in formal courts. This doctrinal research uses a literature study to collect legal materials, which are then analyzed qualitatively. The findings reveal that formal courts often fail to consider absentee land ownership, as regulated in the legislation, leading to errors in determining land ownership entitlement. In one case, the legal justification provided by the judge overlooked a testimonial *de audit* submitted by one of the parties, ultimately dismissing its validity. The implications of this study suggest that there is a need for better integration of customary legal principles into the formal justice system to ensure the protection of indigenous land rights. It also highlights the importance of clear legal frameworks to address conflicts between customary law and national regulations, particularly in land ownership disputes.

Keywords: Alternative Dispute Resolution, Customary Courts, Customary Rights of Indigenous Peoples.

INTRODUCTION

"If it had been decreed from above that customary law should be replaced, but the people were still waiting for it, even the judges of the State courts would be powerless to deal with it ."A statement put forward by Van Vollenhoven to provide an overview of the position of customary law in the Dutch East Indies government (Marinus, 2024). The layout rights of indigenous peoples are the rights granted by the constitution to manage land rights located in the environment of indigenous peoples. Ulayat rights are a series of authorities and obligations that are entrusted to Indigenous peoples, relating to the land being controlled, managed, utilized, and preserved together in order to achieve the prosperity of Indigenous peoples. The 1945 Constitution of the Republic of Indonesia also recognizes, protects, and respects the rights of indigenous peoples as

stated in Article 18B paragraph (2), which states that the state recognizes and respects the unity of customary law communities and 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.

Recognition of the customary rights of indigenous peoples is also contained in the Basic Agrarian Law as stated in Article 3 of the UUPA, which states that the implementation of customary rights and similar rights of indigenous peoples, as long as according to reality they still exist, must be in such a way as to be in accordance with national and state interests, which are based on national unity and must not conflict with laws and other higher regulations (Wangi et al., 2023). Based on the regulations mentioned above, the customary rights of communities in Indonesia are respected and recognized as living law within the customary community as long as the customary rights still exist and do not conflict with the spirit of national law and higher regulations.

As it turns out, it is stated in the preamble of the UUPA that the National Land Law was formed based on customary law, which then united the National Land Law by eliminating feudal colonial land rights. On this basis, it can then be said that Customary Law is the main source in the construction of National Land Law.

Moreover, the general courts under the Supreme Court, which have the authority to resolve a case based on the mandate of the law, have very limited capabilities and are being hit by a crisis of confidence. As it turns out, the Supreme Court's decision Number 1094/Pdt/2020, which tried a case related to the rights of indigenous peoples to land rights, did not provide legal certainty and expediency in its decision, whereas DRH. Constant Karma, as the plaintiff, argued that the plaintiff obtained the land through a customary land release agreement from the Ondoafi of Kayu Batu Village Ridolf Makanuay Junan on July 22, 2013, as well as Washington Waromi, S.T as the defendant argued that his land ownership was obtained through a customary land release agreement from Gaspar Sibi as Ondoafi Kayu Pulo on January 12, 2011.

In the legal considerations of the Supreme Court's court decision Number 1094/Pdt/2020, the judge only argued that the plaintiff's claim lacked parties, which is the main topic in this research, that the judge's decision does not provide legal certainty because it is not known who is entitled to then control the rights to land located in the province of Papua, Jayapura. Then, it does not provide benefits because this decision cannot be implemented due to the uncertainty of who is entitled to the land that is the object of dispute in this case. This then contradicts the principles of legal certainty and expediency in the judge's decision, as Martono states in his book (Margono, 2019). Basically, the principle of expediency is located between justice and legal certainty, where judges assess the purpose or usefulness of the law in the interests of society (Yasa & Iriyanto, 2023). The emphasis on the principle of expediency is more likely to have economic nuances. The rationale is that the law is for the community or many people; therefore, the purpose of life must be useful for humans (Atiqah, 2024).

Dispute resolution does not have to be done through formal justice; there are also several alternative dispute resolutions that can be passed by the parties to the dispute. As in Law Number 30 of 1999 concerning arbitration and alternative dispute resolution. Where article 1 point 10 states that "alternative dispute resolution is an institution for resolving disputes or differences of opinion through procedures agreed upon by the parties, namely out-of-court settlements by means of consultation, negotiation, mediation, conciliation, or expert judgment."

Based on the provisions of the article above, it can be concluded that customary justice is part of an alternative dispute resolution that is expected to resolve disputes through customary justice to resolve customary disputes, especially customary land, and is expected to be able to resolve any problems related to custom. Customary justice based on local wisdom is not new to our country because this kind of justice system was applied in the colonial era, which developed and spread to remote areas of Indonesia.

Before entering into a discussion of alternative resolution of customary land disputes through customary courts, it is necessary to know in advance that the Judiciary is a system related to the process of seeking certainty, justice, and expediency so that justice, certainty, and expediency are achieved as it turns out that the purpose of the law was formed. R. Subekti and Tjitrosoedibio said, "The Judiciary (rechtsbank court) is a body that carries out justice, namely examining and deciding legal disputes and violations of law/legislation. The Judiciary (rechtsbank court) is everything related to the duty of the state to uphold law and justice" (Jimly, 2018).

The purpose of the establishment of a judicial institution is none other than to uphold the law and provide certainty and benefit for all people, while the purpose of organizing the judicial process is so that justice, order, truth, and certainty can be upheld, which aims to create and provide protection to all people. To achieve these judicial objectives, the role of judges in the judicial process is vital because the considerations and decisions of judges in deciding a case will have a very broad impact not only on the litigants but also on future judges' decisions and knowledge in the field of law.

Customary justice is a very simple form and way of implementing justice in accordance with the level of knowledge of the community where the Indigenous community is located (according to the general location of customary land) and, of course, close to the conditions of the conflict that occurred. Case settlement through formal or judicial channels always causes losses for both the parties who take advantage and the victims. Therefore, the choice of case settlement through non-judicial or restorative justice is the right choice (Gaffar, 2012). This restorative justice concept will be outlined in alternative dispute resolution through customary justice. Because restorative justice is appropriate when juxtaposed with adat, there are various complex problems related to adat disputes, and the solution to the development of alternative dispute resolution in Indonesia is non-negotiable (Sitepu, 2016).

Based on the above background, the purpose of this study is to analyze the application of the customary justice system as an alternative to resolving customary land disputes, and to

evaluate whether customary justice can provide a fairer, faster and more efficient solution in resolving disputes involving customary land rights, especially in the Papua region.

Thus, the benefit of this research is to provide a clearer understanding of the potential of customary justice as an alternative dispute resolution that is more relevant to the local wisdom of indigenous peoples. This research is expected to contribute to the development of law in Indonesia, especially in terms of customary land dispute resolution which has been faced with shortcomings in the formal justice system. In addition, the results of this research are expected to serve as a reference for policy makers in formulating better regulations to support the sustainability of indigenous peoples' rights within a fairer and more transparent legal framework.

RESEARCH METHOD

The research used in this study is doctrinal legal research. Doctrinal research is research that uses normative juridical research methods by examining secondary data. This research examines primary legal materials in the form of legal norms and regulations relating to the subject matter of this research, which is conducted on positive law and high court decisions. The use of this research method is to answer the problem formulation of this thesis as well as to examine the considerations of the panel of judges at various levels in the case of Supreme Court Decision Number 1094/Pdt/2020 against the laws and regulations in Indonesia.

The type of research in this study, in terms of its nature, is a descriptive analysis type of research. This type of research is used to examine more deeply a legal problem regarding customary land disputes and examine alternatives to resolving customary land disputes through customary courts, how the validity of agreements to release customary land rights that are not carried out with notarial deeds and the role of notaries / PPAT in resolving customary land disputes and knowing how the process of consideration of the Supreme Court Panel of Judges in deciding case Number Supreme Court Decision Number 1094 / Pdt / 2020. After exploring more deeply and drawing the essence of the problem, an analysis will then be carried out on the main issues in this study, which will then be concluded in paragraph form. Types of Data The type of data used in this research is secondary data, which is obtained from library materials (Soekanto, 2017) or data that has been processed and obtained from other parties. The secondary data used is obtained through a search of primary and secondary legal sources. The types of legal materials used in this research are primary and secondary legal materials. Primary legal materials used are binding legal materials. Data Collection Tools The data collection tool used in this research is a document study. Document studies or library materials serve to provide facts that indirectly provide an understanding of the problem being studied. Document studies are obtained through books, articles, and scientific journals found in libraries and through internet searches. Data Analysis Method This research uses a qualitative approach to produce analytical descriptive data. After obtaining primary and secondary legal materials that will be used, the researcher will analyze from a legal perspective on these materials and then relate them to events that occur in

reality or, in this study, the case of canceling the deed made by a notary due to false information from the parties. Form of Research Results The results of this research are in the form of scientific papers, namely journals.

RESULT AND DISCUSSION

The Position and Authority of Customary Courts in Papua's Special Regulations?

There are several roles and conceptions of customary law in the development of national land law, such as the concept of religious communalism, which is one of the principles derived from customary law that is applied in national land law. The definition of religious communalism itself is stated in Article 1, paragraph (2) of the UUPA, which states that the earth, water, and space, including the natural resources contained therein in the territory of the Republic of Indonesia, as a Gift of God Almighty and is a national treasure (Utomo, 2018). Communalistic value is reflected in the sentence of the earth, water, and space of the Indonesian nation and its national wealth, while religious value is reflected in the sentence All earth, water, and space, including the natural resources contained therein in the territory of the Republic of Indonesia as a Gift of God Almighty to the Indonesian nation (Arba, 2021). The application of customary law principles in national land law is also reflected in the principle of horizontal separation of land with buildings and plants on the land.

According to Boedi Harsono, the layout rights of customary law communities are declared to still exist if they fulfill three elements, namely:

1. There is still a group of people who are citizens of a certain customary law community, which is the customary law community.
2. There is still an area, the layout of the customary law community, which is realized as the common property of its citizens, its "lebensraum."
3. There are still customary rulers who, in reality, and recognized by the citizens of the customary law community concerned, carry out daily activities as executors of ulayat rights (Harsono, 2015).

The layout rights of Indigenous peoples are the rights granted by the constitution to manage land rights located in the environment of indigenous peoples (Ismi, 2012). Ulayat rights are a series of authorities and obligations that are entrusted to Indigenous peoples, relating to the land being controlled, managed, utilized, and preserved together in order to achieve the prosperity of Indigenous peoples. The 1945 Constitution of the Republic of Indonesia also recognizes, protects, and respects the rights of indigenous peoples as stated in Article 18B paragraph (2), which states that the state recognizes and respects the unity of customary law communities and 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.

The subject of customary law is the Indigenous community itself while one of the objects is the rules, rules, and norms contained in customary law, which regulates the rights and obligations of each indigenous community as well as customary prohibitions and sanctions (Rato, 2013). If there is a violation of customary laws and norms, the resolution taken by the customary law community is customary justice in accordance with the customs of the customary area.

Although the position of customary judicial institutions is not explicitly recognized in legislation relating to the Judiciary and formal justice, in fact, customary courts are given the authority to conduct dispute resolution or peace, which is regulated in regional government regulations and village governments. The existence of customary courts is possible, as stated in Article 24 paragraph (3) of the 1945 Constitution, which states, "Other bodies whose functions are related to judicial power shall be regulated by law." In the article, Indische Staatsregeling states that everywhere, as long as the Indonesian people are not allowed to have their own Judiciary, then in Indonesia, the Judiciary is carried out on behalf of the king (Fawaid & Rahman, 2022)

. This means that in addition to the formal courts provided by the state, native courts are recognized and allowed. The original courts are divided into two types, namely:

1. Customary courts in some areas directly under the Dutch government
2. Swapraja Court.

Furthermore, the recognition of customary justice against national law is also regulated in Law Number 6 of 2014 concerning villages, where Article 103 letter d and letter e state that "the settlement of customary disputes is based on customary law applicable in the Customary Village in an area that is in line with the principles of human rights by prioritizing deliberative settlement." Meanwhile, letter e states that "the organization of indigenous village judicial peace sessions is in accordance with the provisions of laws and regulations."

Thus, if we refer to the regulations stated above, we can then conclude that the state recognizes and respects all customary decisions obtained based on customary justice in terms of dispute resolution as long as they do not conflict with written regulations. This also requires that customary courts must be implemented in accordance with the provisions of laws and regulations.

In relation to the conception of customary law in national land law as well as judicial institutions and also the role of judges in deciding a case, article 18 of the Judiciary Law stated that "Judicial power is carried out by the Supreme Court and the judicial bodies under it in the general judicial environment, religious judicial environment, military judicial environment, state administrative, judicial environment, and by a constitutional court" (Hasibuan, 2019). Therefore, when referring to the above provisions, customary courts, and customary judges are not explicitly mentioned in positive law governing judicial institutions. Although customary courts are not explicitly mentioned at the judicial level, customary courts are still binding for Indigenous peoples and become one of the sources of law for judges if there are cases related to customary law

based on Article 5 paragraph (1) of the Judicial Law which states that judges are obliged to explore, follow, and understand the values of law and a sense of justice that live in society. A reflection of the judge's source of law, in this case, customary law in resolving cases, is found in Supreme Court Decision Number 3064 K/Pdt/2010, where in his consideration, the judge said that based on local wisdom, living law and a sense of justice so that the peaceful decision of the customary court should be implemented.

Then, if we refer to the Papua Special Autonomy Regional Regulation Number 23 of 2008 concerning the Ulayat Rights of Indigenous Peoples and the Individual Rights of Indigenous Peoples to Land, article 14 states that:

Article 14

"(1) Disputes arising between customary law communities or individual members of customary law communities subject to the same customary law may be settled according to local customary law.

(2) If each party to the dispute is subject to different customary laws and chooses customary law as the dispute resolution mechanism, the settlement may be conducted by a dispute resolution forum between customary law communities and or involve experts on the customary laws of both parties.

(3) Settlement of disputes over the customary rights of customary law communities and/or the individual rights of members of customary law communities may be pursued through the courts or outside the courts (arbitration, negotiation, or mediation institutions) based on the voluntary choice of the parties to the dispute."

Based on the article above, it can be concluded that alternative dispute resolution in customary courts, especially in the Papua region, can be implemented subject to local customary law, where this customary court is non-litigation based on kinship and consensus deliberation, so in resolving customary cases, it is resolved by deliberation to reach consensus or in other words the agreement of the parties and accompanied by good faith in order to resolve disputes that occur (Betaubun & Bhodo, 2023).

If there are two tribes in dispute, the settlement can be carried out by a dispute resolution forum between customary law communities and or involve experts on the customary laws of both parties. The form of implementation of state respect for customary courts is found in Article 15 of Perdasus 23 of 2008, which states that all costs required for the settlement of customary disputes through customary courts are financed by the Papuan regional government (Murofikoh, 2023).

The authority of the customary court is contained in Article 8 of Papua Regional Special Regulation No. 20/2008, which states:

Article 8

"(1) Customary courts are authorized to receive and manage customary civil cases and customary criminal cases among Indigenous people in Papua;

(2) The customary court, as referred to in paragraph (1), may accept and manage cases that occur between indigenous Papuans and non-indigenous Papuans if there is an agreement between the parties.

(3) Customary cases that cannot be resolved through the authority, as referred to in paragraphs (1) and (2), may be resolved through the general court mechanism.

(4) In the event that one of the parties to a dispute or litigation objects to the decision made by the customary court that examined it, the objecting party may file a lawsuit with the District Court.

(5) To release a criminal offender from criminal prosecution in accordance with the provisions of the applicable criminal law, a statement of approval to be executed is required from the President of the District Court in his/her area, which is obtained through the Chief State Prosecutor concerned with the place where the criminal incident occurred.

(6) In the event that a request for a declaration of consent to the enforcement of a decision of a customary court is refused by the District Court, the police and prosecutor's office may conduct an investigation and prosecution, in which case the decision of the customary court concerned shall be taken into consideration in deciding the case filed."

Thus, although customary courts are not clearly mentioned in the laws and regulations relating to the regulation of formal justice and the Judiciary, customary courts are still considered to exist, and their decisions are respected based on Article 18B paragraph (2), Article 24 paragraph (3) of the 1945 Constitution and related regulations such as Article 103 of Law Number 6 of 2014 concerning villages (Rahman, 2018). Where the decision of the customary court in resolving disputes becomes a reference for formal judges in deciding cases related to customary disputes, before entering the realm of formal justice, the parties of the Indigenous community first resolve it in the customary court, but there is one party who is not satisfied with the decision of the customary court, so they file a lawsuit in the formal court. As in the Supreme Court case No. 3064 K/Pdt/2010. This is because judges are required to explore the rules that live in the community so that the judge's decision in resolving a case can provide justice for the parties later.

How should the role of customary justice be resolved in the case of Supreme Court Decision Number 1094/Pdt/2020?

Almost all customary law communities have their own judicial institutions that have different procedures and procedures (Simanjuntak, 2016). Various regions in Indonesia have different customary justice systems, but there is one thing they have in common. In general, customary justice institutions involve family members of the perpetrator and customary elders in the community. According to Dominikus Rato, there are 18 principles of customary justice (Rato, 2013), among others:

1. Competence
2. Equality before the court
3. Respect for the Judiciary
4. Comparability between the action and the result obtained

5. Where the water is anchored there, the branch is broken
6. Courts are open to the public
7. Diversity of customary law and its courts
8. Prioritizing peace
9. Prioritizing honesty and truth
10. Tiered
11. Considering the good faith of the wrongdoer
12. The court is final and binding on the parties
13. Simple, fast, and
14. low-cost justice
15. Provide a sense of security, peace and tranquility
16. Respect for customary court decisions
17. Discourage over-exploitation of nature and people
18. Equality of men and women
19. Complementary.

In the case of a land ownership dispute in Supreme Court Decision Number 1094/Pdt/2020, where the parties to the dispute involved two different tribes, namely Ondoafi Kampung Kayu Batu and Ondoafi Kampung Kayu Pulau. The plaintiff claimed to have made an agreement to release customary land rights with Ondoafi Kampung Kayu Batu in 2013, while the defendant claimed to have made a land release agreement with a different tribe, namely Ondoafi Kampung Kayu Pulau. According to this research, before the parties conduct a formal judicial process, the parties should first resolve the issue through customary justice to find out and determine which tribe is legitimate and has the right to carry out legal actions on the land. When examining and reading deeper into the above decision, it can be concluded that each tribe does not have strong evidence in terms of land ownership that is transferred to other parties.

The transaction carried out by the parties also did not fulfill article 8 of Papua Perdasus number 20 of 2008, which states that "every legal action as a result of an agreement in deliberation as referred to in paragraph (3), must be carried out by authentic deed". However, when looking at the case in the decision, the parties did not heed this regulation, which then gave birth to a conflict because it is not certain which tribe is entitled to the disputed object land. Thus, according to this research, by implementing customary justice, it is hoped that it can provide the best solution based on kinship, prioritizing deliberation and consensus, as well as simple, fast, and low-cost justice, as stated in article 3 of Papua Perdasus number 20 of 2008.

CONCLUSION

The conclusions in this study show that although adat courts are not explicitly mentioned in the formal laws and regulations governing the judiciary, they still play an important role in resolving disputes within adat communities. Their decisions are respected and referred to by

formal courts, as indicated in Article 18B paragraph (2) and Article 24 paragraph (3) of the 1945 Constitution, along with related regulations such as Article 103 of Law No. 6/2014 on Villages. Customary courts become the first forum in dispute resolution, especially in matters relating to land ownership among indigenous peoples. However, when either party is dissatisfied with the decision, they may seek the intervention of the formal courts.

The study highlights that customary courts, while effective in handling disputes, often face challenges in terms of the parties' ability to provide strong evidence of land ownership, as demonstrated in the cases studied. Legal provisions, such as those outlined in Article 8 of Papua Perdasus No. 20/2008, are sometimes ignored by the parties, thus complicating the resolution process. Therefore, this research shows that integrating adat justice more effectively into the formal legal framework can offer better settlements, based on the principles of kinship, musyawarah mufakat, and cheap and fast justice, as outlined in Article 3 of the same regulation.

In the future, this research contributes to a broader understanding of how adat courts can be harmonized with national law, ensuring a more effective and culturally appropriate dispute resolution mechanism. The research also suggests that further research focus on creating a stronger framework that recognizes and integrates adat courts with the formal legal system, promoting legal certainty and protecting the rights of indigenous peoples.

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