

CUSTOMARY COURT AS ALTERNATIVE TO SETTLEMENT OF DISPUTE IN SOUTH SULAWESI

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Abstract

Customary court is a process conducted in connection with the duty to examine, to adjudicate and to decide a case in the community, which has long ago become a means to seek for justice. Customary court aims at returning broken order resulted from existing dispute. This research mainly focuses on how the essence of customary court in South Sulawesi is and how customary court serves to settle dispute in South Sulawesi. Employing socio-legal method, the research results explain that the Customary court in South Sulawesi has no longer been relied on in settlement of disputes existing in the community as the result of modern court domination.

Keywords: Customary Court, Settlement of Dispute, South Sulawesi.

1. Introduction

Customary law is a law which grows and develops in each area, a work of certain community which aims at establishing a good and fair order of life conduct and act in the community for community's welfare. According to J.H.P. Bellefroid, customary law is life regulation which, although not promulgated by the authority, but, is respected and complied with by the people with belief that such regulations apply as law. Customary law is generally unwritten, constituting complex norms in the sense of people's justice continuously growing constituting regulations of human behavior in daily life, continuously respected and complied with since it has legal consequence or sanction.¹ Vollenhoven (1933) proposes customary law as "totality of behavioral rules for indigenous people and foreign people with sanction on one hand and non-codification on the other hand".²

In the worldwide perspective, customary law community is acknowledged through convention of Customary Law Community in Sovereign Nations (Indigenous and Tribal Peoples Convention) held by the International Labor Organization (ILO) in 1989. This convention is welcome with full of joy by all customary law communities in the world, since it confirms in Article 3 paragraph (1) that Customary Law Community has the right to utilize their rights as

¹ C. Dewi Wulansari. *Hukum Adat Indonesia-Suatu Pengantar*. (Bandung: Refika Aditama, 2012), 4.

² Warman, Kurnia., Saldi Isra, & Hilaire Tegnau, "Enhancing Legal Pluralism: The Role of Adat and Islamic Laws Within The Indonesian Legal System" *Journal of Legal, Ethical and Regulatory Vol 21 No 3 (2018)*: p. 1-9.

human and their fundamental freedom without obstacles or discrimination.³ The provisions of convention apply without discrimination to male and female members of these customary law communities. In addition, Article 2 (1) of this Convention confirms that Government is responsible for arranging, with participation of relevant customary law community, of coordinated and systematic actions to protect their rights and to ensure that their unity is respected. The categories of customary law community, imagined community, issues which bind people and their way are handled and configured by the existing cultural field of power.⁴

Therefore, the question is how is the position of customary law as a currently positive legal system in Indonesia? The position of customary law in the 1945 Constitution of the Republic of Indonesia upon its amendment remains acknowledged, as expressed in Article 18B paragraph (2):

“The State shall recognize and respect, to be regulated by law, the homogeneity of societies with customary law along with their traditional rights for as long as they remain in existence and in agreement with societal development and with the principle of the Unitary State of the Republic of Indonesia.”

According to the Article, the author interprets that the State remains acknowledging the position of customary law for as long as they remain in existence. In other words, even if a customary law is contradictory to prevailing national law, for as long as the customary community remains in existence, the customary law will remain effective.

The researcher has further problem that, when in the Constitution, customary law remains acknowledged, how is the application and its customary court? Law Number 48 Year 2009 on Judicial Authority Article 5 (1):

“Judge and constitutional court judge must discover, follow and understand the values of law and sense of justice existing in the community”.

Interpreting the words values of law and sense of justice existing in the community (living law) can certainly not be separated from the practices or customary law existing in the community. In examining, adjudicating and deciding a case, a judge must consider law existing in the community.

³ International Labor Organization. *C169 - Indigenous and Tribal Peoples Convention, 1989* (Jakarta: International Labor Office, 2007).

⁴ Li, T. M, “*Masyarakat adat, difference, and the limits of recognition in Indonesia's forest zone*” *Modern Asian Studies*, Vol 35 No 3 (2001): p. 645-676.

Then, what about customary court that customary law is only material rules which need tool to apply such material rules. Law Number 48 Year 2009 on Judicial Authority Article 18:

“Judicial Authority is held by a Supreme Court and judicial bodies below it in general court environment, religious court environment, military court environment, State administrative court environment and a Constitutional Court”.

Based on the Article 18, the researcher assumes that customary court has not been recognized. Mohammad Jamin states that customary court has not fully been recognized since the recognition of customary court is applied only in Papua province through Papua Special Autonomy Law. Therefore, Mohammad Jamin proposes to include recognition of customary court into Judicial Authority, not in special autonomy law, and such recognition must be completely and genuinely made by establishing a relationship model in coexistence between customary court and State court.⁵

Furthermore, M. Khoidin states that the existence of customary court is no longer recognized, whereas Dutch Colonial Government initially still recognizes the existence of customary court or self-governing court in some areas. This is proven as the Indische Staatsregeling (IS) as the basis of state administration during the governance of Dutch East Indies in the self-governing court environment states that:

- Self-governmental subjects of the self-governments of Dutch East Indies, except those under contract or those under self-governing rules or kings in the form of judicial authority intended to colonial government judges over subjects (in Sultanate and Susuhunan in Java island almost all of judicial authorities) and in some judicial authorities in exempted cases.
- State subjects in a number of exceptions are those in the initial process have been self-government subjects or to the extent such process operates in areas within such self-government area, indigenous laws on lands, houses and annual plants, civil customary law, criminal customary law and procedural customary law shall apply therein (sometimes in the form of self-governmental regulations), to the extent they are not replaced with express ordinances under contract or authority with *“korte verklaring”* (brief declaration) shall be declared as applicable. And in regard to anything related to criminal law and procedural law to the extent they are not replaced with residency

⁵ Mohammad Jamin. *PERADILAN ADAT ; Pergeseran Politik Hukum Perspektif Undang-undang Otonomi Khusus Papua* (Yogyakarta: Graha Ilmu, 2014), 2.

regulations, (articles 12 and 13 of self-governing rules 1938 and therewith in long-term contracts; compare article 21 article 2 of *Indische Staatsregeling*).⁶

However, since the existence of customary court is considered as irrelevant by the modern legal system, it is then removed. During the governance of Dutch East Indies, the existence of customary court (*inheemsche rechtspraak*) remains recognized besides the official court established by the Government (*governments-rechtspraak*). The existence of customary court in Palembang, Jambi, West Sumatera, and Self-Governing Court in some areas in Java remains recognized although with limited jurisdiction of customary cases.⁷ After Indonesia's independence, the existence of customary court is gradually removed from the Indonesian judiciary system. Emergency Law Number 1 Year 1951 on Temporary Measures for Organization of Unity of Power Structure and Agenda of Civil Courts (State Gazette 1951 Number 9) has confirmed that the indigenous court, often referred to as Customary Court and Self-Governing Court, will be gradually removed.⁸

In this research, the researcher tries to return customary law as well as its customary court entity to their position as the main legal principles in settlement of dispute existing in Indonesia. Customary law and customary court are two non-separated legal systems. Customary law grows and develops and is maintained under its community's legal awareness, and customary court is highly accessible, quick, cheap and flexible with loose structures and norms in adjustment to social change. Therefore, an excuse of judiciary system dualism is not a correct reason and judiciary system pluralism becomes the reason for revival of this judiciary system. Law pluralism supposes choice in law application.⁹

After description of background of the study, the main problem is then formulated: How does customary court exist as a form of settlement of dispute in South Sulawesi?

2. Method

This research employs socio-legal method through combination of normative analysis (legal, juridical norms) and non-legal science approach.

⁶ Mr. B. Ter Haar, Freddy Tangker, Bambang Daru Nugroho. *Asas-Asas dan Tatahan Hukum Adat* (Bandung: CV Mandar Maju, 2011), 3-4.

⁷ Herowati Poesoko, M. Khoidin, Dominikus Rato. *Eksistensi Pengadilan Adat Dalam Sistem Peradilan* (Surabaya: LaksBang Justitia, 2014), 97.

⁸ *Ibid*, 98.

⁹ Uswatun Hasanah, Mohammad Amir Hamzah, dan Muffarijul Ikhwan, "Pluralisme Hukum Dalam Penyelesaian Sengketa Warisan Pada Masyarakat Madura" *Arena Hukum Vol 11 No 1 (April 2018)*: p. 163-183.

3. Result and Discussion

The existence of customary court after the independence, under Emergency Law Number 1 Year 1951 on Temporary Measures for Organization of Unity of Power Structure and agenda of Civil Courts (State Gazette 1951 Number 9), has been juridically removed. The Temporary Law gradually removes the position of *Inheemsche Rechtspraak* (Indigenous Court/Customary Court) and *Zelfbestuur Rechtspraak* (Self-Governing Court).¹⁰

Article 1 paragraph (2) item b states that: Will be gradually determined by Minister of Justice for removal:

- All Self-Governing Courts (*Zelfbestuurs-rechtspraak*) in the previously East Sumatera State, previously West Kalimantan Residence and previously East Indonesia State, except Religious court if the court is, according to living law, a separate part of Self-governing court;
- Customary Court (*Inheemse rechtspraak in rechtstreeksbestuurd gebied*), except Religious court if the court is, according to living law, a separate part of Customary Court.

The removal process continues until today. Law Number 48 Year 2009 on Judicial Authority which becomes the legal basis for enforceability of a judiciary environment in Indonesia only recognizes general court, Religious Court, Military Court, State Administrative Court and a Constitutional Court in Article 18. However, referring to the 1945 Constitution of the Republic of Indonesia which is the highest hierarchy of legislation and is also the fundamental norm, Article 18B paragraph (2) substantially states “The State shall recognize and respect, to be regulated by law, the homogeneity of societies with customary law along with their traditional rights for as long as they remain in existence and in agreement with societal development and with the principle of the Unitary State of the Republic of Indonesia.” In addition, Article 28I paragraph (3) formulates the concept of human rights which confirms cultural identity and traditional rights that “The cultural identities and rights of traditional communities are to be respected in conjunction with progressing times and civilization.” In review of formulation of both articles, the State recognizes both recognition aspects, which are legal alliance and community alliance. In the concept, there seems concept mixture, which

¹⁰ Herlambang Perdana Wiratraman. *Laporan Akhir Tim Pengkajian Hukum Tentang Peluang Peradilan Adat Dalam Meyelesaikan Sengketa Antara Masyarakat Hukum Adat Dengan Pihak Luar* (Jakarta: Pusat Penelitian dan Pengembangan Sistem Hukum Nasional (BPHN), 2013), 13

combines *rechtgemeenschappen* and *volkgemeenschappen* concepts. In addition, there is something interesting when placed in political context of second amendment, that discussion on both articles pays attention more on recognition dimension and respect from human rights perspective.¹¹

In author's opinion, based on the 1945 Constitution of the Republic of Indonesia, the State still respects and acknowledges customary law community as well as its traditional rights and cultural identities. This may become parameter that the traditional rights and cultural identities as referred to in Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution also include the judiciary body. The traditional rights are indeed not further detailed in the 1945 Constitution, however, recognizing and respecting units of customary law community which materially have separate applicable legal rules will also require formal recognition of and respect to such customary law. Traditional rights and cultural identities should be interpreted that such rights also include legal rights and judiciary body to examine, to adjudicate and to decide cases existing in customary law community. Traditional rights should not be narrowly interpreted that such rights comprise only customary ceremonies which must adjust to era development and not contradictory to prevailing positive laws.

In face-to-face interview with "Andi Baso Bone Petta Puang, the 4th generation of the 31st King of Bone, La Pawawoi Karaeng Sigeri states that the customary court does not exist now, and we may even say that the customary court in Bone Regency is over. He says that it occurs because of high political interest for embodiment of unitary national law at that time. This State forgets its own people and legal principles. Before it is called Indonesia, this State is full of Kingdoms distributed throughout the Archipelago. The Kingdoms have had their own legal systems which are made under local wisdom values of respective area. However, since this State acquires its independence, the principles which are derived from those local cultures/wisdoms are not adopted and gradually forgotten. It is ironic that western law is the one adopted to be written law prevailing in Indonesia based on concordance principle. In its definition, the concordance principle is actually enforced by the Dutch East Indies government at that time only for the Europe group who are within the Dutch East Indies area, while customary law remains enforced for the indigenous group, who are in fact Indonesian native people, although not in writing form.

Customary court and village court are recognized for indigenous people since the Dutch East Indies realizes that they cannot solve all problems faced by the people of Dutch East Indies

¹¹ *Ibid*, 14.

(Indonesia) by itself using Europe court. Consequently, classification of citizen is considered the solution for such problem, and in article 163 of *Indische Staatsregeling*, people in Dutch East Indies are classified into three classes: Europe group, Foreign East People group and Indigenous People group, with each of the classes shall apply respective legal rules pursuant to the group when a case arises, except with submission to the Law used by the Dutch government.¹²

At that time, indigenous court or customary court is a court implemented by Europe Judges and also Indonesian Judges, not on behalf of King or Queen of Netherlands and not based on Europe legal principles, but based on customary law designated by Residency under approval of Director of Justice in Batavia. This court is authorized to adjudicate indigenous people who domicile in court area of Defendant or Suspect. The Plaintiff or the disputing party may be non-local, including Europe civilian or non-indigenous civilian who considers himself as aggrieved. This court uses separate specific procedural or formal law in the form of judicial regulations from Residency, such as: *Peraturan Musapat Aceh Besar dan Singkel* (1934), *Peraturan Kerapatan Kalimantan Selatan dan Timur* (1934), *Peraturan Gantarang, Matinggi dan Laikang* (South Sulawesi 1933), etc. Such customary court position is nearly the same with that of Village Court at that time, which is a court implemented by Village Judge in the environment of *gubernemen* court. This court is authorized to adjudicate small cases which are customary affairs or village affairs, such as disputes in land, irrigation, marriage, dowry, divorce, customary position, etc. arising in relevant customary community. Village judges must not decide sanction as set out in Criminal Codes and if the disputing parties are unsatisfied with village judge's decision, they may submit their case to *gubernemen* judge (Herlambang Perdana Wiratraman, 2013). The Dutch East Indies government in the past recognizes customary court since problems arising in the community at that time cannot be solved only by Europe court, since indigenous people have had their own legal system.

Andi Baso Bone also states that customary court exists in the past and is part of *pangngaderreng* concept which become the guideline for people in Bone. Part of *pangngaderreng* is preventive judiciary rules to solve disputes which lead to justice, flexibility and creation of peace.

“As an illustration, there is a dispute in the community in which a person is murdered. The victim's family demands the judge to execute the convict, thus that is justice. The Arung (the king) who at that time becomes the judge in such dispute says to the victim's family that it is the right of victim's family. However, it should also be considered that your

¹² *Ibid.*

position in this world is victim, while if you demand for execution of the convict, then in the afterlife you are another murderer and are subject to sanction given by God. To forgive is a very honorable act. However, when you do not willingly forgive him, as Arung, I hereby impose sanction to the convict in the form of fine for 5 cows to be borne the convict and his family. This will be certainly useful for continuation of life of victim's family".

This illustration depicts exactly how decisions of an *Arung* (king) at that time lead to justice in creation of peace with a very simple and flexible method. The decision is accepted by both parties without leaving resentment in the future, and also gives deterrent effect since the convict's family also assumes the consequences of his act. The decision has permanent legal force and becomes guide of compliance for the community, which is not only a concrete decision, but also becomes rules applicable to similar cases. The decision is respected and appreciated by all people that it is decided by an *Arung* (king) who at that time is a king with authority and influence as an embodiment of the people.

Ter Haar in Theory of Decision (*Beslissingenleer*) which becomes the basis of analysis of this paper proposes that decisions made by ruling functionaries, heads of village and judges are not only viewed as concrete decisions, but also as rules applicable to similar cases (cases with partially or entirely relevant facts, cases with similarities). These legal rules applicable to this fellowship essentially consist of a large number of unbound forms of life, processed to be bound norms in the form of fellowship values and its valuations. However, these rules seem to have different content density, from ascending to descending thickness of meaning supported by systematic *susur galur* with other rules caused by the existing orders, through good or less good valuation of social reality as well as human requirements. A person who is to make decision must be aware that his decision is a responsibility as an element to form law. Such position unavoidably requires him to have power in the fellowship and in his decision in such a way that rules derived from such rules are made pursuant to his ability in the environment where he implements such law. First for concrete cases, and then for other cases to the extent there are facts with same relevance.

Ter Haar describes that customary law as well as its regulations come into existence in the decisions of authorized officials who has authority and influence. Such law continuously grows and develops, maintained with people's law awareness. Decisions of custom leader must be complied with to the extent they are pursuant to people's legal belief or to what people desire. Such customary law can only be viewed from decisions of custom leaders who decide a case

based on what people believe and from such decision, born concrete legal rules which become guide for people's life.¹³

In addition, Andi Baso Machmud also states that customary court has not existed now, differently with kingdom era where people are highly obedient to customary rules. Kingdom in its main duties and functions also creates judiciary body led by the king assisted by protocol makers (*pampawa ade*). Andi Baso Machmud states that if customary court is to be revived in South Sulawesi, particularly in Gowa Regency, we will highly agree. An example, there is dispute in Gowa Regency between regional government and customary institution/kingdom, in which the elected Regent takes *sombayya* (to be paid with obeisance / king) position that basically is the position of a king, that should be assumed by direct line of previous king. This dispute will not occur when customary court as well as its customary apparatuses remain exist in Gowa Regency, since all royal issues will be settled by the kingdom itself, not by regional government.

Different condition takes place in Palopo area, which is the current center of Luwu kingdom. In a face-to-face interview, the 40th Datu Luwu, Andi Maradang Mackulau states that customary court in Luwu still exists to adjudicate disputes in the community. We highly uphold our tradition here. An example, there is prolonged conflict between villages in Luwu Timur in 2016. The police are not able to handle such case since the conflict repeatedly occurs. The head of both villages and the police eventually submit this issue to the Istana Kedatuan Luwu, in which I (Datu Luwu) settle it and, finally, that conflict does not occur anymore. Luwu kingdom highly upholds the tradition established by Batara Guru. Andi Maradang Mackulau adds that the initial source of law of this nation is customary law itself, in which the Dutch colonial government at that time forms self-governing region with self-governmental right. Since then, the indigenous people (*bumiputra*) in settlement of existing disputes uses only customary court, which is flexible and, consequently, leads to peace and realization of justice. This existence cannot be separated from the governmental system adopted by Luwu kingdom since old time. The governmental system of Luwu kngdom has two authorities, which are *Ade' Asera (Hadat Sembilan)* and *Ade' Sappulo Dua (Hadat Dua Belas)*. *Ade' Asera* serves to supervise the governance implementation, while *Ade' Sappulo Dua* serves to choose a king. A four-membered governmental executing body is called *To Maraja (Pakatenni Ade')*.¹⁴

¹³ Mr. B. Ter Haar, Freddy Tangker, Bambang Daru Nugroho. *Asas-Asas dan Tatanan Hukum Adat* (Bandung: CV Mandar Maju, 2011), 194.

¹⁴ Sarita Pawiloy. *Ringkasan SEJARAH LUWU*. (Makassar: CV Telaga Zamzam, 2002), 24.

4. Conclusion

According to the field review on the existence of customary court in the research locations of Gowa and Bone, customary court has not existed anymore. This is caused by the shift or moral of local wisdom values and weak legal protection for customary institution, thus disputes occur between regional government and customary institution. A different condition is found in the research location of Luwu where customary court remains operating. However, the customary court in Luwu becomes people's second choice and serves its functions when the authorities are not able to settle existing disputes and cases, or, in other words, the customary court in Luwu is passive. The Provincial Government of South Sulawesi needs to revive customary court as an alternative to settlement of dispute through Provincial Regional Regulation (PERDA). Customary court helps the Government settle disputes and cases existing in the community. Its flexible and non-complicated characteristics also help the people seek for justice.

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