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The Existence of Traditional Justice Policy in Fakfak District (Juridical Review of Articles 50 and 51 of Law No. 2 of 2021 concerning Special Autonomy for Papua Province)

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Abstract

This article aims to identify and analyze the legal basis for the existence of the Customary Court in Fakfak Regency and the development of the Customary Court. The method used is a normative legal research method because it examines the legal product/basic regulations and the implementation of customary justice in Fakfak Regency, West Papua Province in handling cases. The results show that one part of the Specialty of the Papua Province is that it has been recognized and regulated further in the Papua Special Autonomy Law which has been amended several times, as recently as the enactment of the Law of the Republic of Indonesia Number 2 of 2021 concerning the Second Amendment to Law Number 21 of 2001 concerning Special Autonomy for the Province of Papua. Specifically, regarding the Customary Court, it is regulated in Article 50 paragraphs (1 and 2) and Article 51 paragraphs 1 to 8). Furthermore, the Papua Province has been regulated more specifically by the Papua Provincial Government through the issuance of the Papua Special Regional Regulation (PERDASUS) Number 20 of 2008 concerning Customary Courts in Papua, while for West Papua Province there is no Special Regional Regulation (PERDASUS) West Papua which is administratively the government, one of which oversees the Fakfak Regency area. so even there is no Fakfak Regency Perda that regulates Traditional Jurisdiction. A glance shows that there is still a lack of seriousness of the Regional Government to follow up on the State Recognition of the Existence of ADAT JUSTICE, in the event that support is needed: Legal Certainty on the Institution of Customary Courts.

Keywords: Customary, Justice, Policies

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1. Introduction

For Papuans in general and Fakfak in particular, they have known the boundaries of their territory from generation to generation through the habit of telling historical and cultural stories from their ancestors to the present era. The division of Papuan Land into 7 Customary Territories is, among others, based on similarities in several aspects, namely; kinship, marriage, customary rights, type of leadership, physical characteristics, geography, and others.

The 7 customary/cultural areas in Papua consist of: the Mamta Customary Territory (Mamberamo-Tami or now known as the Tabi region), the Saereri Indigenous Territory, the Ha Anim Indigenous Territory, the La Pago Indigenous Territory, the Mee Pago Traditional Territory (the five are in the Papua region).) and the Domberai Customary Territory and Bomberai Customary Territory in West Papua.

Fakfak Regency itself is administratively located in West Papua Province, while regionally, Adat is included in the Bomberai Customary Area, which also recognizes the existence of Customary Law and Customary Law Community. The Traditional Leadership system in Fakfak is the King Leadership system, which includes 7 (seven) areas of the King's Government, better known as Petuanan. 7 Petuanan King Leadership consists of: (1) Petuanan Raja Rumbati; (2) Petuanan King Pikpik Sekar; (3) Petuanan King Wertuar; (4) Petuanan Raja Arguni; (5) Petuanan Raja Atiati; (6) Petuanan Raja Patipi; and (7) Petuanan Raja Fatagar.

Customary law in Fakfak is still unwritten rules or norms but lives applied in the order of the Fakfak customary law community whose nature is to regulate, bind, and be trusted and deserve to be

obeyed / obeyed, and is also recognized as having physical and mental sanctions. tangible, and it is also believed that there are direct non-physical and intangible sanctions that have magical value.

Customary law and customary courts in the Land of Papua in Papua and West Papua Provinces, especially in the Fakfak Region known as Jazirah Onin or Mbaham Matta Customary Land, are in the Bomberai Customary Territory. exist until now. Customary Law was formed in a long process, namely from this continuous and repeated habit that became a tradition, and in the end the tradition was believed to have magical religious power so that it had a natural binding power, that's when Customary Law revealed its existence to the local Indigenous Community.

Customary Courts are part of the customary buffer which has been practiced for generations since the existence and formation of the Customary Law community which empirically does not really care about the presence or absence of recognition (recognition) from the State, but will exist as long as the Customary Law community still needs and believes, and led by a qualified Customary Leader (master of Customary Law and Firm in Enforcing Customary Law).

The policy of the existence of customary law and customary courts, whose existence is recognized by the existence of the Recognition of the Unitary State of the Republic of Indonesia, which is regulated by a number of laws and regulations, as stated in Article 18B of the 1945 Constitution, is as follows: "State also recognizes and respects customary law community units and their rights.

Regarding the Judiciary and Judicial Power in Indonesia in terms of implementing or enforcing the law, Article 24 paragraph (2) of the 1945 Constitution states: "The Supreme Court and its subordinate judicial bodies exercise judicial authority in the general court environment, the religious court environment, the military court environment, and the state administrative court environment. The Policy for the Existence of Customary Courts has been particularly acknowledged and applied apart from the four courts for the Land of Papua in the Provinces of Papua and West Papua. The customary judiciary in the provinces of Papua and West Papua is governed by Articles 50 and 51 of Law No. 21 of 2001 on Special Autonomy for the Province of Papua.

The Existence Policy of the Customary Court is one of the parts regulated in the special autonomy for the Papua Province (Papua and West Papua) that has two essential meanings and a very strategic role, namely: (1) Carrying out the Function of Judicial Power in the Form of Customary Court Institutions; and (2) Carrying out the Function of Administrative Power in the Form of Customary Court Institutions. The forum/facility for peace courts within the community of customary law is known as the Customary Court, which has the role, function, and power to review and adjudicate customary civil disputes and criminal matters among the members of the indigenous peoples involved. Legal Certainty on Customary Court Institutions, Empowerment and Development of Case Handling Administration and Trial Proceedings, Capacity Building for Customary Judges, Support for Facilities & Infrastructure, and Financing to support the policy of the existence of the Customary Court in Fakfak continue to be deficient. In the event that one of the disputing parties or litigants objects to the decision made by the customary court that examined the case, that party has the right to appeal to the first level court, namely the District Court or Religious Court in the environment of the judicial body that is authorized to retry the dispute or case in question.

Along with civilization and the development of the era from time to time, namely since the 1998 reform, until the birth of the Special Autonomy for Papua in 2001, it has also brought about renewal and development as well as adjustments within the Indigenous Law Community. Apart from Otsus Papua, but still in the spirit of Customary Law and Institutions of Indigenous Peoples, the existence of the Indigenous Peoples Institution (LMA) and the Papuan Customary Council (DAP) which in Fakfak district is better known as the Mbaham matta Customary Council which is also one of the the section has a role in examining and adjudicating civil and criminal cases among members of the customary law community in Fakfak.

2. Literature Review and Hypotheses

Policy definition

In the Big Indonesian Dictionary it is stated that the Policy is described as:a group of concepts and principles that create the blueprint and foundation of plans in the implementation of a job, leadership, and methods of behaving (regarding government, organization, and so on) (about government, organization, and so on).

Definition of existence

In the Big Indonesian Dictionary it is stated that Existence is defined as being or being.

Definition of justice

Judiciary according to the Big Indonesian Dictionary is everything about court cases. Meanwhile, according to the legal dictionary, the judiciary is everything related to the duty of the State to enforce the law and the judiciary. Apart from that, there are several definitions put forward by several well-known scholars as reaffirmed by Dr. Rochman Soemitro. SH. among others: (1) Van Praag defines justice as the determination of the enactment of a legal regulation at the time of a concrete event related to the existence of a dispute; (2) Apeldoorn defines justice as the termination of disputes by an agency that has no interest in the case nor is a part of the parties; (3) G. Jellinek defines justice as including a concrete event in an abstract norm and thus the case is decided; (4) Bellefroit defines the judiciary as a case breaker by the determination of the law; (5) Kranenburg argued that the function of the judiciary was merely to apply the law, giving decisions for concrete cases in accordance with the regulations made by legislators.

Definition of custom

The word Adat as in Indonesian legal language comes from the Arabic term "Adah" which means habit. Adat in the big Indonesian dictionary is defined as a rule that is commonly followed or carried out since time immemorial. The word Adat According to Law Number 21 of 2001 concerning Special Autonomy for Papua as in Article 1 paragraph (15) it is stated that Adat is a habit that is recognized, obeyed and institutionalized, and maintained by the local customary community from generation to generation. As for Custom, according to Prof. H. Hilman Hadikusuma, SH. is a habit in society that gradually becomes a habit that applies to all members of society, so it is called adat.

Definition of customary court

Article 51, paragraph 1, of Law No. 21 of 2001 on Special Autonomy for Papua states that the customary court is a peace court within the community of customary law with the jurisdiction to evaluate and resolve customary civil disputes and criminal cases involving members of the legal community.

Observing the explanation in Article 51 paragraph (2), it is explained that the customary court is a judicial institution for indigenous peoples and not a state judicial authority. The structure is governed by the requirements of the local community's customary law in terms of who is responsible for evaluating and adjudicating the disagreement and the case in question, as well as the procedures for examination, decision-making, and implementation. Customary tribunals are not permitted to issue incarceration or detention punishments. In the case that disputing or litigating parties accept it, the decision of the customary court is final and has permanent legal effect.

Based on some of the descriptions of the understanding above, the authors can conclude that "The policy of the existence of the Customary Courts in Fakfak Regency" is an important effort which is a strategic direction or step to be able to synergize the existing order of local wisdom regarding Customary Courts through reforms. and adjustment of institutional arrangements to answer the needs of a judiciary with a capacity and quality, as well as providing a means of creating legal certainty not only for the benefit of Indigenous Peoples who are litigants as justice seekers, but also for the whole community."

3. Methods

Types of research

The type of research conducted by the author is normative legal research, namely legal research conducted by examining legal norms, in the form of positive legal norms in the form of statutory regulations and customary law norms. In this article, we try to examine the legal provisions related to the policy of the existence of customary justice in Fakfak after the enactment of the Papua Special Autonomy Law.

Data source

Considering that the research conducted normative legal research, the source of data obtained was through laws and regulations, the main data source. The data used are divided into: (1) Primary Legal Material. Primary legal materials are legal materials that have binding force, such as applicable laws and regulations, in this case include: (a) The 1945 Constitution Articles 18 and 24 paragraphs (1 and 2); (b)

Law Number 12 of 1969 concerning the Establishment of the Autonomous Province of West Irian and Autonomous Regencies in the Province of West Irian (State Gazette of the Republic of Indonesia of 1969 Number 47, Supplement to the State Gazette of the Republic of Indonesia Number 2907); (c) Law Number 21 of 2001 concerning Special Autonomy for the Province of Papua, which is contained in the State Gazette of the Republic of Indonesia of 2001 Number 135, Chapter XIV concerning Judicial Powers, Articles 50 and 51; (d) Law Number 48 of 2009 concerning Judicial Power, which is contained in the State Gazette of the Republic of Indonesia of 2009 Number 157; (e) Law Number 45 of 1999 concerning the Establishment of Central Irian Jaya Province, West Irian Jaya Province, Paniai Regency, Mimika Regency, Puncak Jaya Regency and Sorong City as amended by Law Number 5 of 2000 concerning Amendments to Law Number 45 of 1999 concerning the Establishment of Central Irian Jaya Province, West Irian Jaya Province, Paniai Regency, Mimika Regency, Puncak Jaya Regency and Sorong City Law on the Establishment of West Papua Province; (f) Law Number 39 of 1999 concerning Human Rights, which is contained in the State Gazette of the Republic of Indonesia of 1999 Number 165; (g) Law Number 32 of 2004 concerning Regional Government, which is contained in the State Gazette of the Republic of Indonesia of 2004 Number 125; (h) Law No. 6 of 20 of 2014 concerning Villages, which is contained in the State Gazette of the Republic of Indonesia of 2014 Number 7; (i) Government Regulation of the Republic of Indonesia Number 64 of 2008 concerning Amendments to Government Regulation Number 54 of 2004 concerning the Papuan People's Assembly, which is contained in the State Gazette of the Republic of Indonesia of 2008 Number 140; (j) Perdasus 20 of 2008 concerning Customary Courts in Papua, which is contained in the Regional Gazette of the Papua Province of 2008 Number 20; (2) Secondary Legal Material. The results of scientific works in the form of research, articles, and literature in the form of books and searches of the presentation of data and information electronically obtained through internet media access.

4. Results

Customary Court is currently one of the important substances that have been regulated in Law No. 21 of 2001 concerning Special Autonomy for the Papua Province, as the recognition of its regulation is contained in CHAPTER XIV OF JUDICIAL POWER, article 50 paragraphs (1 and 2) and Article 51 paragraphs 1 to 8) , which can be described as follows: Article 50 and Article 51.

Article 50

Article 50 contains: (1) Judicial power in the Papua Province is exercised by the Judicial Body in accordance with the laws and regulations; (2) In addition to the judicial power as referred to in paragraph (1), it is recognized that there are customary courts within certain customary law communities.

In the description of the explanation of Article 51 Paragraph (1) it is stated that the exercise of judicial power in the Papua Province in accordance with the laws and regulations requires special legal services. In this case and to accelerate the acquisition of legal certainty, especially in cases of cassation, the Supreme Court may consider a special policy for the settlement of cassation cases from the Papua Province.

In the provisions of Article 51, it is reflected in the legal politics of dualism of the judiciary that applies in the provinces of Papua and West Papua, namely in addition to the enforcement of the State Courts according to the authority and level of the judiciary which have been recognized and regulated by Law Number 48 of 2009 concerning Judicial Power, however, for In Papua and West Papua, Customary Courts are also implemented as has been applied so far to the Customary Law communities in the Provinces of Papua and West Papua, which contradicts Article 2 paragraph (3) of Law Number 48 of 2009 concerning Judicial Power, as stated that "All courts throughout the territory of the Republic of Indonesia are state courts regulated by law".

Article 51

Article 51 contains: (1) The customary court is a peace court within the customary law community, which has the authority to examine and adjudicate customary civil disputes and criminal cases among the members of the customary law community concerned; (2) Customary courts are arranged according to the provisions of the customary law of the indigenous peoples concerned; (3) Customary courts examine and adjudicate customary civil disputes and criminal cases as referred to in paragraph (1) based on the customary law of the indigenous peoples concerned; (4) In the event that one of the disputing parties or the litigants object to the decision that has been taken by the customary court that has examined it as referred to in paragraph (3), the objecting party has the right to ask the court of first instance within the

competent judiciary to examine and re-trial. the dispute or case in question; (5) Customary courts are not authorized to impose sentences of imprisonment or confinement; (6) The decision of the customary court regarding a criminal offense whose case is not requested for re-examination as referred to in paragraph (4), becomes the final decision and has permanent legal force; (7) In order to free criminals from criminal charges according to the provisions of the applicable criminal law, a statement of approval is required to be carried out from the Head of the District Court in their jurisdiction which is obtained through the Head of the District Prosecutor's Office concerned with the place where the criminal incident occurred as referred to in paragraph (3); (8) In the event that the request for a statement of approval to be implemented for the decision of the customary court as referred to in paragraph (7) is rejected by the District Court, then the decision of the customary court as referred to in paragraph (6) becomes the material for legal consideration of the District Court in deciding the case in question.

It is expressly acknowledged that, regardless of how Article 51, Paragraph 1 is explained in this paragraph, the existing judicial institutions and customary courts in the Papua Province are recognized under national law as a peace court institution between members of the existing customary law community.

Fakfak Regency, which is administratively located in West Papua Province, while regionally, Adat is included in the Bomberai Customary Area, which also recognizes the existence of Customary Law and Customary Law Community. The Traditional Leadership system in Fakfak is the King Leadership system, which includes 7 (seven) areas of the King's Government, better known as Petuanan. 7 are often faced with disputes between Indigenous Peoples, both individually and in groups. Disputes handled by the Customary Courts are not infrequently the subject is not only between Indigenous peoples, but also Indigenous Peoples with other parties such as: individuals from the Archipelago Tribe, Private Legal Entities (Companies) and there are also cases/disputes between Indigenous Peoples and the Government which are dominated by disputes Soil.

The current handling of cases/disputes is not only handled by the Customary Courts coordinated by the King, but since the 1998 reformation, which led to the birth of Special Autonomy for Papua in 2001, it has also brought about renewal and development as well as adjustments within the Indigenous Law Community. Apart from Otsus Papua, but still in the spirit of Customary Law and Institutions of Indigenous Peoples, the existence of the Indigenous Peoples Institution (LMA) and the Papuan Customary Council (DAP) which in Fakfak district is better known as the Mbaham matta Customary Council which is also one of the the section has a role in examining and adjudicating civil and criminal cases among members of the customary law community in Fakfak.

One of the things that really concerns the existence of the Customary Court is that if there is a decision related to a case, it is still disputed by one of the litigants to another Customary Court and it is not uncommon for those who follow up the decision of the Customary level to the State Court (District Court or Religious Court). According to the relevance of the main object of the case and the competence to judge from the State Court.

In the past, before the existence of the State Courts, the existence of the Customary Courts was highly respected and obeyed and became the last end of a case settlement in the midst of the Indigenous Peoples because the role of the Customary Courts was not only as a forum to seek justice (who was right and who was wrong), but the most important thing was seek peace and togetherness.

Whereas the challenges in the current existence of Customary Courts include: Norms and or Customary Laws whose existence is still unwritten, while on the one hand they are currently faced with the advancement of science which of course has an impact on knowledge and character as well as higher and different levels of education. The lack of supporting/supporting support in relation to the Institution of Customary Courts, Empowerment and Guidance of Case Handling Administration and Proceedings of Trials, Capacity Building for Customary Judges, Support for Facilities & Infrastructure and Financing to support the existence of ADAT JUSTICE in Fakfak.

There is still no PERDASUS of West Papua Province which specifically regulates ADAT JUSTICE as the embodiment of the follow-up to the elaboration of Law No. 21 of 2001 concerning Special Autonomy for the Papua Province, as acknowledgment of its regulation is contained in CHAPTER XIV JUDICIAL POWER, article 50 paragraphs (1 and 2) and Article 51 verses 1 to 8). Until there is no Fakfak Regency Regional Regulation on Customary Justice in Fakfak Regency, it is an important matter that deserves to be taken seriously.

5. Discussion

While the Law Number 48 of 2009 concerning Judicial Power, which states that "All judicial throughout the territory of the Republic of Indonesia is a state court regulated by law," conflicts with the

existence of the Customary Court as it has been applied to the community of Customary Law in the Provinces of Papua and West Papua.

Recognition of the Customary Court in Otsus Papua is one of the important elements of the realization of state recognition legally and politically, which is inseparable from the historical background of the birth of Otsus Papua which is the State's response to the incessant pressure of the upheaval of the aspirations of the people in Papua and elsewhere. Foreigners who are aggressively voicing the independence of the land of Papua to form their own state are due to the various gaps and backwardness of Papua in development.

The state has recognized and declared the validity of the existence of the Customary Court as a system for resolving cases or disputes using customary instruments, but on the one hand the existence of recognition followed by regulation is a form of soft intervention by the state and has also brought renewals/changes and adjustments from what was originally Customary Courts live and are implemented in Unwritten Customary norms, which subsequently undergo a transition to shifts in the Customary Court Order which will be passed with a number of provisions which will be formally regulated by State institutions such as the Special Regional Regulation (PERDASUS) concerning Customary Justice in Indonesia. the provincial level, to the PERDA at each district level, even though the Customary Courts are not part of the State Courts.

The Legal Politics of recognizing Customary Courts in the Papua Special Autonomy Law is a progress that has shifted legal politics from previously not recognizing and seeming to ignore the Customary Courts, has turned into recognizing the Customary Courts which dramatically laid the foundations for Changes in the Development and Existence of Customary Courts to be able to be recognized also in the power system of this State Judiciary. If not, even if there is an acknowledgment of the customary court, it is nothing more than a formalist, highlighting a pseudo-customary identity entity or not intact and its existence only arouses the fanatime of the primodiatas.

From the description or view, it is clear that there are juridical problems because there are inconsistencies in the legal political substance related to the recognition of the Customary Courts formulated in the Papua Special Autonomy Law, among others, stated by DR.Muhammad Jamin, SH, MH: (1) Institutionally, the Customary Courts are placed under the subordination of the State Courts so that they are not autonomous and not independent, and all decisions can be annulled by the State Court which examines and retrials the dispute or case in question as referred to in Article 51 paragraph (4) of the Papua Special Autonomy Law no. 21 of 2001; (2) Legal Politics The recognition of the authority of the Customary Court in the Papua Special Autonomy Law contains ambiguity and ambiguity of the norm (vague norm). as in Article 51 paragraph (1) the phrase "the authority to examine and adjudicate disputes in civil and criminal cases". Where it is not clear what type of case is meant; (3) There is a closed possibility of a Customary Court Decision, as in Article 51 paragraph (2) it is stated "The Customary Court is arranged according to the provisions of the Customary Law in a relevant Customary Law community, but in Article 51 paragraph (4) it turns out that the decision can still be submitted for review in State Court. This clearly contains a conflict of norms; (4) Other juridical problems are in particular Article 50 and Article 51 which are normatively contradictory horizontally with the article which states "There is no Court outside the State Court", as stated in Law No. 48 of 2009 concerning Judicial Power.

6. Conclusions

Conclusions of this article are: (1) That Special Autonomy is mentioned as Special Autonomy for the Province of Papua has an expanded meaning as well as the fact that Special Autonomy is not only for the Province of Papua but also for the Province of West Papua, as well as the possibility of other provinces (the result of division) in the Land of Papua. Whereas the definition of Papua Province in Article 1 point 1 of Law No. 2 of 2021 concerning Special Autonomy for Papua Provinces states that Papua Province is provinces located in the Papua region which are given special autonomy within the framework of the Unitary State of the Republic of Indonesia; (2) The definition and regulation of the Customary Court has not been described specifically, so there are still multiple interpretations, which means that there are differences regarding the existence and institutional authority of the Customary Court, even though it has been regulated in Otsus Papua; (3) That the importance of initiating and formulating Government policies to make PERDASUS of West Papua Province on TRADITIONAL JUSTICE, of course, must be relevant to the characteristics that have lived and developed as needed in the local customary law community. (customary territory and Indigenous leadership system); (4) Whereas the roles, duties, functions and authorities carried out by the Customary Courts are very strategic in handling various issues/disputes

between indigenous peoples and between Indigenous Peoples and other Parties (Government, Private and non-Papuan people), it is therefore necessary to maximize Customary Courts not just recognition**.** but also need Strengthening of Customary Courts; (5) That the existence of the Customary Court is not only sufficient for the existence of recognition and part of the proof and respect for the existence of an Indigenous Community, but the function or role of the Customary Court in Law Enforcement and the existence of Legal Certainty is one of the main things that are important for the existence of the Customary Court.

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