

## **The Construction of Land Dispute Settlement Law In Realizing The National And Customary Law Harmonization (A Study In Merauke Regency-Papua)**

Sufirman Rahman, Abd. Qahar, Said Sampara, Ahmad Ali Muddin

*Universitas Muslim Indonesia, Makassar, Indonesia*

*Corresponding Author: Sufirman Rahman,*

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**Abstract:** This research aims at analyzing land dispute settlement of customary right of customary law people in the effort of harmonizing the national law and customary law in Merauke Regency-Papua. It uses normative law and empirical or sociological law research approaches. The qualitative and quantitative data on customary law people's customary right land dispute are analyzed descriptively. The research result indicate that the Marind Anim MHA's customary right land dispute settlement sometimes find social obstacles. These social obstacles, however, can be dealt with by studying further and exploring the social interaction and relation habits which have been built in Marind Anim customary law people which deals with customary land.

**Keywords:** Dispute, Land, Customary Law, Merauke-Papua

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### **I. INTRODUCTION**

The protection of Customary Law People or *Masyarakat Hukum Adat's* (MHA) rights has conceptually been ensured by the constitution.<sup>1</sup> In Indonesia, it is confirmed in the State Constitution which acknowledges the existence of customary law people, i.e. in Article 18 B of the 1945 Constitution which states that the state acknowledges and respects the unities of customary law people along with their traditional rights which still live and comply with the development of state, people and principles of the Unitary State of Republic of Indonesia as set forth in the law.<sup>2</sup>

The most important part of customary people's life in regard to land is the fact that land plays an important role for people's life for their life can never ever be separated from land.<sup>3</sup> One area wherein the control over customary lands by customary people is still highly upheld is Papua, particularly Merauke Regency in which the land is completely controlled by customary law. This can be clearly seen when an individual or party has an interest in owning/controlling a plot of land, especially in Merauke district area, they must obtain a local customary release letter first. Even when a party has controlled a land for a long time, or has held an evidence of their ownership of the land in the form of a certificate, yet they lack this customary release letter from the local customary institution, then this plot of land will certainly be barred by the local customary people who claim that the land belong to their customary right.

Merauke Regency has many tribes, both the native and the immigrants. The number of tribes residing in Merauke Regency is more or less fourty tribes and one of them is Marind tribe. Nevertheless, with this huge number of tribes, the harmony in diversity in their life as a community, a state and a country can be achieved as reflected in their motto "*Izakod Bekai Izakod Kai*" which means One Heart One Goal. This motto is promoted in the 100th anniversary of Merauke Regency.

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<sup>1</sup> Jawahir Thontowi, Pengaturan Masyarakat Hukum Adat dan Implementasi Perlindungan Hak-hak Tradisionalnya, *Pandecta; Research Law Journal*, Vol. 10, No. 1, 2015, p. 2

<sup>2</sup> Hayatul Ismi, Pengakuan Dan Perlindungan Hukum Hak Masyarakat Adat Atas Tanah Ulayat Dalam Upaya Pembaharuan Hukum Nasional, *Jurnal Ilmu Hukum*, Vol. 3, No. 1, 2013, p. 2

<sup>3</sup> Permatasari, Elfira, Habib Adjie, and Hardianto Djanggih. "Perlindungan Hukum Kepemilikan Tanah Absentee yang Diperoleh Akibat Pewarisan." *Varia Justicia*, Vol. 14, No. 1, 2018, p. 1.

Since Irian (now Papua)<sup>4</sup> was freed from the Dutch occupation, including Merauke of course, scientific papers on Marind does not seem to significantly develop since several reports have mentioned that an institution has made some development efforts by conducting studies, yet their values are still insignificant when they are compared to the development of the existing works.

From the many terms of works which have been found, it has seemingly been concluded that the one making *Marindineezen*, *Marindinesen*, *Mariende-anim*, *Maridi-neesch* or *Marind-anim* is the tribe or people of Marind as we know now, i.e. the native inhabitants of Irian or Papua who live the areas from Kondo in the South to Kali Bian in the North and Digul River estuary in the Northwest. However, in reality, there has been a misunderstanding on what is called as *Marind*, because *Marind* people themselves do not think that they are the only one called as *Marind*. This has lasted unconsciously for a long time and has been published so widely that we join the crowd in holding the opinion that what is called as “*Marind*” are as stated above.

In general, the so-called Marind used to refer to people with such physical characteristics as: having black skin and curly hair without limiting where they come from. These characteristic limits were so simple before they developed after cultural style which hold on these general and simple limits. This means the term Marind refer to only those physical characteristics. This is supported by some facts that we find that when Marind people have guests from PNG, they generally call them “*Marind people from overseas*” regardless from what tribe they come.

Marind tribe in Merauke consists of seven Marga groups, they are Gebze, Kaize, Ndiken, Samkakai, Mahuse, Balagaize, and Basik-basik. In order to resurface the local customary values, an institution was then established, i.e. Customary People Institution or *Lembaga Masyarakat Adat* (LMA) Marind Imbuti in 2000.

The establishment of customary institution Marind Imbuti in 2000 was expected to give a breath of fresh air for the community in terms of land utilization, particularly the immigrants. The customary people institution Marind Imbuti is expected to play the role of an intermediary in developing the region and facilitating the harmonization of positive law and the customary law which has long been followed by the customary law people in Merauke.

However, this expectation from the establishment of this Customary People Institution (LMA Marind Imbuti) seems still have a long way to go. People still have widely varied perceptions. This phenomenon is proven by the fact that people still have so many problems, yet when they escalate them to this customary institution, the settlements made have not been fair enough. The mostly reported problems since the establishment of customary institution Marind Imbuti have something to do with customary land, in this case the customary right land.

*Customary right is defined as the alliance with the land they occupy. It has a tight relationship, a relationship which comes from and of “religio-magical” nature. This then leads the alliance to obtain the right to control the land in question, to use the land, to collect the produce from the plants growing on it, and also to hunt the animals living thereon. This alliance right of land is called suzerainty right or customary right.*

An example of land problem that people encounter here is when an individual has a plot of vacant land and they even have had a land certificate as the authentic proof, they will still be questioned about how the land can be theirs, why did not it be processed/approved by the customary institution or when an individual wants to own a plot of vacant land they have to report it to the customary institution. Only after a survey has been conducted by chiefs of Margas on the land can a letter of release be issued as an evidence that the customary land has been handed over after the individual pay the administrative fee and economic price of the land.

Some release letters issued by the customary institution for some lands at certain people or business entity’s request have actually had land certificates issued by the Agrarian and Spatial Planning (ATR) Office. Such a circumstance has resulted in land disputes which requires verification both formally and materially. These problems are just a few of many more land issues between the Agrarian and Spatial Planning (ATR) Office and LMA (Customary People Institution).

In reference to the Law Number 5 year 1960 on Basic Regulations on Agrarian Principles (hereinafter UUPA 1960) in Article 19 paragraph 1, it is fairly clearly explained that “To ensure the law certainty by the government, registration shall be made over lands throughout the territory of the Republic of Indonesia in accordance with the provisions set forth in Government Regulation”.

The conflict between UUPA 1960 and many regulations in local governments, particularly those dealing with the customary institution Marind Imbuti makes the laws overlapping one another, resulting in losses to the community on one hand and regional development delay on the other. It is such a phenomenon which needs to be solved immediately to prevent the community from being confused which regulations they

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<sup>4</sup> Andreas Jefri Deda Dan Suriel Samuel Mofu, Masyarakat Hukum Adat Dan Hak Ulayat Di Provinsi Papua Barat Sebagai Orang Asli Papua Di Tinjau Dari Sisi Adat Dan Budaya; Sebuah Kajian Etnografi Kekinian, Jurnal Administrasi Publik, Vol. 11, No. 2, 2014, p.12

ought to follow. Additionally, it will also provide them with legal certainty which should be clear and acceptable to the society in general.

## II. RESEARCH METHOD

This research uses is normative and empirical or sociological law research approaches. The approaches are used because of the land dispute in customary law people who still implement and uphold their customary law in their daily life. The qualitative and quantitative data on customary law people's customary right land dispute are analyzed descriptively.

## III. DISCUSSION

### Land Dispute Settlement in Realizing the Harmonization of National Law and Customary Law in Merauke-Papua

The control over land by customary law people begins to be abandoned. This is because of the government policies which lack consideration of the development of control over land by customary law people.<sup>5</sup> Meanwhile, when land dispute, particularly the customary land, can be settled well, the objectives of law as suggested by Gustav Radbruch, i.e. justice, usefulness and legal certainty, would be achieved. However, it is quite often that the efforts of settling disputes which begins with proceeding and ends with enforcement of court decision or mediation agreement by mediators cannot be made as effective as expectedseringkali tidak berjalan mulus sebagaimana mestinya. This is because of the huge influence from both within and outside the customary people themselves, leading to an indication of how increasingly complex difference there are.

Every nation and civilization has its own unique characters. These characters are formed based on the history and cultural development of their people.<sup>6</sup> The same applies to the settlement of customary right land dispute, which are frequently disrupted on its way to settlement. In relation to the customary right land dispute of Marind Anim customary law people in Merauke Regency, this also happens. This happens to dispute settlement efforts both through litigation and non-litigation methods, in this case the settlement using customary mechanism which has been deeply rooted in the customary people's life from generation to generation in order to realize the harmonization of national and customary laws.

The disruptions are also the factors which have some effect on the effort of settling the dispute well and comprehensively. The disruptions of customary land dispute settlement in Indonesia also occur to the customary right land dispute of Marind Anim customary law people in Merauke Regency as can be seen in the following table:

**Table:** People's Response to Disruptions in the Construction of Customary Land Dispute Settlement of MHA  
n = 100

No.	Description	Respondent (f)	Percentage (%)
1.	Disrupted	67	67
2.	No disruptions	13	13
3.	Doubtful	20	20
	<b>Total</b>	<b>100</b>	<b>100</b>

Source of data: *Processed from primary data, 2018*

Based on these primary data above, it is clearly indicated that 20% of the respondents state they are doubtful and 13 percent of them say that there are no disruptions in the dispute settlement, and those suggesting that the dispute settlements are disrupted are 67 percents. This is justifiable since a specific community and area, in this case the customary law people, has *communal-magic-religious* characteristics. The table above confirms the theory of customs, particularly in relation to customary law people who follows the solidarity principle in their own structure of law. Therefore, any effort of settling disputes in customary law people should prioritize culture- and habitual custom-based procedure.<sup>7</sup> Meanwhile, the factors which disrupt the effort of applying the conflict settlement resolution are:

<sup>5</sup> Husen Alting, *Penguasaan Tanah Masyarakat Hukum Adat (Suatu Kajian Terhadap Masyarakat Hukum Adat Ternate)*, Vol. 11, No. 1, 2011, p. 87.

<sup>6</sup> Yanis Maladi, *Eksistensi Hukum Adat Dalam Konstitusi Negara Pasca Amandemen*, *Jurnal Mimbar Hukum*, Vol. 22, No. 3, 2010, p. 452

<sup>7</sup> Iman Sudiyat, *Asas-Asas Hukum Adat Pengantar*, Yogyakarta; Liberty, 1998. p. 37

**1. Internal Factors**

The internal factors are those coming from the conflicting/disputing parties and in the object of dispute/conflict, which include:

a. Temperament.

The disputing parties sometimes become one factor which disrupts the settlement process. This has something to do with their temperament. The temperament of customary people in the *musyawarah* (amicable deliberation) process has significant influence in the settlement process. This deliberation sometimes cannot run well as expected since one or both parties let their emotions get the better of them rather than using their logic in the deliberation and they opt to ignore the other party's opinion and selfishly think they are in the right. It is such an attitude which makes the deliberation inconvenient for no party is willing to accept the other's opinion. In the writer's opinion, it is better for the disputing parties to avoid using their temperament to allow the settlement and solution for the existing problems between the parties.

The emotion in oneself or in a group of people can be positive or negative. In general, people think emotion as something negative. Thus, when dealing with a conflict, it is always the case that the emotion would be managed to be minimized or restrained. However, The conflict resolution theory says otherwise, i.e. the conflicting parties' emotions should be awakened. This is done in order to find out to what extent the conflict influence is psychologically. After discovering the emotional rate of the parties, the initiator or mediator follows up the positive emotion to accelerate the settlement process. The negative emotion, on the other hand, is constructed to change it into positive one. When the negative emotion can be constructed into positive one, it will multiply the strength in settling the conflict, as compared to the originally positive emotion. However, when this negative emotion cannot be constructed into positive one, it will disrupt the effort of settling the conflict.

The emotions of the parties, particularly MHA and their sympathizers in the effort of customary right land dispute settlement of Marind Anim customary law people have significant effect on its legal process, be it litigation or *non litigation* (mediation). In building the communication, one or more parties sometimes refuse to listen to what the other party has to say since they think they are in the right. When people let emotion gets the better of them, it is highly likely that they will find a deadlock. This is where certain techniques come in to manage the emotions to form a constructive emotion which can contribute to the effort of solving conflicts.

b. Education

Sometimes, the education level of customary people also becomes the disrupting factor. Based on the research results, it is found that most respondents (customary people) which are a party to the dispute have relatively low education level. Due to this, they often find it hard to understand the focus of dispute under deliberation and this makes the dispute even more complicated to be resolved.

The education level of customary people, in general as taken from the respondent sample which is considered as the representation of Marind Anim customary law people, can be seen in the following table:

**Table: 23** Education Level of MHA Marind Anim Involved in Dispute

n = 100

No.	Education	Respondent (f)	Percentage (%)
1.	Uneducated	35	35
2.	Failed at Elementary School	21	21
3.	Graduated from Elementary School	22	22
4.	Junior/Senior High School	14	14
5.	Associate/Bachelor	8	8
	<b>Total</b>	<b>50</b>	<b>100</b>

Source of data: *Processed from primary data, 2018*

Based on the table above, it can be seen that most of the respondents are uneducated (35 percent), 21 percent failed to pass elementary school, 22 and 14 percents graduated from elementary and junior/senior high schools respectively. Meanwhile, only 8 percent have completed their associate and bachelor degrees. However, these respondents are those who have been in touch with government institutions or descendants of MHA.

With the rapid development and advancement on the part of the world, education inevitably gives some influence the life of people *within the core customary area*. Currently, the Customary Leaders give their people freedom to study formally because it helps them develop themselves and maintain their traditional rights. They are fully aware that the current era requires the people in customary community to adapt in some matters.

It is worth-noting that due to the fact that most customary law people have very low or even never have formal education, they frequently have miscommunication in understanding the set of dispute settlement procedure. It is often the case that the community only hear some information from unreliable sources, yet they

believe in it, leading to their misleading belief and stubbornness when others try to enlighten them. It is such a condition which makes the conflict more complicated for settlement.

c. Support of Customary Institution

The supporting factor which comes not from the government is the involvement of customary institution in exercising and advocating the customary people's rights. The very existence of this customary institution is highly urgent since it has its own tasks and functions in the customary people. Many disputes occurring within the customary people are settled through the customary institution.

This research finds that in the customary people community in the research site a customary institution is still there and exists to perform their tasks and functions in the society. Its existence indicates that the constitutional requirement to be a customary people community is fulfilled. This finding shows that customary people community and its institutional structure are an integral part. The fulfillment of criteria required in UUPA on behalf of the constitution has been the basic norm that Marind Anim customary community in Merauke Regency is still intact, thus their traditional rights shall continue to exist to be implemented.

## 2. External Factors

External factors are those factors coming from neither the subject or object of dispute. These external factors have significant effect on the success of customary right land dispute settlement of Marind Anim customary law people, for the dispute has developed further that it fuses with other problems, resulting in the increasingly complicated dispute to solve. The external factors which influence the dispute settlement are:

a. Culture.

Culture is highly upheld by Marind Anim customary law people, because for them culture or customs is their way of life as a communal, religious and magic society. This *communal-religious* and *magic* characteristic leads them to be fanatic and relatively selfishly when it comes to the understanding of what they obtain in their life.

Culture becomes a disrupting factor in the dispute settlement, Particularly the customary right land dispute of Marind Anim customary law people, due to the excessive fanaticism and selfishness of parties to a demand. This excessiveness gets the better of the parties' willingness to solve the dispute amicably and wisely.

b. Economic.

The parties' increased economic needs as a result of population growth and the increased economic value of land lead to the tendency of the parties to demand higher than their right actually is. In some cases, they demand for the ownership of a land with no clear and certain rightful basis. This also happens to the customary right land dispute of MHA Marind Anim, where several people who initially have accepted the court and mediation decisions, yet for being influenced by irresponsible parties and worsened by their low education level and IT master, then reject and even convince others to demand with no certain and clear rightful basis.

Economic factor will of course be interesting for certain individuals who wish to obtain some benefits to provoke the customary law people to demand their rights. This is undeniable since economic factor is tightly related to the survival of human being.

c. Politic.

Political factors cannot be deemed as something ordinary in any moment, including in dispute settlement. The political role that a group or region plays will have significant impact on the ongoing dispute settlement. The government as the holder of power as the executive body cannot separate itself from the political stand they hold. Thus, in administering the during its tenure they will keep on trying to find the safe and convenient place. It is therefore reasonable that in the settlement of customary right land dispute of MHA Marind Anim the government will prefer to play safe. On one hand, the government gives more room for Marind Anim customary law people in terms of their customary right land, yet on the other they try to make the customary institution which has been established to serve as a means to control the customary right secretly.

d. Social

Social factor is the structure comprised of many communal relationships in certain positions based on a value and norm system applicable to a group of society within certain period of time. This social factor is tightly related to the relationship built well between individuals, groups and families. The built interaction in social factor include social interaction and relationship.

The social interactions and relationships built in customary law people are high. They live in peace and harmony with their specific unifying symbols as a *communal-religious-magic* community. It is through these strong social interactions and relationships that their brotherhood becomes stronger, hence when one of their

members experiences calamity or holds a reception, even without being asked the other members will certainly come to help.

The social factors in a dispute have significant effect on dispute settlement. The influence of social factors on a dispute can take the form of exaggerated suspicion to any plan of settlement to be applied, social status difference which tends to ignore others, tendency to support or challenge the settlement process being implemented due to the their sense of solidarity towards their group or family without having to know whether it is true or not, and the suicidal attitude in fighting for something due to unbalanced economic pressure and so forth.

#### **IV. CONCLUSION**

The land dispute settlement in realizing the harmonization of national and customary laws in Merauke-Papua is still disrupted by influences of many social factors, resulting in frequent obstacles in the way of customary right land dispute settlement of MHA Marind Anim. Therefore, these social obstacles can be dealt with by studying further and exploring the social interactions and relationships which have been built within Marind Anim customary law people which are related to customary land.

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