International Journal of Social Science Research and Review

http://ijssrr.com
editor@ijssrr.com
Volume 5, Issue 3
March, 2022
Pages: 1-5

Settlement of Disputes Over Indigenous Land Ownership Based on Traditional Law

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http://dx.doi.org/10.47814/ijssrr.v5i3.222

Abstract

The research used in this dissertation process uses a type of legal research, the way it works is researching library or secondary materials that have been collected. The civil justice system contains norms and principles that provide space for the practice of customary justice which has a combination of characteristics as informal justice, communal justice, alternative dispute resolution and simplified court regardless of the inconsistency of laws and regulations regarding the existence of customary justice in the power system positive Indonesian judiciary. The state and positive judicial system ideally recognize and give position to customary courts in customary law. It is not directly proportional to the lack of state power over the administration of justice and the facilitation of narrow cultural identities. Second, a positive judicial system provides recognition and position of customary justice in the national justice system, with an effort to make law (both state law and customary law) a representation of universal values, not a representation of the values of narrow interest groups.

Keywords: *Dispute; Traditional Law*

Introduction

In relation to land disputes related to the rights and interests of adat or adat law communities, a type of land dispute resolution appears, namely adat courts. The approach to resolving land disputes through customary courts is a form of state recognition and respect for customary law community units and their traditional rights as long as they are still alive and in accordance with community development and the principles of the Unitary State of the Republic of Indonesia as stipulated in Article 18B of the Constitution Republic of Indonesia in 1945. On the one hand, judicial power is the power of the state to administer justice. Therefore, based on Article 2 paragraph (3) of Law no. 48 of 2009 concerning Judicial Power (Law No. 48-2009), all courts throughout the territory of the Republic of Indonesia are state courts established by law. The judicial system in Indonesia is based on Article 25 paragraph (1) of Law no. 48-2009, only recognizes 4 (four) state courts, namely General Courts, Religious Courts, Military Courts and State Administrative Courts. Based on Article 27 paragraph (1) of Law no. 48-2009, in each of these judicial environments, special courts can be formed which are regulated by law.(Wahyuni et al. 2021)

Various discourses that have developed regarding the strengthening of customary courts lead to two major concepts regarding how the position of customary courts should be in relation to the established national justice system. The first option is to integrate customary courts institutionally to

become part of the national justice system. This proposal was put forward to provide stronger binding power for decisions made by customary courts. The second option is a substantial strengthening of customary courts without the need for institutional integration as the first option. The target to be achieved is the deconcentration of the caseload that has accumulated in the state judiciary, so that what is needed is the availability of various options for dispute resolution in the community.(Arizona 2013)

Judging from the norms governing the judiciary in Indonesia, normatively, customary justice is not known, but when it is associated with Article 25 paragraph (1) of Law no.48-2009, it is possible to make it a special court or at least an *ad-hoc* court. In practice, customary law does have a place in the administration of justice.(Sulastriyono and Aristya 2012) At least this is reflected in some of the jurisprudence produced by the Supreme Court and the judicial institutions under it. Because the existence of customary courts is not legally regulated, it is interesting to study in this research the possibility of customary courts in the perspective of resolving customary land disputes in Indonesia and the extent to which the national justice system provides space for the recognition and position of customary courts.

Research Method

The research used in this dissertation process uses a type of legal research, the way it works is researching library or secondary materials that have been collected.(Agustian, Sugianto, and Michael 2021) Legal research is also a process to determine the rule of law, legal principles, and legal doctrines in order to answer the legal issues faced.

Research Results and Discussion

Position and Existence of Customary Courts in Customary Land Disputes

In 1964, Law no.19 (LN. 1964 No. 107) concerning the Basic Provisions of Judicial Power Article 1 paragraph (1), this Law states that the judiciary in the territory of the Republic of Indonesia is a state court established by law. This Law was repealed and replaced by Law no. 14 of 1970 (LN. 1970 no. 74). In its Article 3 paragraph (1), it is stated that all courts in the territory of the Republic of Indonesia are state courts and are stipulated by law. Article 39 also mentions the abolition of customary and autonomous courts by the government. Thus, since the advent of this Law, the autonomous courts and customary courts in Indonesia are no longer recognized.(Saleh 2003)

This provision is a manifestation of efforts to carry out legal unification which weakens the existence of customary courts. The unification of the judicial system built by the republican government was based on the pretext of realizing legal certainty. This can be seen in every breath of legislation and policies issued by the government, which don't give the customary courts room to move to show their substantive values of justice. Gawing (Gawing 2006) further stated that this uniformity in the formation, implementation and enforcement of this, increasingly stands proud with all the normative justice contained in it as emanated from the sound of each chapter and the neatly codified articles. Forced unification, which forbids diversity in this country, has actually taken the customary courts away from their real habitat, namely indigenous peoples. So that the destruction of the original system of indigenous peoples occurred in almost all indigenous communities in this country.

Even though the customary courts have been declared dissolved by law, the existence of customary courts has never really died out. In various places, traditional courts are still the "primadon" of the community in resolving the cases they face. Since the reformation period, many local governments have tried to become supporters of the implementation of customary justice by revitalizing the existence of customary courts. The Law on Judicial Power actually still provides an opportunity for a dispute to be resolved through other mechanisms outside the state judiciary. In addition to recognition by laws and

regulations, recognition of customary courts also needs to be confirmed by law enforcement agencies as parties that directly deal with disputes that occur in the community. So far, the attitude of recognizing and respecting the decisions of customary courts still appears partially, especially in areas that have a strong customary law base and institutions.(Vareezha et al. 2022)

For example, this happened in Papua, Aceh, West Sumatra, Central Sulawesi, Bali and various other areas. Thus, the strengthening carried out by the government through regional policies and regulations is an important step for recognizing the existence of customary courts.

Recognition of the existence of customary courts through local policies and regulations is not a violation of the law. This regional initiative needs to be seen as the demands of the times for the need to strengthen customary courts. In the past, the existence of customary courts was recognized by the colonial authorities and laws and regulations in the early days of the republic, before being abolished, now the trend is the recognition of the existence of customary courts through local policies and regulations. This trend is currently taking place in several regions by taking advantage of the open space of government decentralization.

Land Dispute Resolution in Indigenous Peoples

According to Lilik Mulyadi,(Jiwa Utama and Febri Aristya 2015) disagreed if it was said that village/customary courts were abolished based on the Law on Judicial Power, because customary courts which were abolished based on Emergency Law Number 1 of 1951 were customary courts in the sense of *inheemsche rechtspraak*, while the authority of customary courts carried out by the heads of customary law community units, namely the Village Courts *(dorpjustitie)* will continue.

In customary law communities, dispute resolution is often carried out outside the formal courts by means of deliberation to reach consensus. The community resolves their disputes outside the formal courts which generally involve third parties such as religious leaders, traditional leaders and village heads. The patterns of settlement of land conflicts that occur in the community can be in the form of *litigation* conflict resolution and *non-litigation* conflict resolution.(Penyelesaian Sengketa Tanah Harta Pusaka Tinggi Yang Sudah Disertifikatkan Melalui KAN Koto Tuo Balaigurah Agam Sumatera Barat | Soumatera Law Review n.d.)

Settlement of land conflicts by negotiation is carried out by the disputing parties to get an agreement for both parties by way of a *win-win solution*, neither party feels disadvantaged. Settlement of land disputes by deliberation and consensus is carried out by the parties to resolve the dispute by involving the families of the parties witnessed by religious leaders or community leaders. Meanwhile, the settlement of land disputes by mediation is where the parties appoint certain parties who are respected and appreciated as mediators (arbitrators) in the settlement.

The reasons underlying the opinion that the civil justice system actually provides a firm acknowledgment of the existence of customary courts and provides a wide space for the implementation of recognition include (Dr. Siti Kotijah, S.H., M.H - Triana Megawati Tening et al. 2021):1) Enactment of the provisions of article 130 HIR, 154 RBg which regulates the obligation of judges to reconcile the parties before the case is examined in court; 2) The application of the principle of active judges, namely the judge as the leader of the trial must actively lead the examination; 3) Apply the principle of simple, fast and low cost; 4) Applicability of the principle of *judicare secundum allegata et probata* or known as the passive judge principle, meaning that the judge is bound to the subject matter of the case proposed by the parties; 5) The application of the principle *of ius curia novit*, meaning that judges are not just mouthpieces of the law, but have the independence and ability to solve any problems that are put to them.

These five principles reflect the normative foundation that should encourage judges as state judicial officials to respect the decisions of customary courts in Indonesia. There is no doubt that

customary justice can provide something that is often better than when people come to formal courts. It is common knowledge that proceedings in customary courts are more accessible to the public, fast and inexpensive. Customary courts are not rigid and formalistic as formal courts which must follow the stages of implementing the procedural law in a coherent and lengthy manner, this makes customary courts tend to be able to resolve the cases they handle more quickly.

Another thing is that customary courts are not run by professionals who depend on their jobs as judges for their livelihood. Rather, it is carried out by certain leaders or people who are considered to understand the customs in the community who also have their own profession/job.(Nugraha et al. 2021) So, the judge or the executor of customary justice is not a person who depends on the operation of the customary court, but because of his responsibilities in the community. This can avoid bribery in resolving cases in customary courts.

Another advantage of customary justice is that its objective is to balance the social situation that is disrupted due to an act that violates customary law. Therefore, in general, customary sanctions are not as a form of retaliation, but as an effort to normalize social conditions into harmony as before. There is nothing wrong with sanctions in customary courts trying to be a tool to reconcile the litigants.

Conclusion

The civil justice system contains norms and principles that provide space for the practice of customary justice which has a combination of characteristics as *informal justice, communal justice*, alternative dispute resolution and *simplified court* regardless of the inconsistency of laws and regulations regarding the existence of customary justice in the power system positive Indonesian judiciary. The state and positive judicial system ideally recognize and give position to customary courts in customary law. It is not directly proportional to the lack of state power over the administration of justice and the facilitation of narrow cultural identities. Second, a positive judicial system provides recognition and position of customary justice in the national justice system, with an effort to make law (both state law and customary law) a representation of universal values, not a representation of the values of narrow interest groups.

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