



Legal Position Open and Closed Traditional Court Decisions Relating to Indigenous Land Disputes in Malamoi Sorong Region in Positive Law (Case Study Between the Clan Malibela Klawalu Against the Clan Malibela Klaifi)

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Abstract

The type of research used in this research is normative legal research. Whereas in civil justice system, there are norms and principles that provide space for practice of customary justice which has a combination of characteristics as informal justice, communal justice, alternative dispute resolution, and simplified court regardless of inconsistency and inconsistency of laws and regulations regarding the existence customary justice system in Indonesian judicial system that applies positively. The influence of the position of customary courts in the civil justice system is especially apparent in the functional relationship between customary court decisions and the settlement of civil cases in court. Therefore, to accommodate the existence of customary court decisions, in practice judges will optimize the mechanisms regulated in the civil justice system such as through mediation in court.

Keywords: *Legal Position; Traditional Court; Law*

Introduction

The importance of land for humans as individuals and the state as the highest community organization is constitutionally regulated in Article 33 paragraph (3) of the 1945 Constitution which states that: "Earth, water and natural resources contained therein are controlled by the state and used as much as possible for the prosperity of the people". (Wahid et al., 2019)

As a follow-up to Article 33 paragraph (3) of 1945 Constitution relating to land or land, Law Number 5 of 1960 concerning Basic Agrarian Regulations (UU No. 5-1960) was issued with the following main objectives: (SARI, 2021)

- a. Laying foundations for the preparation of national agrarian law, which is a tool to bring prosperity, happiness and justice to State and the people, especially people in framework a just and prosperous society.
- b. Laying the foundations for unity and simplicity in land law.
- c. Laying the foundations to provide legal certainty regarding land rights for whole people.

In almost every area where there is a land dispute, parties involved and authorized to deal with problem resolve the issue in various ways. The dispute resolution methods that have been adopted so far are through courts (litigation) and dispute resolution outside the court (non-litigation). In juridical dimension of land tenure and land ownership requires protection, the implication is that there must be legal protection of civil rights of land ownership and fair treatment of land ownership. Protracted land disputes and cannot good settlement, cause aggrieved party to file a lawsuit in court.

Although there is a wide opportunity to sue through the courts, ordinary people tend to avoid it, besides that there is an assumption in the community that filing a lawsuit through the court is relatively expensive, takes a long time and is even convoluted. Therefore, the community tries to resolve their disputes by taking non-litigation routes.

Non-litigation or alternative dispute resolution, better known as *Alternative Dispute Resolution* (ADR) is regulated in Law Number 9 of 1999 concerning Arbitration and Alternative Dispute Resolution. The dispute resolution mechanism in this way is classified in non-litigation media, which is a cooperative conflict or dispute resolution concept that is directed at an agreement on one solution to a conflict or dispute that is a win-win solution. ADR *Alternative Dispute Resolution* was developed by legal practitioners and academics as a way of resolving disputes with greater access to justice. (Busroh, 2017)

In customary law community as well as in the Malamoi Sorong tribal community, disputes have long been resolved by deliberation and consensus through customary institutions known as customary courts. Usually those who act as judges in these institutions are traditional leaders (customary heads) and religious leaders. The authority of this customary court judge is not only limited to peace, but also the power to decide disputes in all legal fields which are not divided into criminal, civil and public terms.

In its development, recognition of customary justice within Malamoi Sorong Indigenous Community has experienced ups and downs. During New Order era, the government made several provisions that limited and even eliminated the customary judiciary. In reformation era, the position of the customary justice institution was again given space and place in line with the strengthening of recognition of customary law communities. (Dolosais, 2020)

In Sorong, West Papua, there is a Malamoi customary law community that has customary institutions. This customary institution is formed through deliberation and consensus in a customary meeting and people who according to genealogical lineage meet criteria to be appointed as customary functionaries will sit in the customary institution. (Golap & Umpain, 2019) The main task of this Malamoi traditional institution is to carry out judicial functions in the spirit of deliberation to reach consensus, which has core of creating a harmonious atmosphere and balance between the disputing community, the community and natural surroundings, as well as rebuilding social relations dispute resolution in Sorong is starting to weaken and decline, at this time. This is indicated by presence of some people who tend to resolve existing disputes through formal institutions such as state courts and the police.

Research methods

The type of research used in this research is normative legal research. (Michael, 2020)

Discussion

Implementation of Open and Closed Customary Sessions in Settlement of Customary Land Disputes in the Malamoi Community of Sorong

The objectives of holding an Open Customary Session and a closed Customary Session, among others: (1). Obtaining customary law legitimacy that Sorong City Government Territory, both Sorong Islands and Sorong Mainland, is purely customary land; (2). Obtaining Assurance of the Legitimacy of

Customary Law regarding the Status of Ownership of Customary Land from the seven clans as owners of Customary Land in the territory of the Sorong City Government; (3). Obtaining Official Recognition/Statement from the Indigenous People of the Moi Tribe, based on history, genealogy, evidence and adat facts; and (4) Obtaining Customary Decisions from Indigenous People regarding their actions against Customary Violations. (Safruddin, 2018)

The implementation of customary session in Malamoi Sorong Customary Area itself is based on fact that there are disputes between indigenous peoples with one another from all sides of customary issues that occur, be it land disputes, marriage, customary rights ownership boundaries or land boundaries and so on. The customary court itself is final path taken in resolving disputes within the customs environment after the parties feel that there is no other way to go. The customary trial itself is not the only way to resolve disputes because there are still several ways that are usually carried out by Malamoi Sorong Indigenous People, such as one example is the Land Eating Procession. This traditional procession is also usually carried out so that the disputing parties can prove their rights by eating the land which is carried out in front of traditional elders and the community as well as each party. The land that is eaten is not land indiscriminately but land from a place that has been determined by the customary council and traditional elders for the procession to eat the land.

In conducting the Customary Assembly in Malamoi Sorong area, there are 2 (two) types of Customary Assembly, namely: (1) **Open Customary Assembly**. The Open Customary Session is an official forum in which the disputing parties before the Chairperson of the Session, the Customary Advisory Council and the Moi Tribe indigenous people provide information in the form of history, facts and genealogical evidence regarding customary land ownership rights, which are strengthened by key witnesses, and clan witnesses- clans bordering customary lands or adjacent clans. (2) **Closed Customary Session**. Closed Customary Sessions are carried out if there is a *status quo* (no meeting point) in an open customary session, each of the parties to the dispute both defending their respective truths, then the Closed Customary Session is carried out by indigenous people to prove the truth of adat based on history, events, facts of customary evidence, including physical evidence and customary goods which are the reasons for adat to obtain legitimacy of customary land ownership. The results of Closed Traditional Session are presented in an open forum.

After knowing two types of customary assembly, the open and closed customary assembly must of course meet several criteria/elements involved in the customary assembly, namely; (1) **Chairperson of the Session**. The Chairperson of the Session consists of one chairperson and two members; his duties are to lead, direct trial and formulate, conclude and ratify the results of the customary trial process; (2) **Customary Advisory Council**. Customary Advisory Council (DPA), whose task is to give consideration, straighten and strengthen based on customary considerations, a statement, statement, before being concluded and decided by the leader of customary assembly. (3) **Indigenous People of the Moi Tribe**. Tribal Indigenous People, are a collection of moi tribal people whose duties are to observe during the trial, listen, observe, listen, assess the truth of the statements submitted by both parties in conveying their statements, as well as provide input to leadership of session and Customary Advisory Council. The authority of Moi Tribe Indigenous People, among others, is to appoint tribal chiefs, to elect Chairman of Customary Council in the highest Moi Tribe Customary Forum, to confirm the results of decisions Customary Council. (4) **the witnesses consisted of witnesses** from clans bordering customary lands (to the north, east, south, and west) and the closest clans who knew history of ownership of customary lands. The task of witnesses is to strengthen statements of each party to dispute key witnesses (customary witnesses), their duty is to assist in corroborating statements that have been submitted by each party before giving testimony, the witnesses take a traditional oath/promise before chairman of session and the customary advisory council and Moi Tribe Indigenous People. These witnesses are presented by each disputing party to Chairman of Customary Council.

The proof of case letter related study in this study is Decree of Customary Session Malamoi Sorong Customary Council in Sorong City Region, West Papua. The decision of Malamoi Sorong Traditional Session was first issued by the Malamoi Sorong Regional Customary Council (DAW-MS) Number; 020/DAS-WIL-MOI/SK/IV/2013 on, on April 10, 2013, which is located at the Moyo Football Field, Klasaman Village, East Sorong District, West Papua where Customary Decision is signed by the Chairman of Customary Council himself, namely Pdt. Paul Safisa, S.Th along with its Secretary, namely Mr. Josua Ulim, and also by Customary Advisory Council Mr. Simson Su as chairman, Mr. Matthew Yenpolo as a member and Mr. Eduard Ulimpa as a member then in decision of the customary court, the panel of customary judges are those who according to local customs have right or have been crowned as *WUNTELEM (Malamoi Sorong language)* which means those who have attended traditional education in the Sacred Forest/Customary Forest of Malamoi indigenous people located in Maladofok Village, Sorong Regency, so that he deserves absolute rights as Wuntelem, and the chairman of assembly is one Wuntelem who is also secretary of Malamoi Sorong Regional Customary Council, namely Mr. Josua Ulim and Mr. Amos Wally as a member of assembly and Mr. Djoni Safisa as a member. (Yuliana, 2018)

In 2017, there was an open and closed customary trial between the Malibela Klawalu clan and Malibela Klaifi clan. However, this customary assembly is different from the previous customary assembly, where previous customary assembly was located at the Moyo Football Field, Sorong City, while the second customary assembly was located directly in Maladofok Village Traditional Forest or Sacred Forest where Malamoi residents carried out traditional education to pursue the title of Wuntelem (results of an interview with Mr. Yosua Ulim, a Wuntelem and also Chairman of the Panel of Judges of the Customary Court who decided the two decisions of customary court both in 2013 and 2017) and as a result of the second customary trial in 2017, the chairman of the panel of customary judges, namely Mr. Yosua Ulim and his members, decided that those entitled to the customary land of Klawalu clan were the Malibela Klaifi clan, not Malibela Klawalu clan, because at the time of the customary trial the Malibela Klawalu clan could not attend and proved sacred objects that could declare their rights to the land they controlled belonged to the Malibela clan, while Malibela clan Klaifi succeeded in proving in the customary court all sacred objects belonging to Malibela clan and customary witnesses who stated that the customary land of the Malibela clan in Sorong City was approximately 2, 106 hectares belong to the Malibela Klaifi clan which was obtained from the ancestors through the PEBEMUN Rights (in the Moi Sorong language), by Decree of the Malamoi Sorong Territory Customary Council Number: 006/DAS-WIL-MOI/SK/VII/2017 on 15 July 2017.

Based on the decision in 2017, those who are entitled to rights to the customary area specifically for the Malibela clan are the Malibela Klaifi clan based on the PEBEMUN RIGHT. Pebemun rights are inheritance rights that are passed down from ancestors to their heirs, in this case customary land.

Recognition and Legal Position of the Decision of the Customary Court Openly and Privately in the Settlement of Indigenous Land Disputes in the Malamoi Sorong Community in a Positive Legal Perspective

The state's recognition of customary law communities is recognized through Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia ("UUD 1945"), that: *"The state recognizes and respects customary law community units and their traditional rights as long as they are live 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"*. (Wahyumi, 2015)

Furthermore, this recognition is described through Law Number 21 of 2001 concerning Special Autonomy for the Papua Province as amended by Law Number 35 of 2008 concerning Stipulation of Government Regulations in lieu of Law Number 1 of 2008 concerning Amendments to Law Number 21 of 2001 concerning Special Autonomy for Papua Province to become a law, was established based on provisions of Article 18B paragraph (1) of 1945 Constitution of the Republic of Indonesia which states

that state recognizes and respects special or special regional government units that are regulated with the Act.(Rooseno, 2016)

The position of customary courts can be equated as a form of alternative dispute resolution institution, which is regulated in Law Number 30 of 1999 concerning Arbitration and Alternative Dispute Resolution. Alternative dispute resolution is a dispute resolution institution or difference of opinion through a procedure agreed upon by the parties, namely an out-of-court settlement by means of consultation, negotiation, mediation, conciliation, or expert judgment.

The strength of proof of the decision of the customary court itself is actually classified as evidence of an underhand deed because the one who issued the evidence was not a state official but rather by the customary head. because formal letter evidence is authentic evidence such as examples of deeds by officials such as a notary and the head of land. however, it cannot be viewed as an eye, because the evidence is not an ordinary deed, but a customary decision whose features are the same as an authentic deed. (Priyani, 2020)

The power of proof of a customary decision is also contained in the 1945 Constitution where Article 33 paragraph 3 stipulates that Earth, Water and Air are controlled by the State. Land ownership rights or Land Tenure Rights are regulated in the Law of Republic Indonesia Number 35 of 1960 concerning agrarian principles. General provisions regarding rights to land, water and space as well as land registration Article 16 paragraph 1, land rights are, property rights, cultivation rights, use rights, building use rights, lease rights, land clearing rights, the right to collect forest products and so on.

Conclusion

Whereas in civil justice system, there are norms and principles that provide space for practice of customary justice which has a combination of characteristics as *informal justice*, *communal justice*, alternative dispute resolution, and *simplified court* regardless of inconsistency and inconsistency of laws and regulations regarding the existence customary justice system in Indonesian judicial system that applies positively. The influence of the position of customary courts in the civil justice system is especially apparent in the functional relationship between customary court decisions and the settlement of civil cases in court. Therefore, to accommodate the existence of customary court decisions, in practice judges will optimize the mechanisms regulated in the civil justice system such as through mediation in court.

In addition, position of institutions and decisions of customary courts in national civil justice system, although partially, is still recognized by laws and regulations. Ironically, more recognition appears in colonial heritage legislation such as BW, HIR/Rbg and RO. Many of legislative products from post-independence to reformation have revoked the position and authority of several models of customary courts that existed during the Dutch East Indies era. In today's practical realm, this recognition is increasingly ambivalent. On the one hand, customary justice is still respected and referred to in several decisions of state judges, but on the other policy hand of unification of judiciary encourages the creation of a paradigm of judicial power that is only owned by Supreme Court (and the judicial bodies under its auspices) and Constitutional Court. As a result, the customary justice institution is positioned only as a complement when the state court requires it.

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