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Customary Justice as an Alternative Justice System in Indonesia

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Abstract: Customary justice is a process for examining, adjudicating and deciding on a case that has been carried out long ago by almost all parts of the archipelago. Customary justice aims to try cases as fairly as possible to achieve peace. This study aims to reinstate adat justice as one of the justice systems in Indonesia. This type of research is qualitative descriptive with an empirical juridical approach. The results of this study answer that indigenous justice in Indonesia has always existed and has become one of the judicial systems trusted by the public.

Keywords: customary justice, the justice system, Indonesia

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I. INTRODUCTION

Interventions and submission to the customary justice system into the State legal system or the absence of a long-standing State customary court trial since 1951. However, in reality, thisadat justice process is still ongoing. This reality is itself a proof, how the sustainability of the traditional justice system is truly extraordinary. This is because the efforts and strategies for the eradication are so systematic, and not only in the direction of policy but at the same time in other directions, namely concrete actions on the ground by the state law apparatus, negative stigmatization and disarming the "legality" of the peasant community. Under this pressure, the adat court can still prove its existence. This condition is inseparable from the attitudes and awareness of the customary law community itself.[1]In many customary law communities in the archipelago, the existence of *ipso facto* customary justice still plays a major role as a *self-regulating mechanism* or often referred to as a community justice system that works informally but autonomously. This institution is through the mechanisms it has to function as a resolver, and as a restorer of an orderly situation in general. Several regions in Indonesia have had a customary justice system since the beginning, including Customary Justice in Aceh, Customary Justice in Dayak, Customary Justice in Musirawas, Customary Justice in Soe, Customary Justice in Bali, Customary Justice in Bengkulu, and Customary Justice in Maluku. These areas are the ones running the justice system based on their customary law.

Based on Article 18 of Law Number 48 of 2009 concerning Judicial Power, it is stated that:

"Judicial power is carried out by a Supreme Court and a judicial body that is under it in the general court environment, religious court environment, military court environment, the state administrative court environment, and by a Constitutional Court."

From the quotation of Article 18 above, it is clear that the Customary Justice did not get recognition in the national legal system, even though the customary law itself still received recognition from the current national legal system. Indonesia deliberately forgot their own legal system and the original justice system.

The existence of this adat court was then considered irrelevant to the modern legal system; then it was abolished. During theHindia-Belanda period, the existence of customary justice (*inheemscherechtspraak*) remains recognized in addition to the official judiciary established by the Government (*governments-rechtspraak*). The existence of customary justice in Palembang, Jambi, West Sumatra, and the Swapraja Judiciary in several regions of Java, is still recognized even though with limited jurisdiction only in customary cases. After Indonesia's independence, the existence of customary justice was gradually abolished from the Indonesian justice system. In Emergency Law Number 1 of 1951 concerning Temporary Measures for Organizing Unity, Composition of Power and Procedure of the Courts of Civil Courts (LN. 1951 Number 9), it has been confirmed that customary justice is also often referred to as Customary Justice and Self-Government

[1]Jamin. M.(2014). *PERADILAN ADAT; PergeseranPolitikHukumPerspektifUndang-undangOtonomiKhusus Papua*. GrahaIlmu. Yogyakarta. p.77.

Courts gradually. Will be phased out.[2]This type of research is the descriptive qualitative type with an empirical juridical approach.

II. RESULTS AND DISCUSSION

In customary law community units in the territory of Indonesia, the terms used are very diverse to refer to the mechanism for resolving cases (disputes/violations) which are often referred to as customary justice. The term often used is "*sidang dewan adat*", "*sidangadat*", "*rapatadat*," or distinctive expressions of each region.[3]In the literature of customary law, the function of the judiciary in customary law community units is generally carried out by customary heads. As Ter Haar said in his 1930 speech entitled "*De rechtspraak van de Landradennaarongeschrevenrecht*," at the timeHindia-Belanda, there are two types of justice, namely the trials run by the heads of the people and the trials carried out by the position judges. The trial carried out by the heads of the people was carried out subject to the law and legal awareness of the local community. This type of justice is called customary justice, namely as a justice system that was born, developed and practiced by indigenous and tribal communities in Indonesia, based on customary law, where the court is not part of the state justice system.[4]Also, those who decide on customary cases in dispute resolution are local customary law community functionaries. Solving problems in people's lives by people who are trusted directly by the local community is open and transparent. On the other hand, decisions or sanctions are given based on deliberation so that the term "fair" is more touching on adat courts. The presence of customary justice is increasingly important to prevent street justice. Here it is necessary to think about the format of the adat justice so that the settlement that has been entrusted with the level of adat, is no longer a polemic and must be brought to the level of a positive law. In principle, in the provisions of national law, every crime and violation committed and occurring in the community is viewed and interpreted as a crime or violation of the State, and the State through the rule of law prioritizes legal sanctions in the form of criminal and criminal proceedings in its settlement. This contrasts with the customary law mechanism that applies in society, in customary law there is a different view, namely every crime or violation that occurs in the community, not seen as a crime or a violation of the State, but a social problem of the community, which puts the settlement process through the involvement of the community, the parties (perpetrators and victims) and families with the mechanism of deliberation and consensus and the settlement of cases through the customary justice mechanism. Customary justice can play a role in utilizing local wisdom as conflict resolution through local and informal institutions. Customary law communities prefer this mechanism to formal justice mechanisms.

Customary justice in practice effectively provides solutions to cases of violence against women in the household as reported by the Women's National Commission as stated by Rukmini PaataToheke (indigenous woman of Ngata Toro Opant in Sigi Regency, Central Sulawesi Province. Rukmini explained in Ngata Toro, cases of violence against women 80 percent is resolved through the adat mechanism, because the process is fast, and the perpetrators immediately get social sanctions, as long as the cases handled by customary courts are domestic violence, rape, dating violence, husband's taking after the process divorce, economic neglect and the issue of female labor (TKW). Judge Prof. Dr.LilikMulyadi proposed three concepts of customary justice that could be applied to the national justice system. He proposed this at the People's Law Summit in Jakarta. " How is the concept of customary justice coming "I offer three concepts," he said when he was a speaker at the summit.[5]

First, customary justice is independent. This concept offers customary justice as the fifth court environment, after the general court, state administrative court, religious court, and military court. This concept can only be implemented if the government and Parliament follow up through changes in legislation. Second, customary justice enters the general court room. Lilik offered this concept by juxtaposing customary courts in equal positions with district courts in the general court. "I propose that the personnel (judges) are a combination of career judges and ad hoc judges," he said. The ad hoc judges offered by Lilik will not be permanent, such as the ad hoc judge currently available in some special courts under the general court. "If there is a case, then you can appoint the judge. The benefits regarding HR and State Finance are possible ". The status of customary courts can also be positioned with other special courts, such as industrial relations courts (PHI) and commercial courts. "Customary cases are placed specifically so that legal remedies must also be specific. The legal remedies have no appeal, directly appeal to the Supreme Court, just like the IRC and the Commercial Court, "he said. Third, there is no need to establish a customary court, but it is enough to use the existing courts. Namely, encouraging judges to explore traditional values when deciding a case. "This concept has been implemented

[2]Poesoko, H., Khoidin, M., &Rato, D. (2014). *EksistensiPengadilanAdatDalamSistemPeradilan*. LaksBang Justitia. Surabaya. p.97.

[3]Jamin. M.(2014). *PERADILAN ADAT; PergeseranPolitikHukumPerspektifUndang-undangOtonomiKhusus Papua*. GrahaIlmu. Yogyakarta. p.44.

[4]*Ibid.*

[5]Salmande, Ali. 2013. "*Hakim TawarkanTigaKonsepPeradilanAdatBelajardari Eritrea dan Papua Nugini*". http://www.hukumonline.com/ (accessed date 04 Maret 2017).

now. For example, how do judges decide on inheritance cases in the fields and so on by exploring traditional values? The challenge is that the Supreme Court (MA) must place the right judges and understand the customary law in an area where they are placed. "The concept of mutation and promotion in the Supreme Court must require that the judge concerned to understand and can explore the traditional values in the society in which he is assigned,". Furthermore, LilikMulyadi said the position of customary law in the national court at this time was like there was and was not. On the one hand, the customary law really does exist and exists, but on the other hand, the government and the DPR have not formalized the recognition of the existence of this customary law into legislation.

Researcher of the Association for Community and Ecological Based Legal Renewal (HuMa) RikardoSimarmata said Indonesia could follow the example of the Eritrean State and Papua New Guinea which have succeeded in reviving customary law into their national courts. Rikardo explained that Eritrea was the only country in Sub Sahara Africa where almost all of its customary laws were written, namely 23 out of 27 customary law groups. In 1992, the Eritrean government established a village court as a first-rate court, but this policy was unsuccessful. "Furthermore, in 2003 a Community Justice was formed as a combination of customary justice and peace justice. Community justice is held as the first level court under the district court, high court and Supreme Court, ". These Community Courts deal with non-complex daily life cases such as civil cases (land boundary dispute, movable and immovable property with a certain value) and criminal (intimidation, property damage caused by livestock, etc.). The judge uses state and customary law when resolving the case. This policy was finally effective. "Since 2003, disputes have been resolved in the Community Courts as much as 60 percent (of the total cases entered,)". Whereas, in Papua New Guinea, successful adat courts are in Bougainville - a state (province) in Papua New Guinea. In 2008, the Papua New Guinea government conducted an assessment of the autonomous region and concluded that formal justice was not sufficient to respond to the needs of the community and did not empower the community in resolving disputes. Based on the assessment, continued Rikardo, the government appointed the Bougainville Peace and Reconciliation Center to train the community regarding conflict resolution, especially through mediation. "People feel the positive impact of these training,". Some of the reasons are that the parties feel they have sufficient information about their rights; informal / customary justice is considered objective and unbiased; informal / customary justice is considered able to restore group harmony, and there is a change in awareness and behavior regarding equality between men and women.[6]

"If the Country Does Not Recognize Us, We Do Not Recognize the Country" (Indigenous Peoples Alliance of the Archipelago, 1999).

The statement of the Indigenous Peoples' Alliance of the Archipelago (AMAN) in 1999 is an expression of the country's limited recognition of the existence and rights of indigenous peoples in Indonesia. There is or lack of recognition (state or national law), in fact, the existence of customary justice in Indonesia has been going on for a long time, maintained for generations by local communities and or indigenous peoples. Law and society, have been united, rooted, and not easily separated since before the Republic were born. Recognition discourse becomes relevant when discussing customary justice in the context of the national legal system, to what extent the adat court relates to the national legal system. Is it really separate at all?.[7]Facts on the ground are often found that the jurisdiction of customary justice has its own character that distinguishes it from national justice, because customary justice can cover the public, private, and or a combination of both in one trial. In practice, it can take place very informally, enough with the mediation mechanism, with the possibility of negotiating space for the process. That is because, defining or even determining the jurisdiction of customary courts, especially regarding whether private or public affairs, is really not just an easy thing, or even impossible or dangerous in the sense that it can bury the existence of the adat court itself. Customary justice, which utilizes the law and or customary law system, actually has its own system logic and principles. Even so, does the claim of holding an adat court always be called an adat court that can be accepted or recognized? This is where real tension or friction occurs, for example, is the adat court held by the National Dayak Indigenous Community (MADN) in Central Kalimantan against the statement of Prof. Thamrin Amal Tamagola is the existence of customary courts which are intended in the special system of customary law? As far as this study has been conducted, it has not found an in-depth, yet rigorous analysis or research on the elements to refer to customary justice, so that it is truly an adat court in a special legal system. One of the fundamental elements that can be found in this study is the "source of authority" in the administration of customary justice, which can be three variants: (1) the source of the authority to administer customary justice comes from the local customary legal system, in the sense that there is confirmation from and by authoritative structures at the level of indigenous

[6] *Ibid.*

[7] Herlambang Perdana Wiratraman. (2013). *LaporanAkhir Tim PengkajianHukumTentangPeluangPeradilanAdatDalamMeyelesaikanSengketa Antara Masyarakat HukumAdatDenganPihakLuar*. Pusat Penelitian dan PengembanganSistemHukum Nasional (BPHN). Jakarta. p.7.

peoples; (2) the source of the authority to administer customary justice comes from non-local customary legal systems, which can come from the local government (governors, regents, village heads, etc.). (3) There is a possibility, the source of the authority comes from a combination of the two, through a certain dialogue room which gives rise to an agreement on the implementation of certain adat courts. The two sources of authority mentioned last become unavoidable, because of the consequences of Indonesia having a historical relationship between national law and customary law, which also brings together formal and informal political structures. The relation is bound in a 'political contract', which is called the constitution of a country. In fact, the constitution also experiences some dynamics of change, so in looking at how the legal system of the country relates to the local legal system, or customary law, it is also necessary to understand how the constitution of a country regulates or determines the relationship. The constitution is the basic norm which becomes the legal basis and policy to what extent the relationship is regulated, so that the study can get a better picture of the context of the norm.[8]

In addition to the elements of the element, the BPHN Study Team also emphasized at least three basic principles of the implementation of customary justice, which should not be ignored at all in the implementation process, namely the principles of local wisdom, social justice, and human rights. Here's a brief explanation.

1. Principles of Local Wisdom It is a principle that bases its implementation by tradition that has been maintained and is widely accepted in the midst of indigenous peoples, for generations. Local wisdom is recognized as a very important part of community life as a basis for social interaction and a marker of morality that is recognized as a local belief.
2. Principles of Social Justice principles that prioritize the realization of a sense of justice that is felt to be very important in the midst of society's implementation, or something that has social significance.
3. Principles of Human Rights this principle includes the perspective of the universality of human rights, non-discrimination, equality, human dignity, not separating human rights from one another, and placing the responsibility of the state in the effort to promote and protect human rights.

On the basis of these elements and principles, this section will answer briefly three key questions, first how are the dynamics of legal and indigenous peoples' provisions in the Indonesian constitution, from 1945 to the I-IV amendment (1999-2002), then see what background, context socio-politics, and ideology which colored the debate up to such constitutional formulations, and reviewed whether the formulation of articles in the constitution provided guarantees related to law and justice relating to adat and their rights?[9]

When the 1945 Constitution was announced on November 23, 1945, the effort to recognize the special regional existence was accommodated by the provisions in article 18. Explained in Indonesia, there were approximately 250 zelfbesturendelandschappen (or other terms of autonomous regions) and volkgemeenschappen. The term used by the 1945 Constitution of the Republic of Indonesia (UUD 1945) is referring to volkgemenschappen, not to rechtgemeenschappen, although it is seen that the facts on the ground are found in the customary law, village, Nagari and clan, and other legal alliances. Because of this form of recognition (volkgemenschappen), in fact, it also has consequences for the recognition of the existence of a system or mechanism for solving problems that have been used as a reference and basis for resolving them, namely the local system which can be in the form of customary justice. This, which must be understood in the Indonesian constitutional structure, does not necessarily mean that the presence of the constitution or the 1945 Constitution has killed the existence of a local or customary justice system. The history of the constitution also leads to a shift in the direction of thought of the articles of the constitution, especially based on the Republic of Indonesia Constitution (RIS 1949 and Provisional Constitution (UUDS) 1950. Arrangements regarding indigenous and tribal peoples can also be listened to in the provisions governing the constitutional basis for law enforcement custom as stated in article 146 paragraph (1) of the 1949 RIS Constitution and article 104 paragraph (1) of the Provisional Constitution of 1950. Both articles state:

"All court decisions must contain reasons and mention the laws and customary rules that are used as the basis for making decisions."[10]

With this article, there will be a shift, from "special regions" to "special regions." This means, more refers to *zelfbesturendelandschappen*, and does not include *volkgemeenschappen*. Even so, this concept was shortly maintained, because since the Presidential Decree of July 5, 1959, apart from the beginning of Sukarno's Guided

[8] *Ibid.*

[9] Herlambang Perdana Wiratraman. (2013). *LaporanAkhir Tim PengkajianHukumTentangPeluangPeradilanAdatDalamMeyelesaikanSengketa Antara Masyarakat HukumAdatDenganPihakLuar*. Pusat Penelitian dan PengembanganSistemHukum Nasional (BPHN). Jakarta. p.9.

[10] Herlambang Perdana Wiratraman. (2013). *LaporanAkhir Tim PengkajianHukumTentangPeluangPeradilanAdatDalamMeyelesaikanSengketa Antara Masyarakat HukumAdatDenganPihakLuar*. Pusat Penelitian dan PengembanganSistemHukum Nasional (BPHN). Jakarta. p.10.

Democracy formation, the constitution was returned to the 1945 Constitution. This meant returning to the original concept of the Indonesian state.

Conceptually, it no longer changes until the second amendment in 2000, which changes the formulation of article 18, specifically the additional article 18B paragraph (2), the substance of which is:

"The state recognizes and respects the customary law community units and their traditional rights as long as they are alive and by the development of society and the principles of the Unitary Republic of Indonesia, which is regulated in the law."[11]

Also, in the second amendment to article 28I paragraph (3) of the 1945 Constitution, the concept of human rights was formulated which emphasized the issue of cultural identity and traditional rights:

"Cultural identity and the rights of traditional communities are respected by the development of times and civilizations."

If judging from the formulation of the two articles, state recognition includes both aspects of recognition, both of the legal alliance and the community alliance. In the concept, there appears to be a mixture of concepts, which combine the concepts of rechtgemeenschappen and volkgemeenschappen. Also, one thing that is interesting if it is placed in the context of the second amendment politics, the discussion of the two articles further shows the dimensions of recognition and respect from the perspective of human rights.

That is because, the spirit that must be seen from this context is the spirit of human rights protection for the position and existence of indigenous peoples, and this is a constitutionalism dimension that must be understood by state officials when placing customary legal and judicial positions in the national legal system.

Constitution Article	Article Substance	DimensionsConstitutionalism	State Obligations
18B paragraph (2)	Recognition and respect of customary law community units and their traditional rights Conditional provisions for recognition and respect: - As long as you're alive - By the development of society - Principles of the Republic of Indonesia - Regulated in law	Governance and rights that are born in the governance of customary law communities State and customary law community relations through conditional provisions	State recognition and respect
28I paragraph (3)	Respect for cultural identity and the rights of traditional communities Conditional conditions: - In line with the development of times and civilizations	Human rights related to the cultural identity of citizens and their rights	respect

Based on the two articles in the 1945 Constitution, the constitutionality of indigenous peoples and their rights and laws has been formulated. Even so, the constitutional text is not even yet to state the protection of the rights of indigenous peoples, because the idea and enthusiasm for the efforts to implement the articles in the 1945 Constitution are very dependent on the socio-political context that affects them, including the special situations that occur in the field. In this case, access to justice and human rights principles is an important thing to be seen more closely when local or customary law is practiced in reality, both regarding the relation of

[11] *Ibid.*, p.11.

customary justice in the national legal system, as well as the extent to which the reflection of adat justice on access to justice and the principle of rights human rights.

In the eyes of the world too, in principle indigenous peoples get recognition through the Convention on Customary Law in the Independent States (Indigenous and Tribal Peoples Convention) by the International Labor Organization (ILO) in 1989. This Convention was welcomed with joy by all legal communities custom in the world, because in the convention affirmed in Article 3 paragraph (1) Customary Law Society has the right to enjoy their rights as human beings and fundamental freedoms without obstacles or discrimination. The provisions of the convention apply without discrimination to male members or female members of this customary law community. Not only that, in Article 2 paragraph (1) this Convention strongly affirms, the Government has full responsibility to formulate, by providing participation from the concerned indigenous and tribal peoples, coordinated and systematic actions to protect the rights of these customary communities and to ensure respect for their rights.[12]Ter Haar in Decision Theory reveals that decisions taken by powerful functionaries, village heads, judges who are always not only seen as concrete decisions, but also as rules that apply to the same cases (cases - cases with facts that are either partially or entirely relevant, so the cases are as long as there are similarities) decided in the adat court.[13]

III. CONCLUSION

Customary justice in the constitution in accordance with Article 18B paragraph (2) and Article 28I paragraph (3) of the 1945 Constitution of the Republic of Indonesia becomes the basis for the legality that customary courts are respected and recognized by the State as long as they are in line with the times and principles of the Republic of Indonesia. . Customary courts should have a place in Law Number 48 of 2009 concerning Judicial Power as a derivative rule that governs the scope of the judiciary that applies in Indonesia, so that customary justice can be an option for customary law communities to resolve cases that occur.

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