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Customary Land Disputes in Indonesia

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Abstract

In Indonesia, there is a dual system of governing customary land. It creates confusion when it comes to dispute resolution methods. Customary land disputes may lead to a bigger issue between disputants. The disputants might not get justice from the civil court due to the ownership issue of the land. This paper aims to study the existing national laws, customary laws, and dispute-resolution methods used in resolving customary land issues. This paper adopts a qualitative research method. Normative legal research is adopted to collect data from the legal materials, including primary, secondary, and tertiary materials. A socio-legal approach is adopted to ascertain and identify the experience in addressing and settling customary land disputes. A few short case studies are included to illustrate the issue of dispute resolution involving customary land. The findings show that the current method of resolving customary land dispute cause injustice, and distress and is ineffective to the indigenous people. Customary land disputes need to be resolved through amicable settlement or alternative dispute resolution (ADR) with a simple process that prioritizes the principles of kinship in the society or following indigenous or customary laws.

Keywords: Customary Land, Case study, Dispute Resolution, Indonesia

Introduction

Land issues are among the most complex. The issue of land and justice is the most complex sector of the problem (Martin and Turner, 2004). Thirty percent (30%) of the total cases that enter the court are in the land sector. According to the Human Rights National Commission (KOMNAS HAM) report in 2015, KOMNAS HAM has been receiving and getting cases of human violation in Indonesia, and some cases are consistent and have similar patterns such as agrarian cases. Those cases keep occurring from one place to another. The problem persists despite that the government of Indonesia has improved the legislation and institutions relating to agrarian. The agrarian or land issue is complicated especially when the authority or government official takes sides and fails to be neutral in handling cases. The issue is complicated because in settling the land issue, the authority required return evidence. Whilst certain land belongs to the indigenous people, and they do not have any written evidence.

Some indigenous lands do not have documents to prove they belong to the indigenous people. However, they have remained in the said land for many years. They inherited the land from their ancestors. Hence, in cases where there are overlapping issues on the land's rights, the State must take action to ensure the indigenous people get justice (Nuraini et al., 2015). Five hundred out of two thousand complaints were filed at the Human Rights National Commission (KOMNAS HAM), and 25 % of the total complaints submitted to the Indonesian Ombudsman Institute are land or land-related cases (Human Rights Watch, 2019). In addition, interventions through security and military approaches often occur because violent clashes between the government and civil society are inevitable (Garuda, n.d.). Land conflicts caused the members of the society not only to lose their lands but even their lives. It is still fresh in the memory of the society of more than 10 fatalities in Mesuji, Lampung, and land cases in Bima, West Nusa Tenggara. The situation shows that land issues if not handled diligently and amicably, might escalate and create bigger problems and might cause a social revolution. The Government of Indonesia is trying to improve the dispute resolution method in land disputes by working together with other parties such as Non-Governmental Organisations (NGOs). The land regulatory system was revisited, and many measures were taken to achieve its objectives. In order to advocate issues in the land sector, KOMNAS and NGOs were established. The President relaunched the agrarian reform program allowing free communication between the government and the people on land matters. It helps people to vent their feelings about their problems. However, land disputes continue to be volatile in terms of quantity. This illustrates that the system for resolving land issues is not effective yet. This issue is considered harmful to the life of the nation and state (Sumardjono, 2003).

The fundamental factors that caused the failure to resolve land problems using the current method are due to a few reasons. First, the current method does not accommodate the fundamental interests of the parties. Second, it is a short-term settlement paradigm rather than a solution for the long term. This is due to the ownership of customary land belonging to a tribe or native. It is not like other land which belongs to an individual or company. The tribe holds the land, bequeathed to the descendants, and can never sell it. Third, there is weak participation among communities. Fourth, an unsystematic approach by the agency in resolving the disputes. Fifth, the verdict given to a dispute is not effective or unenforceable (Fauzi, 1998).

This paper aims to study the laws and government agencies involved in customary land disputes. A few short case studies were included to illustrate the issue of dispute resolution involving customary land. This paper adopts a qualitative research method. Normative legal research is adopted to collect data from the legal materials, including primary, secondary, and tertiary materials. A socio-legal approach is adopted to ascertain and identify the experience of related agencies or institutions and courts in addressing and settling customary land disputes. Ten heads of the regional land agencies have been interviewed to collect data relating to the current laws and the case studies. Agrarian justice or agrarian laws whenever referred to in this article include the indigenous people. The limitation of this research is the area of research is limited to Yogyakarta Indonesia. Further, the limitation in this paper is the lack of literature on this specific matter. The findings show that the current method of resolving customary land disputes causes injustice, and distress and is ineffective. Customary land disputes must be resolved through amicable settlement or alternative dispute resolution (ADR) with a simple process and prioritize the principles of kinship in society based on customary law.

Discussion

Law, Government, and Land Dispute Resolution

The legal system in Indonesia is based on the values of Pancasila (the five principles of the Republic of Indonesia) on top of the principles of law. The elements of a legal nature or law (*Idee des Recht*) are to realize justice, certainty, and practicality. The three elements play their roles in ensuring the stability of the country. Justice ensures the basic rights and responsibilities of a person. Certainty means the legal system guarantees the existence of human rights. While the purpose of practicality outlines that every citizen enjoys his rights. In fact, law as a political product is often obscured to lay down legislative goals.

In a justice system, the rules are complex with the requirement of procedure and bureaucracy. It is further restrained by the rule of certainty. The authorities use the law for their own interest rather than responding to the needs of the citizens. The theory of law may be divided into the theory of ethics and the theory of practicality. Ethical theory refers to abiding by the law and providing justice in all aspects of human life. On the other hand, the theory of practicality refers to the practical needs of humans in the aspects of economic, social, and political. However, this situation is not static and changes upon the changes of the government. Lesson learned from the history of colonial politics on agrarian policy. However, the authoritarian has yet to come up with a solution to the issues on the welfare of the citizens. All this while, the agrarian law relates to the expansion of the economy. Hence, authoritarianism was chosen to be the policy in the dispute resolution of land conflicts (Sumardiono, 2003). However, the real law is the one that responds to the needs of the people and cares for their interests regardless of the character of the law (Soekanto , 1999).

Law is employed to perpetuate the authorities. Therefore, it will be very difficult to change the law that has been constantly authoritarian. Hence, an idea emerges to incorporate new notions in the land dispute resolution institution inclusive of the agrarian justice institution (MD, 2000). Agrarian conflict is seen as an extraordinary issue. It is no longer perceived as an ordinary issue. In order to respond to the extraordinary challenges, a comprehensive and strategic plan is required to be prepared by the government. It is also important to provide justice for an agrarian issue. Agrarian justice resolves current issues and is needed to provide solutions for future issues. The history of agrarian conflicts and the judiciary influence the ability of the agrarian justice system to respond to the conflict, as well as the judiciary itself (interview with Anonymous B, 2 June 2021).

Good governance must be made as the basis of the implementation and execution of the land dispute resolution process. It would be difficult for the dispute to be resolved without good governance (Hutabarat, 2011). The principles of good governance have been laid down in Article 20 of Law 28 of 1999 on State Administration that is Clean and Free from Collusion, Corruption, and Nepotism as follows:

> *The governmental administration is guided by the general principle of state administration consisting of the principle of legal certainty, the orderly principle of state administration, the principle of public interest, the principle of openness, the principle of proportionality, the principle of professionalism, the principle of accountability, principle of efficiency and principle of effectiveness.*

The implementation of the land conflict settlement through litigation and alternative dispute resolution (ADR) within the Indonesian court indicated high time consumption of time and cost and involved a rigid procedure (Haspada, 2019). It is against the principle of efficiency and effectiveness. The gradual development of the dispute resolution model for land matters

shows that serious efforts were put into addressing the issues. Litigation is seen as not the best method to resolve disputes when there are many issues such as backlog at the end of the 20th century, and simultaneously ADR is developed by many countries. Hence, ADR models are introduced to reduce the issue in court, empower and engage the community as well, and give them autonomy in resolving disputes (Ginting, 2016).

There are a few legislations involved in land dispute resolution. The laws and regulations show the spread of land dispute resolution arrangements. Codification of arrangements for the resolution of land disputes and conflicts needs to be realized to create legal certainty. The legislation concerning the law procedure that regulates judges in resolving disputes in an amicable manner, law relating to alternative dispute resolution, and law on reaffirming the usage of ADR. Examples of the laws are *Herzien Inlandsch Reglement* (HIR), Law No. 14 of 1970, Law No. 30 of 1999, Law No. 4 of 2004 and Law No. 48 of 2009. There is certain regulation that specifically supports ADR such as Supreme Court Regulation No. 1 of 2008 which support land dispute agreements, Regulation of the Agrarian Minister, or the Head of National Land Biro (BPN) Number 1 of 1999 that provides procedure in handling lad disputes and conflicts, and Regulation the Head of BPN (National Land Agency) Number 3 of 2011 that concern the management and study of land cases.

The land in Indonesia is managed by the government agency which is established in pursuant to the 1945 Constitution. The objective of the establishment of the agency is to develop land in future and to benefit society. The authority, function, and finance of the agency totally depend on the government that administers the country. If the government changes upon completion of its tenure, the function of the agency might also change. Initially, the land management agency was formed under the Department of Agrarian Affairs, thereafter it was placed under the Ministry of Home Affairs. The management agency of land is directly answerable to the President after the issuance of Presidential Regulation No. 10/2006. The agrarian reform requires thorough and consistent policies at national and regional levels. Therefore, both regional and national levels must work together in land matters. Internal coordination and communication need to be built by the government to ensure land policies are executed effectively and smoothly at all levels (interview with Anonymous A, 1 July 2021).

There are challenges that need to be addressed by the government in implementing land management for the benefit of the community. First, at the organizational level, the National Land Agency is not fully effective due to a lack of coordination between the land office and the “working unit” at the regional office with the federal office. Further, there is inequality in workload between regions and the working units. Second, at the human resource level, the employee’s competency needs to be improved to the level of the position held. The standard of education and training needed to be provided and conducted, respectively. Further, there is a need to have accurate data on staff information to improve career patterns, and employee placement and promotion. Third, in terms of work facilities and infrastructure, there are many offices facing this issue such as the National Land Agency Special Region of Yogyakarta. Fourth, the restrictions to execute land management programs such as executing the rules related to finance and authority. In order to implement reformation on dispute resolution relating to land conflicts, there is a need to give serious attention to this matter.

Customary Land

The indigenous traditional rights are recognized by the law of Indonesia as long as the people practices them as provided by Article 18b (2) of the Indonesian Constitution 1945. It is further

provided that the recognition is valid so long the rights are in line with the unitary principle of Indonesia and are not against the development of the community. The Indonesian constitution highlights that the natural resources, earth, and water are meant for the whole Indonesian people (Article 33(3) of the Indonesian Constitution 1945). The authorities that are responsible for the management of the space and water which includes the natural resources are the states (Article 1 of the BAL). The states are granted such authority since a state is considered as the people's organization. The Indonesian law recognizes the rights on land granted to the native people by any law or government regulations (Article 2 of the BAL). It is emphasized that the law applicable in regulating any activity relating to space, earth, and water is the customary law with a condition that it does not conflict with any of the state or national interests in the context of the establishment of the national land law or agrarian law system (Article 5 of the BAL). Hence, it is obvious that the customary law is the base of the Indonesian agrarian law. The law further extends the customary meaning by adding a religious element.

The civil law which was adopted from the Dutch colonial law supports and recognizes the Indonesian customary law and the indigenous people's rights (Article 2 of the BAL). The customary law does not stand in isolation but is supported and recognized by various laws such as Act No 27/2007 on Management of the Coastal Zone and Small Islands, Act No 32/2010 on the Environment, Act No 5/1960 on Basic Agrarian Regulation, and Act No. 39/1999 on Human Rights. The National Development program included the development of a national legal system based on indigenous people. This program is part of the Indonesian Medium-Term Development Plan and Long-Term Development Plan. The principles of indigenous people and the traditional dispute resolution way embraced by the Palace Court (*Keraton*) are recognized by the program. The indigenous people have principles on land which include the principle of ownership of land that belongs to God and humans, communal interest is above individual rights, the ecosystem must be protected and sustained, the customary procedure must be complied with and cannot be compromised and finally, there must be a respect towards the leader (interview with anonymous 4 June 2021).

The Courts in the Keraton generally have 4 areas, namely the *Surambi Court*, the *Balemangu Court*, the *Kadipaten Anom Court* and the *Pradata Court*. The role of these courts is to resolve disputes in the community. The procedural law used is basically customary law. Even though the law has been modernized and reorganized to meet the interests of the colonizers, it still benefits the people. It is worth sharing that under indigenous law, the rights of the community prevail over the rights of the individual. The community is headed by the king who is considered the ruler of the land. Individual rights were not ignored in total. It was gradually recognized. Under the law, the role model of the community is the leader itself (interview with anonymous 7 June 2021).

Case Study

Sleman's Customary Land Disputes

In 2020, the Land and Spatial Planning Office of Sleman Regency 2020 completed the facilitation of 52 land problems (General Conflicts), with only 3 cases remaining. From the annual task report issued by BPN Sleman, it can be seen that the factor that hinders the resolution of land conflicts is that village officials are less open to facilitating residents' land problems or taking sides with one party. In tackling the problems that occur, a follow-up will be carried out where a coordination meeting will be conducted with the village

administration/government as to enable the dispute resolution process to be carried out properly.

PT Rimba Lazuardi and the Domo Tribe's Land Dispute

In this case, there was a customary land that became the object of dispute between PT Rimba Lazuardi and the Domo tribe, the descendants of Datuk Sati (late). They were fighting for an *ulayat* land (a plot of land belonging to a group of people such as a tribe, a descendant of a native or native people). The *ulayat* land covers an area of approximately 4,000 hectares. Disputes occurred when the PT Rimba Lazuardi took control of the customary land by entering without permission and planting various kinds of plants without the permission of the Domo Tribe. In an effort to resolve the dispute, several discussions and family 'meetings had been held. Unfortunately, PT Rimba Lazuardi failed to honor the results of the meetings. Due to this, the Domo tribe filed a Civil Lawsuit to the Rengget District Court to get justice since the plot is their customary land.

However, the national land law and customary law have some differences in terms of ownership of land. Article 19 paragraph 1 BAL provides that,

> "For legal certainty by the government, land registration is held throughout the territory of the Republic of Indonesia according to the provisions regulated by Government Regulations."

Furthermore, in paragraph (2) it is explained that land registration can be in the form of:

a. Land surveying, mapping, and clearing
b. Registration of land rights and the transfer of these rights
c. Provision of letters of proof of rights, which serve as strong evidence.

Hence, according to national land law, ownership is shown in the registration of the land or any written evidence showing ownership. Unfortunately, this part is missing. Domo tribe does not have the so-called "legal registration document". Domo tribal communities have defended their land from generation to generation and with the unilateral recognition of customary law communities in the form of documents signed by traditional elders. Thus, they are required to prove the ownership of the land through evidence accepted by the court. Regrettably, the Domo tribe was unable to produce the evidence accepted by the court to prove the land belonged to them. The only document they have is a copy/photocopy of a document showing the land belongs to the tribe which is unaccepted. Article 1888 of the Civil Code provides that a copy/photocopy of a document is only accepted if the original is produced. The article provides that *"the strength of proof of written evidence is in the original deed"*. Thus, if the original deed exists, then the copies and summaries can be accepted.

On the other hand, PT Rimba Lazuardi has a land tenure permit granted by the Minister of Environment and Forestry of the Republic of Indonesia as proof for settling and working on the land. Therefore, in this case, the court rejects all claims for the Domo tribe, and they are liable to pay court fees of Rp. 6,569,000.00.

Huta Lumban Gambiri Village, Saor Nauli Hatoguan Village, Palipi District, Samosir Regency's Land Dispute

The land dispute that occurred in the Huta Lumban Gambiri Village, Saor Nauli Hatoguan Village, Palipi District, Samosir Regencyinvolved Ramles Situmorang, the descendants of Op montang Situmorang and 5 (five) persons, namely Manapar Sinaga, Kadiaman Sinaga, Jonnes Sinaga, Mardihot Sinaga, and Saritua Sinaga. The five people took over control of the land by

force and caused destruction without the permission of the owner of Lumban Gambiri Village, namely Descendants of Aparholing Situmorang who is the grandfather of Ramles Situmorang. The land where the banyan tree grows is part of the village and farming land.

Under the Batak tribe's customary law, the ownership of *ulayat* land (*golat*) in which the *boru* party (relatives from the sister) who lives together with the *hula-hula* Party (relatives from the wife surname), belongs to the owner of *ulayat* land. The *boru* party has no ownership over the *ulayat* land. However, they have the right to inhabit the land and control the land with the permission of the owner. The *boru* party with the communal settlements cannot build any permanent building on the *ulayat* land without the consent of the owner or descendant of the ulayat landowner.

In this case, the five people who control the land are from the Sinaga clan. Thus, they are the boru party of the Situmorang clan (i.e., the Situmorang clan woman is married to the Sinaga clan man). They are not owners of the disputed land and have no right to control the land. Whilst Ramles Situmorang proved that he is the descendent of Aapar Holing Situmorang who is the son of Op. Manotang Situmorang, the owner of the Lumban Gambiri Forest, which is in the village of Saor Nauli Hatoguan, Palipi District, Samosir Regency.

Whereas at the time of registration of the Village in the Samosir Customary Land during the Dutch occupation of Indonesia, Op. Manotang Situmorang listed Huta Lumban Gambiriin the Register of De Kampoengs Met De Daarover Besturende Radja's Hoendoelan Hatogean No. 438.Later, the village is registered as Lumban Gambiri Village and Apar Holing Situmorang is the Head of the Village in Huta Lumban Gambiri. According to Article 3 of the UUPA which reads

> "the implementation of ulayat rights and similar rights of customary law communities, as long as in reality they still exist, must be in such a way that they are in accordance with national and state interests, which are based on national unity and must not conflict with laws and other higher regulations"

Hence, in this case, the court recognized the customary law of the Batak and took it into account in making its decision. In addition, in this case, the land owner has also registered his land as regulated in the UUPA Article 19 paragraph (1) which reads

> "For legal certainty by the government, land registration is held throughout the territory of the Republic of Indonesia according to the provisions stipulated in a Government Regulation."

In the process, the land owner registered Huta Lumban Gambiri on the De Kampoengs Met De Daarover Besturende Radja's Hoendoelan Hatogean Register, which is still being used and recognized by the Balihe District Court. The national land law recognized customary law which is in line with it. For example, if it fulfills the requirement of land registration, then it is recognized.

From the cases above, it is obvious that the national land law has its own procedure. If the customary law is in line with it, the customary law will be accepted. It is because the national land law requires evidence which is the registration of the land transaction to prove ownership. If the customary land is followed without taking account of the national land law, the disputant may not get the justice they deserve as in the case of PT Rimba Lazuardi above at the court. As for the civil court, the judge must base the decision according to civil law, not customary law. The court cannot assist the parties, especially when they fail to follow the procedure as laid down by the national land law. Unless customary law or the disputants follow the procedure as laid down by the national land law. It is obvious that civil courts might

not be able to serve justice to the disputants of customary land disputes. There is a need to establish a new policy to allow ADR or amicable settlement to resolve the disputes.

2. Findings

From the discussion, it may be concluded that the dispute resolution relating to the agrarian issue needs attention and improvement. The dispute resolution method needs to consider customary law as the way of resolving the customary land dispute. The customary law is the origin of the Indonesian law. Further, legal acknowledgment needs to be given to allow the dispute resolution method to be part of the system relating to agrarian and land matters which is integrated into the government system. It means that a new method of dispute resolution needs to be formed based on customary law such as amicable settlement or ADR, and the method is recognized by civil law. Hence, the result or decision made is legal as the judgment of the civil law court.

Agrarian laws are not alien to the national legal system of Indonesia. In fact, it is the basic regulation of the legal system which was integrated after the independence of the country until the formation of the new order. The agrarian system includes both the procedural and substance laws upon the formation of the new order regime until today. However, the laws are implemented through various legal sectors, not within the national legal system on natural resources. Basically, national, and agrarian legal systems recognize customary dispute resolution methods since its model is based on customary law and local wisdom. Unfortunately, it is not easy to implement the customary dispute resolution method because it depends on a few factors. The factors include the village and region's acceptance of the method as a legal method, the practice of the local community on customary land law, and the existing custom of the community leaders.

In Indonesia, there exists an imbalance national legal system due to the consequences of the colonial legal system that introduced and practiced civil law and the written customary law.

The existence of dispute resolution in resolving land matters based on customary law is needed. There are a few elements worth discussing in looking into this point. In the customary community, the highest authority is the customary (*adat*) leader. The resolution to the land issue can be implemented effectively or an effective solution to the issue is the application of cultural wisdom involving the community leaders, the king, or the custom leaders. The existence of customary law as the basis of the dispute resolution model allows the State to implement a system for the benefit of the public interest. This is because, under customary law, individual interest cannot take priority over community interest or public interest. The maturity of law or culture takes place when there is a balance between the individual and the community's interests. This situation supports the existence of a dispute resolution method based on custom.

ADR or amicable settlement is well known with the element of a win-win situation, impartial mediator, maintaining the relationship between the parties, avoiding resentment, fast, less procedural process, cheap and the mediator is the community leader who is credible, trusted, and respected by the community. Community leaders need to be accredited persons for the ADR process such as accredited mediators, or negotiators. Qualification system is compulsory for a customary-based dispute resolution system to gain the trust of the public, and ensure the system is workable and progresses well in giving justice to people with regard to customary land matters.

From the case study, it is obvious that some customary land is not accepted in the civil court. The court accepts if the customary law is similar to the national land law only. The civil court is ineffective in resolving disputes relating to customary law or in resolving issues in

agrarian matters. Hence, there is a need to establish a dispute resolution method that incorporates customary law in the system and to be integrated with civil law which indirectly recognizes the customary law. This is important to ensure everyone who seeks justice will get it. Otherwise, it causes injustice to the native or indigenous people. Thereafter, causes distress among the tribes or native.

Therefore, it is suggested that:

1. The government agency or ministry to issue a new policy that allows disputants to resolve their dispute using ADR or amicable settlement through a recognized leader of the community all disputes involving customary land.
2. The government agency or ministry must ensure the leader has a legal appointment letter that empowers them to make decisions or affirm the decision of the parties. The decision is valid, binding, and enforceable. However, the parties are given the right to appeal to the civil court if there is a need.
3. Customary law or native tribe or sub-native or subtribe is recognized and allowed to be implemented. As discussed earlier, customary law or the law of the indigenous is recognized by the legislation and the government of Indonesia.

3. Conclusion

In Indonesia, the government recognizes customary law if the custom is being practiced by the indigenous people. There are many laws that recognize the rights of indigenous people and customary land law. However, when it comes to disputes relating to customary land, the national land law or agrarian law has supremacy over the customary law. Disputes relating to customary land need to follow the civil law procedure if the case is being presented at the court. Unfortunately, in certain cases, the indigenous people failed to obtain justice because they did not have the title of the land to prove ownership which caused them to be regarded as non-legal owners. Despite the fact and all evidence showing they had been living in the area or land for many generations, they failed to be the legal owners. Hence, they have no right to occupy and live on the land. Therefore, recognizing ADR or amicable settlement in customary land disputes as the resolution method is crucial in ensuring the indigenous people obtain justice in customary land disputes. It is correctly suggested herein for the government to take this matter seriously to ensure the well-being of the indigenous people and their rights on the customary land. A dual system creates confusion and might not be able to uphold justice in this kind of issue. It is hoped there will be other research done on this matter from the law enforcement perspective.

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