Pertanika J. Soc. Sci. & Hum. 28 (1): 343 - 359 (2020)

PERTANIKA JOURNALS

SOCIAL SCIENCES & HUMANITIES

Journal homepage: http://www.pertanika.upm.edu.my/

Changing the Model of Recognition from Full Incorporation to Co-existence to Strengthen the Customary Court in the State Justice System

Mohammad Jamin

Faculty of Law, Universitas Sebelas Maret, Kentingan, Surakarta 57126, Indonesia

ABSTRACT

The specific goal of this research is to reveal the weaknesses in the model of full incorporation for the recognition of the customary court and to discover a model of recognition for the customary court which is more responsive. The type of research is socio-legal research which uses field data as well as both primary and secondary legal material. The instrument for data collection was a literature review that involved content identification and text analysis. The data analysis used a qualitative method with a hermeneutic interpretation which focused on the synchronization of the legal texts and contexts of the related legislation. The results of the research showed that customary courts had in fact already developed and existed in customary law communities long before the Indonesian nation was born. Ironically, the legal policy contained in Law No. 48 Year 2009 about Judicial Power does not recognize the existence of the customary court, while Law No. 21 Year 2001 about the Special Autonomy of Papua gives only pseudo recognition because it uses a model of full incorporation, which positions it below the state justice system. In order to strengthen the customary court, this model of recognition should be replaced with a model of co-existence so that institutionally, the authority and decisions of the customary court can exist alongside the state justice system.

ARTICLE INFO

Article history:
Received: 17 January 2017
Accepted: 2 August 2019
Published: 19 March 2020

E-mail address:
jamin_mh@yahoo.com (Mohammad Jamin)

Keywords: Customary court, co-existence, full incorporation, Model of recognition, state justice system

ISSN: 0128-7702
e-ISSN: 2231-8534

INTRODUCTION

Since former times, the practice of conflict resolution implemented by customary courts has existed across the whole of the Indonesian archipelago (Saptomo, 2010). This practice existed long before the Indonesian nation was formed because empirically, the laws prevailing in Indonesia are not only the legislation made and passed by the power of the state but also customary laws of a local nature. However, it is ironic that the regulations that currently exist in the judicial power system fail to recognize the existence of the customary court. This is a form of neglect or denial of the facts of legal pluralism (Nurjaya, 2011).

It is a fact that the customary court system, which is independent, autonomous, and highly respected, is highly effective for resolving disputes and violations of the law in customary communities. Local wisdom can be empowered in conflict resolution through processes for settling disputes and violations of the law, using informal mechanisms that involve the customary court. The problem faced is that the legal policy in the field of judicial power, which adheres to the principle of centralism and unification of the law, does not acknowledge the customary court in the system of the judicial power of the state. As a result, the customary court will lose and be overruled if it comes into confrontation with the state justice system.

Law No. 48 Year 2009 about Judicial Power, which currently prevails and is based on the pluralistic 1945 Indonesian constitution, does not recognize the existence of the customary court. The only law that gives recognition to the customary court is Law No. 21 Year 2001 about the Special Autonomy of Papua, although this recognition is inadequate because it follows a model of full incorporation which means that customary courts have a lower status than state courts. The institution of the customary court is positioned below the state, thus the authority of the customary court is extremely limited and the decisions issued by customary courts have little power since they can be annulled by a state court.

Some cases of the cancellation of customary court decisions by state courts in fact actually result in legal uncertainty and can even damage local wisdom. It is a fact that if the customary court system can function effectively, it will reduce the flow of cases to state courts, and for this reason, the existence of the customary court should be strengthened. The customary court system can be strengthened by affirming the recognition of the institution, authority, and decisions of customary courts in the judicial power system.

MATERIAL AND METHOD

This research used the paradigm of legal constructivism, which saw reality as existing in various forms of mental construction, based on social experiences, both local and specific, and depending upon the person involved. The epistemological relationship between the observer and the object is a single entity that is subjective and the result of the combined interaction between the two. Therefore, the primary method

used for this study was hermeneutic and dialectic (Wignjosoebroto, 2002). In line with the paradigm of the research - legal constructivism – the research method chosen is one of socio-legal research with the specifications of a descriptive research study.

The type of legal material used consisted of primary material in the form of binding legislation, and secondary legal material to provide an explanation of the primary legal material, in the form of relevant references *(Dewata & Ahmad, 2010). The instruments for data collection were a literature study and interviews* (Creswell, 2008).

The analysis of data and legal material was performed using a qualitative approach with the use of futuristic interpretation and hermeneutic interpretation by focusing on the synchronization of legal texts and contexts from a vertical and horizontal perspective of the related legislation (Hamidi, 2011). A hermeneutic interpretation of law involves the interpretation of legal texts not only in terms of their formal legal aspect based on how the texts read but also in terms of the factors which formed a background to the past (contextualization).

RESULTS

This research tries to raise various issues in the customary courts in the State Justice System. There are two issues raised in this study, namely: (1) Critically describing the various weaknesses in the Full Incorporation Model for Customary Court Admission, and (2) Strategies to Strengthen Indigenous Courts by Changing the Recognition Model from Full Establishment to Co-Existence. The two problems were then analysed based on available empirical data. The results of the analysis of the first problem are: The current system of judicial power adheres to the legal policy of judicial unification which does not acknowledge or recognize the existence of a judicial body outside the state justice system.

The results of the analysis of the second problem obtained the following results. (1) Recognition of the institution of the customary court needs to be affirmed as an autonomous justice system, (2) Regulation of the recognition of the authority of customary courts should state clearly which kinds of cases come under the authority of the Customary Courts, and (3) Regulation of the recognition of decisions issued by a customary court should state emphatically that such decisions are final. Furthermore, some of the results of this study can be described in the discussion below.

DISCUSSION

The loss of the existence of customary justice is caused by a lack of recognition from the formal court. Some countries that have recognized and applied customary justice include Papua New Guinea. In this country, customary justice coexists with the state justice system, this is done by the way the government creates a harmonization mechanism between the formal and informal justice systems (Team Justice for The Poor World Bank, 2009). The same thing happened in the Philippines through the application of the Local Government Act

of 1978 which combined formal dispute resolution and informal customary justice (The Barangay Justice System) which lived in 42,000 indigenous peoples.

Meanwhile, Fono customary justice institutions still exist in Western Samoa and are recognized in a law called the Village Fono Act (1990). There is a system that is close to the nuances of restotarif based on local wisdom called Ifoga (Maxwell & Hayes, 2006). Customary justice in Bangladesh (Shalish) which is oriented towards the value of restorative justice by referring to community-based methods recognized by the state. In some legal cases, the handling of civil disputes and certain criminal acts is resolved through this informal path (Zulfa, 2013). In Peru, customary justice is very effective in helping to suppress crime because of its decision to use a reconciliation approach so that the state provides regulation and authority to it (Wojkowska, 2006).

Weaknesses in the Model of Full Incorporation for Recognition of the Customary Court

The existence of customary law communities was recognized by the founders of the nation when they compiled the Constitution of the Republic of Indonesia. The close relationship between the state and customary law communities means that philosophically, as the organization that holds the highest power, the Indonesian nation is obliged to recognize these communities, which means protecting, guarding, satisfying, and respecting them. Philosophically, if Indonesia recognizes and respects the existence of the justice systems that exist in customary law communities, this means that the state has fulfilled the philosophical mandate of humanitarian values, values of togetherness, and values of justice (Sulastriyono, 2015). Pancasila contains religious values (in the first principle), humanitarian values (in the second principle), values of unity (in the third principle), social values (in the fourth principle), and values of justice (in the fifth principle) (Notonagoro, 1994).

The values contained in Pancasila have formed strong roots in the customs, cultures, and lives of Indonesian communities for hundreds of years, becoming a way of life for the Indonesian nation. Diversity should not be understood as differences to be contested but instead should be explored and examined in order to discover the potential, force, or strength of these differences that can be utilized to remain united as Indonesians (Sudjito, 2016). Therefore, a policy of legal pluralism should prevail as a foundation for other legal policies to recognize the unity of customary law communities (Atmaja, 2015).

The policies of the colonial Dutch East Indies Government, which juxtaposed the law of the state (enforced by the State Justice System) with customary law (enforced by the Customary Justice System) through a policy of legal and judicial dualism, can be considered to have been successful (Mahadi, 1991). The colonial government awarded recognition by issuing a number of *Staatblad (Stb)* stating the recognition of the existence of the customary court in various

places in the Dutch Indies (Mertokusumo, 1983).

Unfortunately, the legal policy of recognition of the customary court during the era of the Dutch East Indies did not continue after Indonesian independence (Daniel, 2015) because the legal policies in the laws governing judicial power in Indonesia abolished the recognition of justice and sacrificed customary law.

Since the enforcement of Emergency Law No. 1 Year 1951 about Temporary Measures to Unify the Structures, Powers, and Procedures of the Civil Courts, the existence of the customary court was abolished (*vide*: Article 1 paragraph (2) letter b). The legal policy of unification (Ubbe, 2014), which did not recognize the existence of the customary court, was subsequently followed by other laws pertaining to judicial power, including Law No. 48 Year 2009 about Judicial Power, which states that "All courts in the entire territory of the state of the Republic of Indonesia are state courts provided for under the law", see: Article 2 paragraph (3). This article reaffirms the legal policy of unification of Law No. 48 Year 2009 about Judicial Power, which does not recognize or acknowledge the existence of judiciary bodies outside the state judiciary system, including customary courts (Bakri, 2015).

Law No. 21 Year 2001 about Special Autonomy for the Papua Province is an exception because it awards recognition to the customary court for customary law communities in the Papua Province, as regulated in Article 50 and Article 51 paragraph (2), which states: Aside from the judicial power of the state, the existence of the customary court is recognized in certain customary law communities. Article 51, meanwhile, reads in full as follows:

1. Customary courts are courts of reconciliation within the customary law community, which have the authority to examine and adjudicate civil disputes and criminal cases among members of the customary law community concerned.
2. Customary courts are formed under the provisions of the customary laws of the customary law community concerned.
3. Customary courts examine and adjudicate civil disputes and criminal cases as stated above in paragraph (1) based on the laws of the customary law community concerned.
4. In the case that one of the parties involved in a civil dispute or criminal case objects to the decision made by the customary court examining the case as stated in paragraph (3), the objecting party has the right to ask a court of first instance in the area of jurisdiction concerned to re-examine and retry the dispute or case concerned.
5. Customary courts do not have the authority to issue a sentence of imprisonment or confinement.
6. The decision of a customary court about a criminal offence which is not requested to be re-examined as

stated in paragraph (4) is the final decision and legally binding.

7. In order to free a criminal from criminal charges according to the rule of criminal law that prevails, a statement of approval is required from the Chairman of the State Court in the vicinity concerned, obtained through the Head of the State Prosecutor's Office in the place where the criminal act was committed, as stated in paragraph (3).
8. In the case that the request for a statement of approval to be given in connection with the decision of a customary court, as stated in paragraph (7), is rejected by the State Court, the decision of the customary court as stated in paragraph (6) becomes legal consideration for the State Court in reaching a decision about the case concerned.

This legal policy, which recognizes the customary court, is a sign of progress because it replaces the previous legal policy that did not recognize, or in fact ignored, the existence of the customary court, and therefore it deserves to be noted as a dramatic change (Smith & Angie, 2014). Nevertheless, the legal policy which recognizes the customary court in the Law on Special Autonomy in Papua needs to be reviewed because it is not yet responsive to the needs of customary law communities. This is what is known as a model of full incorporation. This model of recognition of the customary court has a number of weaknesses, as follows:

First, as an institution, the customary court is positioned below, or subordinate to, the institution of the state court, which means that it is neither autonomous or independent and all decisions made by a customary court can be annulled by a state court that re-examines and retries the dispute or case concerned, as stated in Article 51 paragraph (4). This stipulation is inconsistent with the section entitled "Explanation of Law on Special Autonomy in Papua, Number I General, Basic matters contained in the constitution, Number Two", which states the spirit of autonomy contained in the Law on Special Autonomy in Papua, which amongst others aims to recognize the existence of and empower customary law communities in Papua. Meanwhile, it is a fact that in customary law communities in Papua, settlements by customary courts are regarded as being fairer than settlements made by state courts (Reumi, 2015).

Second, the legal policy on the recognition of the authority of the customary court in the Law on Special Autonomy in Papua contains ambiguity and obscurity of norms. In Article 51 paragraph (1), the phrase "authority to examine and adjudicate civil disputes and criminal cases" does not state explicitly the kinds of criminal cases it refers to, whether it includes cases that have an equivalent in positive law (the Criminal Procedure Code – KUHAP) or only cases

that are purely of a customary nature (and have no equivalent in positive law), and whether the authority is absolute or relative. There are no clear boundaries of authority here between the customary court and state courts. In customary law communities, customary courts only have the authority to receive, examine, and adjudicate "cases according to the customary laws" to which they refer (Sumule, 2014).

Third, the legal policy on recognition of a decision made by a customary court contains an internal conflict of norms. On one hand, Article 51 paragraph (2) states that: "(2) Customary courts are formed under the provisions of the customary laws of the customary law community concerned", but Article 51 paragraph (4) emphasizes that the decision of a customary court can be submitted for re-examination and retrial (a law of appeal) to a state court, in which the settlement uses the logic of state law (positive law), thus creating the potential for a violation of human rights. This is also inconsistent with the goals of recognition of the customary court, as stated in the Explanation of Article 51 paragraph (2), which reads:

"By recognizing the customary court in this Law, there will be many civil disputes and criminal cases between members of customary law communities in Papua which can be resolved *completely* by the people involved *without involving* a court in the sphere of *state justice*".

Strengthening the Customary Court by Changing the Model of Recognition from Full Incorporation to Co-Existence

Theoretically, there are three models that can be implemented for a state's recognition of informal courts (customary courts), namely Abolition, Full Incorporation, and Co-existence (Wojkowska, 2006). First, a model of Abolition is when a country insists on the uniformity or unification of the law and abolishes any non-state justice systems (the customary court). In the state legislation, it clearly states that the customary court system is abolished (Connolly, 2005). Second, a model of Full Incorporation is when an informal (customary) justice system is given a formal role in the country's justice system and becomes a (subordinate) part of the state justice system. The merging of two different justice systems is unnatural and difficult to realize because each legal system has its own different mechanisms, logic, and paradigms for resolving cases (Tanya, 2010). Third, the model of Co-existence is the independent existence of an informal justice system within the formal structure of the state, in which the state has very limited involvement in its supervision or control.

The recognition of the customary court in Law No. 21 Year 2001 about Special Autonomy for the Papua Province shows more of the characteristics of the model of full incorporation, similar to the model of the Barangay Justice System (BJS) used in the Philippines (Team Justice for the Poor World Bank, 2009). This is because there is

no clear division of authority between state courts and customary courts, and customary courts are subordinate to state courts, since all decisions, without exception, can be submitted for re-examination and retrial in a state court by an objecting party. The customary court is positioned as a low court in the state justice system, and when retrying a case, the state court uses formal laws that are founded on a different philosophy and have different standards of values from customary law.

It is the writer's view that in order to strengthen the customary court within the judicial power system, in the future the political model of recognition of the customary court should adopt a model of co-existence. In this type of model, there are two justice systems that have different jurisdictions, namely the state court with general jurisdiction and the customary court with jurisdiction limited to cases that arise within the sphere of customary law. Informal courts can exist alongside the formal state justice system without having to combine the structure of the two.

Authority is divided between the two, as long as the boundaries are clear because it is not possible for the jurisdiction of the two to overlap. This model is used in Peru, which implements regulations that allow customary courts to operate formally albeit with certain restrictions. Although the two systems are separate, at the request of one or both parties, the decision of a customary court can be registered in an official community registry book at the state court in order to obtain a written record (Team Justice for the Poor World Bank, 2009).

If the recognition of the customary court is changed from a model of full incorporation to a model of co-existence, the implications will be to strengthen the customary court system, as long as it is accompanied by a revision of Law No. 21 Year 2001 about the Special Autonomy of the Papua Province, with specific reference to the following three points.

First, recognition of the institution of the customary court needs to be more clearly defined, namely as a justice system that exists outside the state system and functions as a court of non-litigation, whereby the two systems exist alongside one another and strengthen one another (co-existence). Affirmation of the customary court as a non-state justice system is needed in order to define the meaning of the customary court as a community justice system that is separate from the state justice system, which has independence and autonomy based on the theory of the autonomy of unity of the customary law community. This kind of recognition of the institution of the customary court also has a philosophical foothold in the values of Pancasila, as the national principle of the state, especially in values of humanity and values of social justice (Lembaga Ketahanan Nasional [Lemhanas], 2016), as well as a theoretical foothold in the theory of legal pluralism

which refers to a situation in which two or more legal systems interact (Hooker, 1975). With this affirmation, the recognition of the institution of the customary court will not only be a pseudo recognition but will become a full and genuine form of recognition (Nurjaya, 2011).

The writer believes that the institution of the customary court should be given a status that is equal to that of the state court, as a "court of non-litigation" or an institution for "non-litigation adjudication", in accordance with the nature of the customary court as a community justice system. As an institution of "non-litigation adjudication", a customary court is able to settle customary disputes through a process of adjudication outside a state court in which the decision made has the same power as a decision made by a state court.

Second, the regulation of recognition of the authority of the customary court must state clearly which cases fall under its authority and which cases are under the authority of the state justice system. In order to identify the boundaries between the authority of the customary court and state court in trying a particular case (the object), a distinction needs to be made between customary cases that fall into the category of customary disputes (civil cases) and customary cases that fall into the category of customary violations of customary offences (including the domain of criminal law). Cases of violation of customary law can be divided further into two categories, namely those that are pure customary violations and those that are compound customary violations, or which some people refer to as double criminality (Huda, 2013).

Pure customary violations are actions that violate customary law but cannot be classed as criminal acts according to positive law, or of which there is no equivalent in the Criminal Code (KUHP), and which involve members of the customary law community concerned. This kind of case should naturally be under the absolute authority or competency of the customary court. This means the case is under the complete authority of the customary court and cannot be taken to a state court to be tried. This view is in line with the opinion of Suparta Jaya SH., MH. from the Prosecutor's Office in Papua, who states that "in a customary case, if it is not regulated in the Criminal Code, the customary decision is the final decision which cannot be re-examined by a state court (Tim Kemitraan 2008).

The consequence of this is that criminal cases that are under the complete authority of the customary court include only (purely) customary violations or crimes that are not regulated by and do not have an equivalent in positive law, such as: customary cases involving moral offences (love relationships, consensual sexual relations, broken marriage vows, adultery, incest, cohabitation); customary cases involving material wealth (theft or damage of customary objects); customary cases involving violation of personal interests (swearing, lying); customary cases involving negligence (failure to perform

customary obligations, failure to take part in traditional ceremonies, failure to attend meetings, failure to pay contributions); customary cases involving land, as long as they are connected with communal land rights; customary cases involving the adoption of an illicit child without a traditional ceremony (Tim Kepolisian Daerah Papua - Fakultas Hukum Uncen - Partnership for Governance Reform In Indonesia, 2005).

Cases of compound customary violations, or double criminality, are acts of customary violation which are also criminal acts according to positive law or of which there is an equivalent in the Criminal Code. In such a case, the customary court should only have limited authority, namely to try the customary violation, while the act that is considered criminal according to positive law (Criminal Code) should be tried by a state court.

In order to strengthen the existence of the customary court in the judicial power system, customary courts should be given the authority to try minor criminal cases or cases of less severity with a penalty of up to 5 (five) years imprisonment. Thus, all cases of customary violation, whether purely a violation of customary law or a case of double criminality or a violation of customary law which has an equivalent in the Criminal Code with a maximum penalty of 5 (five) years imprisonment are under the authority of the customary court and the decision is final. The customary court will implement its authority through a mechanism of penal mediation as the mechanism to settle a criminal case (Arief, 2012). The authority of the customary court to try a case other than a case involving a severe criminal act also overrides the authority of the state to prosecute, except in the event that a customary court fails to implement its authority.

For customary violations that have an equivalent in the Criminal Code, with a penalty of more than 5 (five) years imprisonment, or major criminal acts, customary courts should only have the authority to try the case in the domain of the violation of customary law and customary sanctions, and subsequently, the decision made by the customary court may be taken into consideration by the judge of a state court when issuing a verdict (Tim Kemitraan 2008). The sanction or sentence imposed by the customary court is limited to a customary reaction which may not contravene human rights, and in general takes the form of immaterial compensation, paying a customary fine, holding a ceremonial meal (*selamatan*), concealing the result of the shameful act, or apologizing (Wiranata, 2005).

The regulation about the co-existence of the authority of the customary court and the state court in the future is summarized and explained in Table 1.

Third, if the recognition of the customary court follows a model of co-existence, the regulations concerning the recognition of decisions made by the customary courts should state emphatically that such decisions

Table 1

Authority to try customary cases by customary courts and state courts

	Customary Case	Customary Court	State Court
1	Customary case in the form of a dispute	Absolute Authority	No authority
2	Customary case in the form of a pure violation of customary law.	Absolute Authority	No authority
3	Customary case in the form of a violation of customary law which is also a criminal offence according to positive law with a maximum prison sentence of 5 (five) years.	Authority to try the case, overriding the right of the state to prosecute.	Authority to try the case in accordance with the criminal act outlined in the Criminal Code, if the customary court fails to implement its authority.
4	Customary case in the form of a violation of customary law which is also a criminal offence according to positive law with a minimum prison sentence of 5 (five) years.	Authority to try the case limited to the aspect of violation of customary law with the sanction based on customary law.	Authority to try the case in accordance with the criminal act outlined in the Criminal Code. The decision made by the customary court may be taken into consideration to reduce the sentence.

are final, and there is no opportunity to submit a request for re-examination and retrial by a state court as long as there has been no violation of human rights and as long as the customary case is not also classed as a major criminal case according to positive law. This reasoning can be juxtaposed with the wishes of customary law communities in Papua, as stated in the Cultural Decision issued by the People's Assembly of Papua (MRP) Number III/ KK-MRP/2009 about the Special Policy for Alignment, Protection, and Empowerment of the Indigenous People of Papua, which in Article 36, Chapter III, Section seven, Paragraph 2 about the Customary Court states: "Cases and or disputes that have already been adjudicated by customary courts cannot be submitted for retrial by a state judicial body as long as there has been no violation of human rights" (Secretariat of the People's Assembly of Papua: 2009).

If the model of recognition of the customary court is one of co-existence, this means that it enforces the principle that the decision issued by a customary court is final, based on the basic value of upholding the supremacy of the law by implementing the principle of legal certainty to a maximum level in accordance with the mandate of the constitution (Upara, 2011). In addition, a judicial decision that is final is an implementation of the principle of justice in a manner that is simple, quick, and at a low cost, as stated in Article 4 paragraph (2) of Law No. 48 Year 2009 about Judicial

Power, and in the General Explanation, number 3 letter e Law No. 8 Year 1981 about the Criminal Procedure Code (KUHAP).

From the perspective of a customary law community, a decision made by the court, which is a customary sanction imposed on the person who committed the customary violation, is not only intended to create a balance in social relations and harmony with nature but also to give legal certainty to the person on whom the sanction is imposed because he or she has been tried in accordance with the degree of his or her offence based on the customary law that prevails in the customary community concerned. This also applies to the family of the victim and the surrounding community who benefit from the actions of the person concerned.

The nature of a customary court decision which is final is also founded essentially on the principle that the execution of the decision issued by a customary court is carried out immediately after the decision has been made and executed by the customary judge involved in the trial. The execution of a decision issued by a customary court which is in the form of a customary fine in favour of the victim may either be paid directly to the victim or through the customary judge. In certain cases, it may not be possible for the fine to be paid directly in the form of cash in which case it is paid over a period of time, the duration of which is determined by the judge, taking into consideration the financial situation of the offender (Tim Kepolisian Daerah Papua-Fakultas Hukum Uncen-Partnership for Governance Reform In Indonesia, 2005).

Overruling the decision of a customary court and holding a retrial in a state court for a case that has already been adjudicated is a violation of the legal principle *nebis in idem*, which is universal, and also a violation of human rights that should be protected by the state. In a country ruled by the law which upholds the supremacy of the law, the state provides legal protection to all its citizens by making legal certainty a principle for law enforcement in accordance with the mandate of the constitution of Indonesia, as stated in Article 28 D paragraph (1) of the 1945 Constitution of the Republic of Indonesia which reads: "Every person has the right to fair recognition, security, protection, and legal certainty and to be treated with equality before the law", and all the stipulations of its derivation contained in Law No. 39 Year 1999 about Human Rights.

More specifically, the provisions that regulate the re-examination and retrial of a decision issued by a customary court in a state court, where the settlement uses the logic of state law, are contradictory with the law on Human Rights. Article 6 paragraph (1) of Law No. 39 Year 1999 about Human Rights states: "In order to uphold human rights, the differences and needs of customary law communities should be addressed and protected by the law, by society, and by the Government." Furthermore, in the explanation of this article, it states that the customary rights which prevail and are upheld by a customary law community

must be respected and protected in order to provide protection and enforcement of human rights in the community concerned while paying attention to the prevailing laws and legislation. Meanwhile, Article 18 (5) of Law No. 39 Year 1999 about Human Rights states: "No-one can be prosecuted a second time in the same case for an action which has already been given a court decision that is legally binding." Thus, the acknowledgement that a decision issued by a customary court is final is a form of respect for human rights in the interest of upholding legal certainty.

The principle that the decision issued by a customary court is final, in fact, rests ontologically on the theory of human rights and the unity of customary law communities (Ad Hoc Committee I DPD RI [2009]) whereby customary law communities have the authority to implement their own justice system (*zelfrechtspraak*). This authority is the logical consequence of the authority of the community to create its own laws and also its authority to enforce these laws. The authority to hold a trial is evident in the existence of the customary court which is manifested through discussions held in the customary community to resolve problems that occur in the vicinity of the customary law community concerned. In addition, by nature, a customary court is not a court consisting of different levels but rather a single judicial institution that belongs to the customary law community.

The spirit that underlines the desire to reinforce the final nature of a decision issued by a customary court is really an endeavor to enforce the authority of the customary court, which in the past has not been recognized by the state. If a customary court's decision is final, the customary court will no longer be considered subordinate to the state court (as in a model of full incorporation), since both have their own place and jurisdiction with all the strengths and weaknesses that

Table 2

Nature of decision issued by a customary court in accordance with its authority to try a case

	Type of Customary Case	Authority to Adjudicate	Nature of Decision
1	A Customary case in the form of a dispute.	Absolute	Final
2	A Customary case in the form of a (pure) customary violation.	Absolute	Final
3	A customary case which is a customary violation and also a criminal case according to positive law with a maximum penalty of less than 5 (five) years.	Authority to adjudicate, overriding the right of the state to prosecute.	Final

Table 2 *(Continued)*

	Type of Customary Case	Authority to Adjudicate	Nature of Decision
4	A customary case which is a customary violation and also a criminal case according to positive law with a maximum penalty of more than 5 (five) years.	Authority to try limited to the aspect of violation of customary law with sanctions based on customary law.	Final as far as the customary law violation is concerned and may be taken into consideration to reduce the sentence issued by a judge in a state court. If the person committing the violation has already come to a peaceful agreement with the victim's family, it is possible that the police may use their discretion to not carry out an investigation.

they possess (co-existence). The final nature of a decision issued by a customary court in accordance with its authority to hold a trial can be seen in Table 2.

CONCLUSION

The current system of judicial power adheres to the legal policy of judicial unification which does not acknowledge or recognize the existence of a judicial body outside the state justice system. Law No. 21 Year 2001 about Special Autonomy of the Papua Province recognizes the customary court using a model of full incorporation which places it beneath or subordinate to the state justice system.

The strengthening of the customary court is only possible if the model of recognition of the customary court is changed from a model of full incorporation to a model of co-existence. The co-existence model of recognition requires the revision of three points.

1. Recognition of the institution of the customary court needs to be affirmed as an autonomous justice system which exists outside but alongside the state justice system in a form of co-existence.
2. Regulation of the recognition of the authority of customary courts should state clearly which kinds of the case come under the authority of the customary courts.
3. Regulation of the recognition of decisions issued by a customary court should state emphatically that such decisions are final, and there is no possibility of submitting a request for re-examination and retrial in a state court, as long as there has been no violation of human rights.

A model of co-existence for the recognition of the customary court will strengthen the existence of the customary court so that it is able to exist alongside the state justice system without merging the two structures and with each maintaining its own jurisdiction.

ACKNOWLEDGEMENT

The researcher would like to thank the parties who have helped in completing this research. To the Director of Research and Development of the Ministry of Ristekdikti who has funded this research and other parties who contributed data and information in this research.

REFERENCES

Arief, B. N. (2012). *Mediasipenal penyelesaian perkara Pidana Diluar Pengadilan* [Mediation of penal settlement of criminal case Outside Court]. Jakarta, Indonesia: Obor Indonesia.

Atmaja, G. M. W. (2015). *Politik pluralisme hokum dalam pengakuan kesatuan masyarakat hokum adat dengan peraturan daerah* [Political legal pluralism in recognition of the unity of indigenous and tribal peoples with local regulations]. Semarang, Indonesia: Pustaka Magister FH UNDIP Press.

Bakri, M. (2015). *Pengantar hukum Indonesia, system hukum Indonesia pada era reformasi* (Vol. 1) [Introduction to Indonesian law, the legal system of Indonesia in the reform era]. Malang, Indonesia: Universitas Brawijaya Press.

Huda, C. (2013). Koordinasi antara para pemangku kepentingan peradilan adat dengan institusi formal penegak hokum [Coordination between indigenous justice stakeholders with law enforcement formal institutions]. *Makalah Seminar Arah Peradilan Adat dalam Sistem Hukum Nasional* [Seminar Paper on the Direction of Customary Justice in the National Legal System]. Surabaya, Indonesia: Badan Pembinaan Hukum Nasional Kementerian Hukum.

Connolly, B. (2005). Non-state justice systems and the state: Proposals for a recognition typology. *Connecticut Law Review, 38*(2), 239-294.

Creswell, J. W. (2008). *Research design: Qualitative, quantitative and mixed methods approaches* (2nd ed.). California, USA: Sage Publication Inc.

Daniel, S. L. (2015). *Hukum dan politik di Indonesia, kesinambungan dan perubahan* [Law and politics in Indonesia, sustainability and change]. Jakarta, Indonesia: LP3ES.

*Dewata, M. F. N., & Ahmad, Y. (2010). Dualisme penelitian hokum normatif dan empiris [*Dualism of normative and empirical law research*]. Yogyakarta, Indonesia: Pustaka Pelajar.*

Hamidi, J. (2011). *Hermeneutika hukum: Sejarah, filasafat dan metodetafsir* [Hermeneutics law: History, philosophy, and methods of exegesis]. Malang, Indonesia: UB Press.

Hooker, M. B. (1975). *Legal pluralism: An introduction to colonial and neo-colonial laws.* Oxford, England: Clarendon Press.

Lembaga Ketahanan Nasional. (2016). *Nilai-nilai dasar empat consensus dasar kebangsaan yang bersumber dari Pancasila* [The basic values of the four basic national consensuses sourced from Pancasila]. Jakarta, Indonesia: Author.

Mahadi. (1991). *Uraian singkat tentang hukum adat sejak RR-tahun 1854* [A brief description of customary law since RR-year 1854]. Bandung, Indonesia: Alumni.

Maxwell, G., & Hayes, H. (2006). Restorative justice developments in the pacific region: A comprehensive survey.*Contemporary Justice Review, 9(2),* 127-154.

Notonagoro. (1994). *Pancasila secara ilmiah popular* [Pancasila in popular knoeledge]. Jakarta, Indonesia: Bumi Aksara.

Nurjaya, I. N. (2011). Pengelolaan sumber daya alam berbasis kearifan masyarakat adat: Perspektif antropologi hokum [Management of natural resources based on indigenous peoples' wisdom: A legal anthropological perspective]. *Makalah*

seminar nasional tentang arah perlindungan hokum bagi masyarakat adat dalam system hokum nasional [National seminar paper on the direction of legal protection for indigenous peoples in the national legal system]. Malang, Indonesia: Regent Park Hotel.

Reumi, F. (2015). *Reaktualisasi pluralisme hokum dalam peradilan adat di Papua* [Reactualization of legal pluralism in customary justice in Papua]. Jayapura, Indonesia: Uncen Press.

Saptomo, A. (2010). *Hukum dan kearifan local revitalisasi hokum adat nusantara* [Local law and wisdom revitalization of the customary law of the archipelago]. Jakarta, Indonesia: PT. Grasindo.

Smith, A. L., & Angie, N. (2014). Papua: Moving beyond internal colonialism? *New Zealand Journal of Asian Studies, 4,* 90-114.

Sudjito. (2016). *Ideologihukum Indonesia, kajian tentang Pancasila dalam perspektif ilmu hukum dan dasar negara Indonesia* [Indonesian legal ideology, the study of Pancasila in the perspective of legal science and basic Indonesian state]. Yogyakarta, Indonesia: Lingkar Media.

Mertokusumo, S. (1983). *Sejarah peradilandan perundang-undangannya di Indonesia sejak 1942 dan apakah kemanfatannya bagi kita bangsa Indonesia.* [The history of the judiciary and its legislation in Indonesia Since 1942 and what is its use for us Indonesian nation]. Yogyakarta, Indonesia: Liberty.

Sulastriyono. (2015). Filosofi pengakuan dan penghormatan negara terhadap masyarakat hokum adat di Indonesia [The philosophy of state recognition and respect for indigenous and tribal peoples in Indonesia]. *Jurnal Hukum Yustisia, 90*(XXIII), 66-72.

Sumule, A. (Ed.).(2014). *Mencari jalan tengah otonomik husus provinsi Papua* [Looking for the middle road of special autonomy of Papua province]. Jakarta, Indonesia: PT GramediaPustaka Utama.

Tanya, B. L. (2010). *Hukum dalam ruang sosial* [Laws in social space]. Yogyakarta, Indonesia: Genta Publishing.

Team Juctice for the Poor World Bank. (2009). *Menemukan titik keseimbangan: Mempertimbangkan keadilan non-negara di Indonesia* [Discover the balance point: Consider non-state justice in Indonesia]. Jakarta, Indonesia: Justice for the Poor World Bank – Sub Office.

Tim Kepolisian Daerah Papua-Fakultas Hukum Uncen-Partnership for Governance Reform In Indonesia. (2005). *Peradilan adat di Papua* [Customary justice in Papua]. Jayapura, Indonesia: Author.

Ubbe, A. (2014). *Hukum adat kesusilaan Malaweng kesinambungan dan perubahannya* [Malaweng's moral law of continuity and its alteration]. Jakarta, Indonesia: Yarsif Watampone.

Upara, A. R. (2011). Eksistensi putusan pengadilan adat di Papua dalam perpektif asas Ne Bis In Idem [The existence of customary court decisions in Papua in the perspective of the Ne Bis In Idem Principle]. *Jurnal Konstitusi, III*(1),123-150.

Wiranata, I. G. A. B. (2005). *Hukum adat Indonesia, pebirorkembangannya dari masa ke masa* [Indonesian customary law, its development from time to time]. Bandung, Indonesia: PT. Citra Aditya Bhakti.

Wignjosoebroto, S. (2002). *Hukum paradigma, metode dan dinamika masalahnya* [The law of paradigms, methods and the dynamics of the problem]. Jakarta, Indonesia: ELSAM and HUMA.

Wojkowska, E. (2006). *Doing justice: How informal justice systems can contribute*. Oslo, Norway: United Nations Development Programme Oslo Governance Centre the Democratic Governance Fellowship Programme.

Zulfa, E. A. (2013). *Mendefinisikan keadilan restorative* [Defining restorative justice]. Retrieved November 23, 2013, from http://evacentre.blogspot.com/2009/11/definisi-keadilan-restoratif.html