ImplementationofCustomaryLawinMerauke

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Abstract-customarylawisanever-ending problem fortheclosure because formallawwithformallawcannothappen inIndonesia orinsome countries thatstillstronglyupholdcustomarylawinadditiontonationallaw.Therefore,thisresearch canbedone tosolve theresolution problem inMerauke.Thisresearch uses ajudicialempirical method.Datafromobservation,literature,datacompletion andin-depth interviews.After that,thedatacollected issummarized,explained,andanalyzed qualitatively.Theresult oftheresearch showsthatthere arestillmanyunresolved cases andmustbeimproved andthere needs tobealocalregulation toaccommodate customarycourttobemore selected inthecommunity.

Keywords:Costumary,implementation,dispute,resolution.

I. INTRODUCTION

Thequestion oftherole ofstatutorylawinsocialenvironments permeated bycustomandtradition-alnormsisparticularlyimportantwhen thestate lawaimstocorrect socialinequalities embedded inthe .The conventional view isthatmodern lawoften failstotake rootincustom-driven poorsocieties,especially when the formallawconflictswiththe custom.(Jean-etal:2014)

HukumAdatadalahhukumyangberlaku danberkembang dalamlingkunganmasyarakatdisuatudaerah yangdilakukansecara berulang-ulangseperti yangadadiNegara IndiaCustomisrecognized asamajorsource oflawunder theIndianlegal system.Article 13(1)ofIndia'sConstitutionprovides thatwhen theConstitutionentered intoforce,allprevious lawsthatwere inconsistent withtheConstitutionwere considered void.TheConstitutiondefines "law"toinclude "customorusage havingintheterritory ofIndiatheforce oflaw."TheCourtsofIndiahave recognized customaslawonlyifthecustomis(1)"ancient orimmemorial"inorigin,(2)"reasonable innature andcontinuousinuse,"and(3)"certain."TheCourtshave interpreted "ancient orimmemorial"tomean thatforacustomtobebindingit"mustderive itsforce fromthefactthatbylongusage ithasobtained theforce oflaw."Acustomalso"derives itsvalidityfrombeing reasonable atinception andpresent exercise."Lastly,a"certain"customisonethatis"certain initsextent andmode ofoperation"andinvariable(B.J.Krishnan:2000)India'sConstitutionalsoprovides protection oftribalindigenous communities andtheir customsthroughArticles 244,244-A,371-A,andtheFifthandSixthSchedules.TheFifthandSixthSchedules provide forasystem of"Scheduled Areas"ortribalregions,whicharedesigned toprotect theinterests oflisted indigenous communities or"Scheduled Tribes.

Legal pluralismisakeyfeature ofAfricanlegal systems.Theformofpluralismthatpermeates these systems derives fromwhatisknownastheprinciple of"legal centrism,"whichholdsthatalllawemanates fromthestate andthatrites developed andpracticed bynonstate actors,includingreligious andcustomaryinstitutions,arelawonlytotheextent they arerecognized bythestate.Thismayoccurthrough"normative recognition"inwhichstate institutionsrecognize substantive customaryand/orreligious lawsaslaw,and/orthrough"institutionalrecognition"inwhich theactionsofcustomaryinstitutionsareconsidered enforceable.

Customarylawinsome countries isstillvisible Thesame evolution hasbeen detected inNiger where women,inrecognition oftheir ownership rights,mayreceive partofthecropharvested onthefamilylandbytheir brothers under anarrangement knownasaro(Cooper,1997).Itisalsointeresting tonote thatwomen whohave completed their primaryschoolingandthose whohave anon-agriculturaloccupation(even after excluding themarketing ofagriculturalproducts)have atendency toexpress negative opinionsaboutcustomarypractices suchasarranged marriages,bride price payments,andthelevirate system where byawidowisremarried toabrother ofherdeceased husband(GaspartandPlatteau,2010).Suchachange ofattitudes andbeliefsreflects anincreasing readiness ofthese'progressivewomen tochallenge thecustom.

Formallawsplayamarginalrole ingoverning the lives ofmanyAfricancitizens,particularlythose residing inruralareas (Chirayathetal.,2006).Instead,customarylegal systems provide prompt,accessible,andculturallycoherent justice services (Wojkowska,2006).Customarycourtsoversee andenforce customsandinformalrules

ofbehavior,typicallytakingintoaccountlocalegalitarian andredistributive norms(Platteau,2000),Ontheother hand,ifthose disadvantaged bythecustomarysystem ace strongsocialdisincentives toappeal toformallegal institutions,they maycontinue tousethem even when thelawisavailable andindividuallypreferred.Inthiscase increased competition ofthe formallawmayprovide noclear benefit.Innon-corner scenarios customaryjudges mayfear defections andappeals toalternative forums,fostering changes incustomaryoutcomes,even ifinequilibrium nobodyuses the formallaw.Aldashev etal.(2012a,2012b)provide clear

InEthiopia(Cecchi,andMelesse:2016),Mongolia(caroline:2009)isconsistent withthestudythatonlyasmallproportionofthose directly utilize formallaw.Ourresults showthatlocalinstitutionaladatdispute resolution mayhave arole inaltering existing customsprevious tothedesired result.Inareas where formalformalinstitutionshave limited reach.

InSabahandSarawak,anumber oflocalcustomarylawshave been passed.Inanumber ofbulletins,Wooley outlines certain features ofcustomarylawinhamlets,murutandKwijaninSabah.InSarawak,several customarylawshave been enacted andincorporated intotheOriginalIndigenous LawsActof1955.TheoriginalIndigenous Legal Code approved byRajah(R~ja)Brooke crystallizes intheformofarigid,unwritten law.Customsadopted bycertain other tribes arealsocarried out.Forexample,inrelation toinheritance law,Chinese customarylawhaslongbeen recognized bytheSarawakcourtsandtheSarawakcourtswanttoenforce thislaweven thoughChinese arenotnative Sarawakresidents.Itshouldbenoted,however,thatinSarawak, Chinese customarylawisenforced aslongasthelawisrecognized bylegislation (AstimRiyanto:2007)

Numerous examples attest thatmodern lawsintended tomodifyorsupersede customaryrules have hadnoimpactonsuchrules.These lawsthusremain dead letter Forinstance,lawsenacted inSub-SaharanAfricaaimed atpreventing excessive fragmentation ofrurallandholdings–throughinheritance orlandsale transactions–have never been enforced.Themaincause isnotthecitizens' ignorance ofthelawbuttheir widespread belief that,given thatthese lawsruncounter todeeply entrenched customaryprinciples (e.g.therightsofallmale children toreceive aportionofthefamilyland),itisunlikely tobefollowed byothers orbacked byappropriate sanctions(AndréandPlatteau,1998).Incountries where thelawforbidsmarriage payments(e.g.,bride price intheIvoryCoast,Gabon,Central AfricanRepublic,anddowryinIndia)orsets aminimummarriage ageforgirls,people continue tofollowthecustomandtoignore thelaw(Ntampaka,2004).InGabonandSenegal,thestatesallow(optionally)toexplicitlymention polygamyinmarriage contracts.Moreover,thelawprovides thatviolationofthecommitment toeither monogamyorpolygamyisalegitimate cause fordivorce;inSenegal,theviolationofmonogamycanbeinvoked todeclare themarriage void.However,thelegal prescription isfrequently ignored bymenwhorenege ontheir commitment tomonogamy(Coulibaly,2005;Nambo,2005;Sacco,2008)

Inreality,theindigenous peoples inPapuastillimplement,maintainandobey their owncustomarycourts,especially inresolving customarycases amongmembers ofcustomarylawcommunity.Thisisevident andsupported bytheSpecial Regional Regulation(Perdasus)ofPapuaNo.20of2008onCustomaryCourtinPapua.Legislatively,indigenous resolution isexplicit,buttheimplementation oftheregulation isdifficultandsuboptimal.AccordingtoMahfudMD,recognition ofcustomarylawcommunityunitsasreferred toinArticle 18Bclause (2)ofConstitution1945alsomeans recognition tostructures andgovernances developed bylocalindigenous constitutionallawnorms.Theobstacles ofimplementing Special AutonomyLawinPapuainclude different understandings andperceptions onSpecial AutonomyinPapua.Thisreview iseven more relevant becausedispute resolution isasociologicalfactthatcustomarycourtsarealive andpracticed inthethousandscustomarylawcommunityunitsintheterritory oftheUnitaryState oftheRepublic ofIndonesia.It’svery importanttostudythepoliticaldynamicsofjudicialpower fromtime totime inresponding tothesocialreality(Hedar :2003).Thecustomarylawofsome countries isstillrecognized andinthisoccasiontheauthortries toelaborate onthecustomarylawthatapplies inMerauke PapuauIndonesia andthisstudyisvery relevant because sofarnoonehaswritten indetail aboutcustomarylawinMerauke.

II. MATERIALSANDMETHODS

Thisresearch uses ajudicialempirical method.Datawere collected fromobservation,literature,datacollection andin-depth interviews.After that,thecollected dataiscollected,described,andanalyzed qualitatively

III. RESULTSANDDISCUSSION

Thesettlement oftheconflictsthatoccurred inseveral countries mustbedifferent fromeach other.Oneoftheexamples isThaiGovernment's

EffortinConflictResolution inSouthern ThailandIn2004-2009(AprilaFitri,2016).

Disingapore toaccommodate conflictsettlements thatoccurthen theSingapore government hasestablished theSingapore Mediation Center.Eachcountryhasitsownwayofhandlingthecustomary conflict,suchasinMalaysiawhichissolved bytheso-called *Penghulu* (head ofMalayvillage).*Panchayat*(Indiancommunitycouncil)inAs ianandAfricancountries even seetheconflictfromcustomarylawperspective aslongasitcanbeaccepted bythecommunity.

Themostresolved cases arelanddisputes.Landdisputes arecustomaryproblems whicharesodifficulttoresolve because inMerauke thelandwasmainlydominated by*Ulayat*landowners thatconsistof7(seven)clans.Furthermore,insolvingtheexistin g landproblems inMerauke districtthere isalready aninstitutionwhichspecifically handles land-lawcases thatiscalled asCustomaryCommunityInstitution(*Lembaga MasyarakatAdat-LMAImbuti*).Althoughlandproblems inMerauke aredifficulttoresolve,itnever leads tointer-ethnic fights,apartfromtheproblem ofuninterrupted soilproblems ofmildpersecution ,domesticviolence,sexual assaultcases andmurder cases whichbecame customaryissues (settled incustomarymeetings).Theactualsettlement ofdisputes willnotresult inconflictofnormsaslongastheauthorityofthecustomcourtsis regulated indetail.

Ifthesettlement throughthecourtofjustice aimstoobtainjustice andlegal certainty,then whatisprioritized intheout-of-courtsettlement isprecisely thepeace inhandlingdisputes between theinvolved parties,rather thanseeking therightorwrongparties.Ifyouhave tofindoutwhoisrightandwrong,itwillnotresult inadecision thatbenefits theparties tothedispute.

Thenumber ofcustom-resolved cases table 1.

Table 1.Number ofVillages/Cases

No	Villages	Cases	Details
1	Wayau	1	1resumed,stillinvestigated
2	Senegi	9	1resumed,already given theverdict
3	Sota	4	Completed
4	Urumb	1	Completed
5	Domand e	12	Completed
6.	Toray	6	Completed

Thetable Ianalyzes thatmanycases areresolved customarilyandofthemostprevalent cases arelanddisputes,sexual harassment cases,domestic violence,aswell astwomurder cases.Inorder tofindouthowmanycases areresolved customarily.Cases thatoccurred inSenegihad alsobeen resolved customarilybygivingafine,bygivingadaughter and*wati.*

Table 1explains thatcases occurringinSenegi andWayauappear tohave sanctioned sanctionsinwhichcases have been resolved customarilybutarealsoprocessed byformallawwithoutundoingthecustomarysanctionsthathav e been granted.Thecustomaryinstitution'sdecision here isconsidered awaytoremove thegapsbetween thetwoparties involved inthedispute soasnottoinflictagrudge onthepartofthevictim.

Inaccordance withtheresearch field seen thatthemostcases arecases ofviolence inthehousehold andfollowed bylandcases thiscanbeseen intable 2.

Table 2:Types ofcases resolved customarilyinsome villages inMerauke

No	Villages	Cases	Number ofcases
1	Wayau	murder	1
2	Senegi	murder domestic violence Case ofland	1 5 3
3	Sota	domestic violence	4
4	Urumb	Case ofland	1
5	Domande	domestic violence Case ofland Persecution Rape Case ofland	4 2 2 2 2
6.	Toray	domestic violence	6

Table 2explains thatcases processed inadatcourtaredominated more bydomestic violence andthese cases areallresolved bycustomarylawandarewell accepted bythelitigantsonlyincases ofmurder thatoccurred inthewayauandtheperpendicular jurisdictionformal.Fromtheresults ofinterviews withheads ofvillages ineach village canbeconcluded thatcases ofviolence inthehousehold aremore under thecustomarycourtbecause thecommunityconsiders thatthesettlement does nottake alongtime andsanctionsfromitisconsidered notheavy.Thecase ofdomestic violence occurringinMerauke isduetothevery lowlevel ofeducation.Thiscanbeseen intable 3ofthelevel ofcommunityeducation whose case ishandled inthejudiciaryorcustomarylaw.

Table 3.Educationallevel oftheoffender

No	Villages	Number ofcases	Level ofeducation	
			primarysc hool	juniorhigh school
1	Wayau	**1**	1	
2	Senegi	9	5	4
3	Sota	4	4	
4	Urumb	1	1	
5	Domande	12	8	4
6.	Toray	6	6	

Fromtable 3itcanbeseen thatcases occurringindimerauke areduetovery lowlevel ofeducation.Thiswasalsorevealed bytheSotavillage chief that"thenumber ofcases ofdomestic violence thatoccurinthecityisduetothevery lowlevel ofeducation andalsobecause ofthelackofpublicunderstanding aboutthelawsothatthere isstilloften apersecution inthehousehold.

Thelevel ofeducation andlackofunderstanding ofhumanresources aboutthelawisalsooneoftheproblems faced inthefield sothatinsolvinglegal problems arestillnoteffective sothatthegovernment needs totake actiontoprovide trainingrelated tolegal understanding totheelders inMerauke adatuasoindeciding andprovidingmore optimalsanctions

Thelowlevel ofeducation owned byhumanresources insome villages by2017canbeseen intable 4.

Table 4:Level ofeducation ofhumanresources

No	**Villages**	**Volume**	level ofeducation				
			NotEducation		**Junior high**	**Senior high**	**college**
1	Wayau	**4**	3	1			
2	Senegi	4	2	2			
3	Sota	5		2		1	2
4	Urumb	5	2	1		2	
5	Domande	5		2		3	
6.	Toray	6	4	1	1	1	
		29	11	9		7	2

Intable 4itcanbeseen thatmosthumanresources have education thatdoes notcomplete primaryschooleducation sothatindecision makingisstillnotoptimalsothatsome cases handled mustproceed toformalpathbecause society feel dissatisfied withdecision orsanctionwhichdecided.

Inorder fortheimplementation ofadatlawandnationallawtoworkside byside itisnecessary tomake improvements andadditionseverywhere includingtomake aregional regulation whichisderived fromtheSpecial AutonomyLawandtheexisting legislation sothatthejudiciaryislegally recognized andthecommunitycanchoose whether tosettle hiscase tothecustomarycourtortotheformaljustice

IV. CONCLUSION

Recognition ofcustomaryjustice institutionsisvery importantnotonlytherecognition oflegislation buthowthereal recognition intheimplementation soasnottohappen Nebis inidem means thatcases thathave been resolved customarilynolonger intheproceeding totheNationalCourtaslongasthecommunityhasreceived theresults ofthedecision Insolvingadatconflictsnoonewinsorloses,butstrives fordisturbed balance recovered,andtheparties tothedispute canrelate harmoniouslysoastocreate harmonywithregard tothefactsandfeelings thatlive insociety,whichhasbeen embedded intotraditionfromgeneration togeneration.

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