IJCLS Indonesian Journal of Criminal Law Studies

ISSN 2548-1568 (Print)
ISSN 2548-1576 (Online)
VOLUME 7 ISSUE 2, November 2022
DOI: 10.15294/ijcls.v7i2.35087

TYPE: RESEARCH ARTICLE/REVIEW ARTICLE

Institutionalizing Customary Court in Indonesian Justice System as an Effort to Realize Access to Justice Right for Indigenous People

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Citation
Mayastuti, A. H, L.T. Lukitasari, D. (2022). Institutionalizing Customary Court in Indonesian Justice System as an Effort to Realize Access to Justice Right for Indigenous People. *IJCLS (Indonesian Journal of Criminal Law Studies)*, 7(2), 227-244

History of Article
Submitted: 30 June 2022
Revised: 25 August 2022
Accepted: 15 November 2022

About Author(s)
Please describe all authors biographies, including the currenct activities and working, expertise, publication, grant and award, and any imporant information for readers.

IJCLS (Indonesian Journal of Criminal Law Studies) published by the Faculty of Law, Universitas Negeri Semarang, Indonesia. Published biannually every May and November.

ABSTRACT

This study aims to find customary court institution form in an effort to reinstitute customary court in Indonesia. This research is a prescriptive doctrinal legal research, using statutory and conceptual approaches. The data used is secondary data in the form of primary legal materials, while data analysis technique used is qualitative non-positivistic using hermeneutic interpretation method. Customary disputes are included in the realm of material law that occur in the space of indigenous peoples, if they are resolved by a different formal legal institution, namely the general court as regulated in Law no. 21 of 2001 on Special Autonomy for Papua Province. In principle, the customary court is the last judiciary based on customary law, but efforts to obtain justice (access to justice) and the truth are the human rights of everyone. Therefore, everyone who seeks justice must be interpreted as the right to obtain fair recognition, guarantee, protection and legal certainty and be treated equally before the law. The idea of reviving customary justice is important because as a body of customary courts it is in charge of adjudicating customary law disputes that occur in the community.

KEYWORDS
Social Media, Crime, Sanctions.

1 INTRODUCTION

It is well known that Indonesia consists of a heterogeneous expanse society. In other words, Indonesia is made of a pluralistic society formed of approximately five hundred ethnic groups who speak three hundred different languages. Each ethnic group maintains their cultural identity by claiming their ethnic territory. These ethnic groups are what is often referred as indigenous people. This term is a translation of rechtsgemeenchappen, which was first found in Ter Har's book entitled Beginselen en Stelsel van Hat Adat Recht [1].

The term "indigenous peoples", which was declared through the ILO (International Labor Organization) Convention, namely "Convention Concerning Indigenous and Tribal Peoples in Independent Countries". This term was later adopted by the World Bank in the implementation of development funding projects in a number of countries, especially in third countries, such as in Latin America, Africa, and Asia Pacific [2].

Indigenous People is a a group of people who have the same feeling in a group, living in one place due to genealogy or geological factors. They have their own customary law that regulates rights and obligations on material and immaterial goods, in addition to having social institutions, customary leadership, and customary courts that are recognized by the group [3].

The constitution guarantees legal protection for the position of the Indigenous Law Community is very clearly stated in Article 18B Paragraph (2): *The state recognizes and respects entities of the indigenous people along with their traditional rights as long as these remain in existence and are in accordance with the development of community and the principles of the Unitary State of the Republic of Indonesia, are regulated by law.* However,

[1] Gregory Leyh, *Pendidikan Hukum Dan Kehidupan Publik", Dalam Gregory Leyh, Ed., Hermeneutika Hukum : Sejarah, Teori Dan Praktek, Terjemahan M. Khozim Dari Judul Asli Legal Hermeneutics* (Bandung: Nusa Media, 2011), 395.
[2] Leyh, *Pendidikan Hukum Dan Kehidupan Publik", Dalam Gregory Leyh, Ed., Hermeneutika Hukum : Sejarah, Teori Dan Praktek, Terjemahan M. Khozim Dari Judul Asli Legal Hermeneutics*.
[3] Leyh.

even though indigenous people and their traditional rights are constitutionally recognized and protected, discrimination and marginalization of indigenous people still occur.

Moh. Mahfud MD argues that based on Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, the recognition of indigenous people has the following consequences:

a. When a community unit (i.e indigenous people) is recognized as an indigenous people, they could act as a legal subject collectively, which is distinct from the individual members.
b. Indigenous people are entitled to certain rights and obligations and are able to carry out legal actions collectively.
c. With the recognition of indigenous people, the state also automatically recognizes their legal system that formed those communities as a legal entity.
d. Recognition of indigenous people also automatically means acknowledgment of the structure and governance established based on local customary constitutional norms

Therefore, based on his opinion, the recognition of indigenous people must be carried out comprehensively. This means, the state should also recognize their inherent traditional rights, namely the right to administer government, customary institutions, and judicature. Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia was later derived into Law No. 21 of 2001 on Special Autonomy for the Papua Province (hereinafter referred to as the Papua Special Autonomy Law), in which Article 50 states that (1) Papuan judicial power is exercised by the Judiciary in accordance with statutory regulations and paragraph (2) recognizes the existence of customary courts.

Article 50 of the Papua Special Autonomy Law, rules the customary court as a subordinate to the state court, hence the customary court is not an autonomous body. In consequence, its decision can be overruled by the state court that examines and retrials the dispute as stated in Article 51 paragraph (4). The recognition of customary court in the Papua Special Autonomy Law also contained a conflict of norm which is shown in Article 51 of the Papua Special Autonomy Law.

A further reading on Article 51 of the Papua Special Autonomy Law, shows the conflict of norms occurs for a reason that, on the one hand the customary courts are supposed to be established based on the provisions of the customary law of the indigenous peoples concerned (Article 51 paragraph (2)). But on the other hand based on Article 51 paragraph (4), If a re-settlement is requested from the court of first

instance within the state judiciary, the dispute will be resolved by referring to positive law (state law) which is contrary to the character, nature and style of customary law as stated in Article 51 paragraph (2).

Articles 50 and 51 of the Papua Special Autonomy Law are normatively contradictory to the Law on Judicial Powers No. 48 of 2009 which states that "there is no court outside the state court". Law on Judicial Powers No. 48 of 2009 was formed on the constitutional basis of the provisions of Article 24 of the 1945 Constitution of the Republic of Indonesia, while the Special Autonomy Law for Papua rests on the constitutional basis of Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia.

Based on the legal issues above, the authors are interested in examining the idea of institutionalizing customary court in the Indonesian justice system as an effort to realize access to justice for indigenous people (Study of Law No. 21 of 2001 concerning Special Autonomy in Papua).

The issues surfacing from the background which will be discussed are:

a. What is the urgency of reinstating customary court in Indonesia?
b. What is the institutional form of the customary justice system in the Indonesia justice system that reflects justice for indigenous peoples in Indonesia?

2 Method

This research is a prescriptive doctrinal legal research, using a statute approach and a conceptual approach. The conceptual approach is based on the views of experts to build arguments. The data used is secondary data in the form of primary legal materials, namely regulations and secondary legal materials in the form of scientific writings (journals), books and other written sources. The data analysis technique used is non-positivist qualitative utilizing interpretation method. The interpretation used is a hermeneutic interpretation by taking into account the vertical and horizontal synchronization of the text and legal context with the relevant laws and regulations. The interpretation of legal hermeneutics, defined as interpretation of legal texts which does not solely concentrate on the formal legal aspects textually but also viewed from the context of the past in terms of socio-political, cultural and present.

3 RESULT AND DISCUSSION

A. The Concept of Customary Judiciary

Customary court is a peace court within the customary law community, which has the authority to examine and adjudicate customary disputes among the members of the customary law community concerned. [4].

Sociologically, the term customary justice is not a term commonly used in everyday people's lives, even the term "customary justice" is almost never used in community interactions. The terms used are very diverse, such as "sidang adat", "rapat adat" and others (Sudantra, 2017). The Supreme Court noted that dispute resolution through customary courts was increasingly able to reduce the percentage of cases that had not been decided in a year to less than 20 percent (Simarmata, 2021).

The existence of customary courts today is in fact still respected and referred to in several decisions of state judges, but on the other hand the policy of unification of the judiciary encourages the creation of a paradigm that judicial power is only owned by the supreme court, consequently customary courts are only as a complement if the state court requires it. [5]

In the judicial system in Indonesia, it is as if customary justice is outside the formal legal mechanism. This has happened because since 1945, there have been almost no statutory provisions in Indonesia that provide opportunities for the existence of customary courts as regulated in Law Drt no.1 of 1951 concerning the application of customary law and regulation of customary criminal sanctions in the Indonesian legal system. [6]

As a comparison to the customary justice mechanism, a mechanism for resolving cases outside the State Courts run by indigenous peoples in Indonesia.. In western Samoa, the village head or Fono has the responsibility to formulate applicable laws in the community, resolve disputes through customary deliberations (musyawarah) and decide what form of sanctions should be implemented[7]. Until now, the Fono institution still exists in Western Samoa and is recognized in a law called the 1990 Village Fono Act.

In Bangladesh, the existence of village heads in the *Shalish* institution is very effective in resolving disputes in the community, so a number of alterations to this institution have been carried out by various parties, including the *Madaripur Legal*

[4] Dominikus Rato, "Prinsip, Mekanisme Dan Praktek Peradilan Adat Dalam Menangani Kasus Hukum Dengan Pihak Lain" (Surabaya, 2015), 124.
[5] Pat Howley, "Incorporating Custom Law into State Law in Melanesia," *Queensland : International Diploman in Restorative Justice* (Queens University, 2007), 1.
[6] Matt. Clark Samuel Stephens, "Menemukan Titik Keseimbangan: Mempertimbangkan Keadilan Non-Negara Di Indonesia" (Jakarta, 2009), 54.
[7] Gabrielle Maxwell and Hennessey Hayes, "Restorative Justice Developments in the Pacific Region: A Comprehensive Survey," *Contemporary Justice Review* 9, no. 2 (2006): 1, https://doi.org/10.1080/10282580600784929.

Aid Association (MLAA) [8]

B. The Concept of Judicial Power

Starting from the provisions of Article 24 paragraph (2) of the 1945 Constitution of the Republic of Indonesia which states that:

"The judicial power shall be conducted by a Supreme Court and the subordinated judicial bodies within the realm of general judiciary, the realm of religious judiciary, the realm of military judiciary, the realm of state administrative judiciary, and by a Constitutional Court."

Meanwhile, Article 1 chapter I General Provisions of Law No. 48 of 2009 on Judicial Powers defines Judicial Power as *"The power of an independent state to administer the judiciary to enforce law and justice based on Pancasila and the 1945 Constitution of the Republic of Indonesia, for the sake of the implementation/ of the Republic of Indonesia Staatmacht."*

Additionally, judicial power is exercised according to the principle stated in Article 2 paragraph (1) *"Judicial Courts are conducted for the sake of Justice Based in the blessing of the Almighty God, and all courts throughout the territory of the Republic of Indonesia are State Courts regulated by law*". These principles are the main and general framework that lays the foundations and principles of justice as well as guidelines for the General Courts, Religious Courts, Military Courts and State Administrative Courts, where each court is still regulated into separate law.

However, it should also be noted that the provisions of Article 5 paragraph (1) Article 10 paragraph (1) and Article 50 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power lay the basis for the existence of customary law. This shows that the existence of indigenous peoples and the laws that govern them, namely customary law, including the existence of customary courts, are recognized and have a position and are guaranteed by the constitution. The existence of customary law as a component of legal substance must be given a reasonable place in the development of legal materials in accordance with the socio-cultural diversity of the community. In the concept of the rule of law, then fair legal certainty is not only pursued by the arguments contained in the law, because Indonesia is not a country based on laws, but also sees developments, values that live in society, such as customary law [9].

C. The Concept of Judicial Power

Through *stufentheory* or hierarchy of norms theory, Hans Kelsen states that,

[8] Alfredo Tadiar, "Institutionalising Traditional Dispute Resolution the Philippine Experience" (Manila, 1998), 24.

[9] Tadiar, "Institutionalising Traditional Dispute Resolution the Philippine Experience."

norms are hierarchical ordering or various strata of legal norms, where lower norms are legally valid if they are supported from higher preexisting norms. The norm forms a tiered layer where the norm below is derived from "higher" norm up to the highest level norm which cannot be traced further. This happens because, the highest norm is hypothetical, fictitious, which Hans Kelsen then introduced as the basic norm or *grundnorm*.

Later, Hans Nawiasky then developed Hans Kelsen's theory into *theorie von von stufenbau der rechtsordnung* or tiered legal theory which he divided into the following groups[10]:

1. State fundamental norms (*Staatfundamentalnorm*)
2. Basic rules of the country (*Staatgrundgesetz*)
3. Formal legislation (*Formell Gesetz*)
4. Implementing rules and autonomous rules (*Verordnung en Autonome Satzung*)

A. Hamid Attamimi then compares the theory introduced by Hans Kelsen and Hans Nawiasky and applies it into the structure of Indonesia legal system. He concluded that the legal hierarchy in Indonesia is represented more by Hans Nawiasky's theory. Based on this theory, the structure of the Indonesian legal system is as follows [11]:

1. *Staat fundamental norm*, Pancasila (Preambule of the 1945 Constitution of the Republic of Indonesia)
2. *Staatgrundgesetz*, namely the Body of the 1945 Constitution of the Republic of Indonesia, the MPR Decree, and the Constitutional Convention
3. *Formell gesetz*, Law
4. *Verordnung en Autonome Satzung*, starting from Government Regulations to Regent or Mayor Decrees.

In Indonesia, the theory of hierarchical norms is provided in Article 7 paragraph (1) of Law Number 12 of 2011 on Legislation Making, which states as follows: Types and hierarchy of Legislation are as follow:

1. the 1945 Constitution of the Republic of Indonesia;
2. the People's Consultative Assembly Decision;
3. Law/Government Regulation in Lieu of Law;

[10] A Hamid Attamimi, "Peranan Keputusan Presiden Repubik Indonesia Dalam Penyelenggaraan Pemerintahan Negara." (Universitas Indonesia, 1990), 287.
[11] Attamimi, "Peranan Keputusan Presiden Repubik Indonesia Dalam Penyelenggaraan Pemerintahan Negara."

4. Government Regulation;
5. Presidential Regulation;
6. Provincial Regulation;

From the article above, it is clear that Indonesia has various rules and regulations. To maximize the function of the Indonesian legal system, those rules and regulations have to be harmonized. Harmonization of law is an effort or process to overcome the boundaries of differences, conflicting matters and irregularities in law. It is an effort or process to realize harmony, conformity, suitability, compatibility, and balance between legal norms in laws and regulations as a legal system within a unified framework of the national legal system[12].

Furthermore, according to Kusnu Goesniadhie, the national legal system includes written and unwritten law, hierarchically structured and operationalized into reality in the process of forming positive law, through legislation and jurisprudence, contained philosophical principles embedded in Pancasila and constitutional principles prescribed in the 1945 Constitution [13].

The framework of the national legal system includes elements of legal material or legal order consisting of an external legal order, namely laws and regulations, unwritten law including customary law and jurisprudence, as well as an internal legal order, namely the legal principles underlie them, elements of the legal structure and its institutions consisting of various institutional bodies or public institutions with their officials, and elements of legal culture, which include the attitudes and behavior of officials and community members with respect to other elements in the processes of organizing community life [14].

D. The Concept of Judicial Power

1. Contemporary Standing of Customary Court

Juridically, there are dogmas that still point to the existence of Customary Law. An example is the provisions in Law Number 14 of 1970 on the Principles of Judicial Power jo. Law No. 4 of 2004 on the Principles of Judicial Power, especially in Article 14 paragraph (1) which states that : *"Judges as court officers*

[12] Kusnu Goesniadhie S, *Harmonisasi Hukum Dalam Perspektif Perundang-Undangan, Lex Specialis Suatu Masalah* (Surabaya: JP Books, 2006), 26.
[13] Kusnu Goesniadhie S, *Harmonisasi Hukum Dalam Perspektif Perundang-Undangan, Lex Specialis Suatu Masalah*.
[14] Kusnu Goesniadhie S.

are believed to have a comprehensive understanding of law. Justice seeker comes to them to attain justice. If judges could not find written regulations, then they must explore the unwritten law to reach a decision based on the existing law as a wise person and responsible to God Almighty, themselves, society, nation and state."

Meanwhile, general elucidation of the above law provides that *"It is determined that the Court mentioned is the State Court. Thus, there is no place for the Swapraja Court and the Customary Court. If these courts still exist, then as soon as possible they will be abolished as has been gradually being done."*

The elucidation further mention that the stipulation does not intend to deny the existing unwritten law, which referred to as customary law, but will only transfer the development and application of the law to the State Courts.

However, if the statement of Article 14 paragraph (1) is further examined, it gives the impression that based on its juridical design, customary law will only be used if the judge could not find a written legal basis to reach a decision [15]. The statement also implies that if there are no statutes or laws that could be referred to (according to the provisions of the law), no other legal rules could be interpreted from, no precedent existed, only then the customary law could be used. This shows there is a sort of priority order, and the customary law is only used as a legal base for deciding cases as a complement or subsidiary to the written law.

In the journey of judiciary (State Court) development, the Supreme Court of the Republic of Indonesia (MA RI) made an effort to reduce the accumulation of cases based on Article 130 HIR/154 RBg. MA RI then issued the Supreme Court Circular (SEMA) No. 1 of 2002 on Empowerment of Courts of First Instance in Implementing Peaceful Institutions. Supreme Court of the Republic of Indonesia then complemented the SEMA by issuing the Regulation of the Supreme Court of the Republic of Indonesia (PERMA) Number 2 of 2003 concerning Mediation Procedures in Courts, which was later revised to PERMA No. 1 of 2008 concerning Mediation Procedures in Courts [16].

Furthermore, the settlement of disputes outside the litigation process in Indonesia is regulated in Law Number 30 of 1999 on Arbitration and Alternative Dispute Resolution and PERMA No. 1 of 2008 on Mediation Procedures in Courts. It should be mentioned that Customary courts are not part of the general

[15] Soleman B. taneko, *Hukum Adat Suatu Pengantar Awal Dan Prediksi Masa Mendatang* (Bandung: Eresco, 1987), 123.
[16] Soleman B. taneko, *Hukum Adat Suatu Pengantar Awal Dan Prediksi Masa Mendatang*.

court as regulated in Chapter IX of the 1945 Constitution of the Republic of Indonesia. In spite of that, Indigenous people's traditional rights is regulated in Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. Since Customary Court is not part of the Judicial Power, Customary Court is not a subsidiary to Supreme Court (Judicative Power), but is under the supervision, development and empowerment of government power (executive). Nevertheless, the position of customary courts against state courts can fill in the gaps or provide support based on complementary principles. The implementation of this principle is also based on the principle of coordination and non-subsidiary, meaning that the interaction between customary courts and state courts is equal.

The reasons for that are, because customary court is part of customary law and customary law is part of national law, moreover indigenous peoples are also Indonesian citizens. Nevertheless, the customary court system and the state court system are different, so the relationship between the two justice systems is coordination and not subordination. In principle, under customary law, customary court is the last trial, but rights to obtain truth and justice are the human rights of everyone. As has been regulated in Article 28 D paragraph (1) of the 1945 Constitution of the Republic of Indonesia which says *"Every person shall be entitled to recognition, guarantee, protection, and equitable legal certainty as well as equal treatment before the law."*

Therefore, every individual who seeks justice must be interpreted as the right to obtain fair recognition, guarantee, protection and legal certainty and be treated equally before the law. Thus, it is possible for someone, both a foreigner. or Indonesian Citizens to proceed their cases to the State Courts. Thus, when a case is proposed to be resolved through the Customary Courts it also can be transferred to the State Courts, if certain requirements are met [17]:

a. The Customary Court was unable to resolve because it was too complex
b. The Customary Court is not authorized or has no competence to adjudicate, because the disputed object is not part of traditional right or is not related to the cultural identity of an indigenous people.
c. The parties do not accept the decision of the customary court despite its binding and enforceable characteristics.
d. The transfer of authority to adjudicate from the customary court to the state court is not by coercion.

[17] Rato, "Prinsip, Mekanisme Dan Praktek Peradilan Adat Dalam Menangani Kasus Hukum Dengan Pihak Lain."

2. Synchronizing Recognition of Customary Courts in the Papua Special Autonomy Law and Judicial Power Law

In the effort of recognizing customary court in the Papua Special Autonomy Law, an internal conflict of norms appeared as shown in Article 51 of the Papua Special Autonomy Law, which states that:

(1) The customary judicature is the reconciliation within the circles of the indigenous people, which has the authority to hear and adjudicate customary civil disputes and criminal cases among the members of the indigenous people concerned
(2) The customary court shall be formed under the provisions of the customary law of the indigenous people concerned
(3) The customary court shall hear and adjudicate customary civil disputes and criminal cases referred to in paragraph (1) based on the customary law of the indigenous people concerned.
(4) If one of the disputing parties expresses an objection to the decision that has been taken by the customary court as referred to in paragraph (3), then the objecting party may request a court of first instance within the competent judiciary to examine and retrial the dispute.

A deeper analyze on Article 51 of the Papua Special Autonomy Law, shows the conflict of norms occurs is that on the one hand the customary courts are institutionalized based on the provisions of the customary law of the indigenous peoples concerned (Article 51 paragraph (2)) on the other hand based on Article 51 paragraph (4), if a settlement is requested from the court of first instance within the state judiciary, the dispute will be resolved by referring to positive law (state law) contrary to the character, nature and style of customary law as stated in Article 51 paragraph (2). Articles 50 and 51 of the Papua Special Autonomy Law are normatively contradictory to the Law on Judicial Powers No. 48 of 2009 which states that "there is no court outside the state court".

Law on Judicial Powers No. 48 of 2009 was formed on the constitutional basis of the provisions of Article 24 of the 1945 Constitution of the Republic of Indonesia, while the Special Autonomy Law for Papua rests on the constitutional basis of Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. The Papua Special Autonomy Law adheres to the legal politics of judicial dualism, where, in addition to state courts, customary courts are also recognized as courts outside the state. On the other hand, the Judicial Power Law

adheres to the legal policy of the judiciary unification, which does not apply in Papua Province.

According to the hierarchical theory of laws and regulations, legal politics which in basic legal norms (verfassungsnorm) must be further contained in regulations (gesetzgebungnorm) whose legal norms have a general nature and bind citizens as a whole. Law Number 48 of 2009 on Judicial Power was passed after the second amendment to the 1945 Constitution of the Republic of Indonesia in 2000 was made. Thus, it seems to be fitting if the legislation making of Judicial Powers Law should not have ignored the provisions stipulated in Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. Whereas regulation on the recognition of indigenoes people is also strengthened through Law Number 39 of 1999 concerning Human Rights, in particular Article 6 paragraph (1) which states that *"In order to uphold human rights, the differences and needs of indigenous people must be taken into consideration and protected by the law, public and the Government."*

Therefore, the legislation making of the Judicial Power Law, should've also paid attention to the norms provided in Article 18 B paragraph (2) of the Constitution of the Republic of Indonesia. 1945 and Article 6 paragraph (1) of Law Number 39 of 1999 on Human Rights.

a. The Urgency of Institutionalizing Customary Court as a fulfillment of Indigenous People's Access to Justice Right

Dominikus Rato delivered several arguments in the importance of customary court reincarnation in Indonesia, which could be narrowed down to [18]:

1) The state and government are obligated to recognize the existence of indigenous people rights which are expressly stated in Article 18 B paragraph (2) of the 1945 Constitution of the Republic of Indonesia. This obligation is stipulated on Article 28 I paragraph (4) of the 1945 Constitution)[19].
2) The customary court should be instated based on the complementary, coordination and, non-subsidiary principle.
3) Equality between Customary Courts and State Courts should be

[18] Dominikus Rato, "Mekanisme Dan Praktek Peradilan Adat Dalam Menangani Kasus Hukum Dengan Pihak Lain, Disampaikan Dalam FGD Bada Pembinaan Hukum Nasional Republik Indonesia," (2013), 4.

[19] Article 28 I paragraph (4) of 1945 Constitution stipulates that "The protection, advancement, enforcement and fulfillment of human rights shall be the responsibility of the state, particularly the government.".

implemented, for customary court is part of customary law and customary law is part of national law, with a distinct judicial system between them.

Meanwhile, Sudantra believes that the revitalization of customary justice is important to expand access to justice for the people, especially people in indigenous peoples. With the strong and effective functioning of customary courts, the people can have other alternatives to obtain justice other than through state courts [20].

The concept of customary court revival must also consider whether the existing customary material law in several regions in Indonesia is still truly recognized and embraced by the community. This is crucial considering as a court, customary court is in charge of adjudicating customary disputes that occur in the community. It should be noted that, customary dispute itself is in the realm of material law, while the dispute settlement, including the institution authorized to resolve the dispute, is in the realm of formal law. It then, would be inappropriate if a material legal dispute is resolved by a different formal legal institution, thus it is also inappropriate if a customary dispute is resolved by a general court institution that is different from the customary court [21].

Elucidation of Article 51 paragraph (2) of Law Number 21 of 2001 on the Special Autonomy of the Papua Province provides that "*The Customary Court is not a State Court, but a judicial institution for indigenous peoples. Based on the existing reality, the institution is regulated according to the provisions of the customary law of the indigenous people concerned, the court examines and adjudicates customary civil disputes and criminal cases based on the customary law concerned. This includes, the composition of the judiciary, who is in charge of examining and adjudicating the dispute and case in question, the procedures for examination, the decision making and its implementation. The Customary Court is not authorized to impose imprisonment or confinement*".

That being said, there are two possible methods for reviving customary justice in Indonesia:

1) Instituting customary court as part of the state judiciary system

Based on Article 8 paragraph (1), which stated that "a special court

[20] Rato, "Mekanisme Dan Praktek Peradilan Adat Dalam Menangani Kasus Hukum Dengan Pihak Lain, Disampaikan Dalam FGD Bada Pembinaan Hukum Nasional Republik Indonesia."
[21] M. Khoidin, "Eksistensi Pengadilan Adat Dalam Sistem Peradilan Di Indonesia : Eksistensi Hukum Adat Dan Pengadilan Adat Di Indonesia" (Surabaya, 2015), 99–100.

regulated by law can be established within the General Courts " (Article 1 number (5) of Law No. 49 of 2009 junto Law No. 2 of 1986 on General Court). However, if the Customary Court is one of the Special Courts, then the Customary Court is a sub-order of the State Courts because it is under the Supreme Court [22].

Customary courts as subordinate to general courts, implies that the structure of the judiciary is encased in a **layered or tiered** formation, which will facilitate supervision of the judicial process carried out by the judiciary. Without supervision, there will be opportunities for judicial error and this will lead to injustice for people seeking justice. This method allows customary courts to be revived with different forms and structures from their original forms but without leaving the values, principles and spirit that belong to customary law. and customary courts.

Customary courts can be **instituted** as part of the existing judicial system in Indonesia, so that they remain part of the state judicial system or the general justice system. The legal basis for that could be traced in the provisions of Article 24 paragraph (3) of the 1945 Constitution of the Republic of Indonesia which states that *"The other bodies whose functions are related to judicial power are regulated by laws"* and Article 1 point (5) of Law no. 49 of 2009 Jo. UU no. 2 of 1986 concerning General Courts which states that *"Within General Courts a Special Court can be formed which regulated under the law"*.

Based on these provisions, customary courts can be qualified as special courts within the scope of general courts. While the composition of the organs of the customary court, the procedural law used and other matters related to the customary dispute resolution process could be determined by law [23].

The establishment of customary courts by placing them within the general court environment will be carried out as needed. Namely, in certain areas or regions where the existence of customary law and courts are still recognized by the community. Judges sitting in customary courts can be taken from general court judges who have knowledge of customary law or from traditional leaders or chiefs as ad hoc judges. The process of

[22] Rato, "Mekanisme Dan Praktek Peradilan Adat Dalam Menangani Kasus Hukum Dengan Pihak Lain, Disampaikan Dalam FGD Bada Pembinaan Hukum Nasional Republik Indonesia."
[23] M. Khoidin, "Eksistensi Pengadilan Adat Dalam Sistem Peradilan Di Indonesia : Eksistensi Hukum Adat Dan Pengadilan Adat Di Indonesia."

examining the case is also supposedly prioritizing the principle adopted by indigenous peoples, namely as much as possible prioritizing deliberation in resolving disputes.

By placing the customary court as a special court in the general court, then the decision handed down can later be enforced **by force** and its execution with the help of the head of the court. This will provide a powerful supremacy for customary court decisions. Because up until now, every customary court decision cannot be executed, because it is not considered a judicial institution decision but only as an effort to resolve disputes outside the court.

2) Instituting customary court out the state judiciary system

Customary courts are recognized as an effort to resolve disputes outside the court, their existence can be formalized as an alternative form of dispute resolution outside the state court (official court). The procedure for examining cases and making decisions by customary judges is arranged like a quasi-judicial institution, for example, equated with arbitration decisions which also have the power to be extorted by force (executory power) [24].

Then, it can be regulated in law, such as the decision of the customary court is given an executorial title or irah-irah, so that the decision can be enforced by force with the permission (fiat) of the head of the District Court. The case examination system can be ruled like the decision of the arbitration institution, where it is final and binding, so that no appeal or cassation can be submitted. The choice of dispute resolution through customary court must be agreed upon by the parties, namely clausa agreeing to settle the case through the customary court. This refers to the dispute resolution model by Arbitration which must be based on the agreement of the parties to resolve the case through arbitration.

If the placement of customary law courts outside the state courts as an formal alternative dispute resolution is acceptable, then amendments must be made to several provisions in the General Courts Law and Law no. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.

4 CONCLUSION

[24] M. Khoidin.

The case of children in conflict with the law brought in the judicial process is a serious case, and even it must always prioritize the principle of the best sakes of the child, and the process of punishment is the last resort while not ignoring children's rights. In addition, cases of child cases can be resolved through non-formal mechanisms based on standard guidelines. Forms of non-formal handling can be carried out with diversion or restorative justice that can be resolved by requiring children facing the law to take part in education or training at a particular institution, or if they are forced to punish children's rights not to be ignored. So that in the end non-formal handling can be carried out well if it is balanced with efforts to create a conducive justice system.

5 ACKNOWLEDGMENTS

None

6 DECLARATION OF CONFLICTING INTERESTS

Authors declare that there is no conflicting interest in this research and publication.

7 FUNDING

None

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It is not wisdom but authority that makes a law

Thomas Hobbes