

An Analysis of Legal Considerations of Judicial Decisions on Customary Land Disputes: A Comparison of Indonesia and Africa

Safrin Salam

Universitas Muhammadiyah Buton, Indonesia

safrinjuju@gmail.com

La Gurusi

Universitas Muhammadiyah Buton, Indonesia

lagurusi7@gmail.com

La Ode Muhammad Karim, Indonesia

Universitas Muhammadiyah Buton

muhqarim@gmail.com

Cynthia C. Izu

Afe Babalola University, Nigeria

izu.cc@achievers.edu.ng

Supriyanto

Universitas Muhammadiyah Buton, Indonesia

ttnsupriyanto@gmail.com

Rasmala Dewi

Universitas Muhammadiyah Buton, Indonesia

rasmala.dewi08@yahoo.com

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ABSTRACT

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Purpose of the Study: This research aims to analyze judges' legal considerations in adjudicating Decision No. 20/pdt/2021/PTKDI as well as to find the implications of legal changes on customary land regulations in Kondowa Village, Buton Regency, Southeast Sulawesi Province, Indonesia.

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Methodology: This research employed the normative juridical method with the statute approach, the case approach, and the conceptual approach. The data were sourced from primary data consisting of primary legal materials, secondary legal materials, and tertiary legal materials.

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Corresponding

Author: Safrin Salam,
Safrinjuju@gmail.com

Results: In Decision No. 20/pdt/2021/PTKDI, judges gave legal considerations of the decision based on inapplicable regulations. They ignored the existence of customary laws from the Kampirina Customary Institution. There are different perspectives on the indigenous rights concept as well as the legality of registering customary land. Apart from that, there are different interpretations on the Kampirina Customary Institution's legality which is based on the Regional Regulation of Buton Regency No. 4 of 2015 on Customary Institutions and Regulation of the Ministry of Internal Affairs No. 52 of 2014 on the Guidelines to Acknowledging and Protecting Indigenous Societies. The legal implication of Decision No. 20/pdt/2021/PTKDI includes changes in the customary law on the regulations regarding customary land as well as the validity of indigenous rights from the Kampirina Customary Institution.

Applications of this Study: This research can be applied by giving insight into judges' logical dynamics in creating logical legal considerations according to the applicable regulations.

Novelty/Originality of this Study: This research offers novelty as judges' legal considerations were analyzed using the customary law as well as the justice awareness theory, the reality theory, and the decision theory that apply in the customary law. This research yielded an analysis of judges' legal considerations based on the customary law and the positive law that creates a sense of justice for indigenous people.

Keywords: Judicial Decision, Customary Land, Customary Law, Legal Reasoning, Indonesia.

ABSTRAK

Tujuan Penelitian: Penelitian ini bertujuan untuk menganalisis pertimbangan hukum hakim dalam mengadili Putusan No. 20/pdt/2021/PTKDI serta menemukan implikasi perubahan hukum terhadap peraturan pertanahan adat di Desa Kondowa, Kabupaten Buton, Provinsi Sulawesi Tenggara, Indonesia.

Metodologi: Penelitian ini menggunakan metode yuridis normatif dengan pendekatan perundang-undangan, pendekatan kasus, dan pendekatan konseptual. Data bersumber dari data primer yang terdiri dari bahan hukum primer, bahan hukum sekunder, dan bahan hukum tersier.

Hasil: Dalam Putusan No. 20/pdt/2021/PTKDI, hakim memberikan pertimbangan hukum atas putusan tersebut berdasarkan peraturan perundang-undangan yang tidak berlaku. Hakim mengabaikan keberadaan hukum adat dari Lembaga Adat Kampirina. Terdapat

perbedaan perspektif mengenai konsep hak ulayat serta legalitas pendaftaran tanah adat. Selain itu, terdapat perbedaan penafsiran mengenai legalitas Lembaga Adat Kampirina yang didasarkan pada Peraturan Daerah Kabupaten Buton No. 4 Tahun 2015 tentang Lembaga Adat dan Peraturan Menteri Dalam Negeri No. 52 Tahun 2014 tentang Pedoman Pengakuan dan Perlindungan Masyarakat Hukum Adat. Implikasi hukum dari Putusan No. 20/pdt/2021/PTKDI antara lain perubahan hukum adat terkait pengaturan tanah adat serta keabsahan hak ulayat Lembaga Adat Kampirina.

Aplikasi Penelitian: Penelitian ini dapat diaplikasikan dengan memberikan wawasan mengenai dinamika logika hakim dalam merumuskan pertimbangan hukum yang logis sesuai dengan ketentuan yang berlaku.

Kebaruan/Keaslian Penelitian: Penelitian ini menawarkan kebaruan karena pertimbangan hukum hakim dianalisis menggunakan hukum adat serta teori kesadaran keadilan, teori realitas, dan teori putusan yang berlaku dalam hukum adat. Penelitian ini menghasilkan analisis pertimbangan hukum hakim berdasarkan hukum adat dan hukum positif yang menciptakan rasa keadilan bagi masyarakat adat.

Kata Kunci: Putusan Pengadilan, Tanah Adat, Hukum Adat, Penalaran Hukum, Indonesia.

INTRODUCTION

Custom is a term that indicates customs, habits, and traditions that are often linked to customary practices and community identity. In the context of land, customary land is that which is regulated by customary law as well as customs and traditions (Arizona, 2023; Davidson & Henley, 2007). The customary land rights are often unwritten and are based on traditional practices, making them difficult to prove in the formal legal system (Bola, 2017). On the other hand, the Indonesian government has made efforts to formalize the rights of customary land to provide legal certainty.

This effort includes an acknowledgement of indigenous communities' authority and the granting of their rights through state administrative decisions (Simarmata, 2019), one of which is through the regulation on the existence of indigenous communities in the stipulation of Article 18 B clause (2) of the 1945 Constitution. This Indonesian Constitution shows the acknowledgement of indigenous communities as autonomous traditional societies who have

traditional rights, cultural rights, historical rights, and their own governmental authority (Widjaatmaja, Dewi, Putra, Suyatna, & Westra, 2023).

Legal regulations on the existence of indigenous communities and traditional rights in Indonesia show that this country guarantees the legal rights of its indigenous communities. From another aspect, the legal acknowledgement and protection of the existence of indigenous communities can be reviewed in judicial decisions on customary land disputes that have been brought to court. In the theoretical context, these judicial decisions should create social orderliness, especially for indigenous communities.

Even though Gustav Raadbruch perceives that there are three objectives of law, namely legal certainty, legal benefit, and legal justice, the estuary of these legal objectives is the existence of the Rule of Law principle. In essence, legal objectives and legal principles do not counter each other but they work hand-in-hand (simultaneously) in achieving the legal objectives (Rasyid, 2019). Judges have a great role in giving disputing societal members in court a sense of justice. Judges act as lawmakers as well as law enforcers. If no laws regulate a certain case, judges can make new laws by considering their implications in the future. On the contrary, in the existence of precedents, judges will obey them with full obedience so that the law stays consistent and predictable (Davidson & Henley, 2007).

Judges are limited by strict and authorized regulations that were determined in precedent cases. In cases where there are no firm regulations, they depend on common rationing on the best results based on the facts of the problem as well as the moral and practical goals in making the legal decision (Sherwin, 2023). The decision-making process involves a series of complex factors, such as consideration of how the judicial appointment is carried out, the characteristics of the disputing parties, institutional norms, as well as strategic behavior that judges follow in obtaining the results that they want (Alarie & Green, 2017).

In making these decisions, judges are influenced by various extra-legal factors, especially in difficult cases, where there is a rather large room for judicial wisdom and the decisions are influenced by various extra-legal factors (Smekal & Vyhnánek, 2020). Therefore, judicial decisions must follow certain principles, such as legal supremacy, judicial independence, impartiality, and justice. These principles guarantee that decisions are made without bias and are based on legal standards (Andrews, 2018; Shetreet, 2013). From the legal implication aspect, judicial decisions create legal uncertainty as in the first level (District Court) the party of the Customary Institution was given victory but at the second level (High Court)

the party of the community was given victory in the customary land case as seen in Decision No. 20/PDT/2021/PTKDI.

This research focuses on analyzing judges' legal considerations in making decisions on customary land cases based on Decision No. 20/PDT/2021/PTKDI. Previous research which analyzed a relevant theme to this research's topic was written by Bola (2017), which discussed the legality of rights over customary land in Indonesia as well as challenges in acknowledging the rights over unregistered customary land in the national land system. Another research was conducted by Simarmata (2019), which discussed customary laws' existence in Indonesia in the context of regulations on customary rights. Then, Davidson and Henley (2007) analyzed how customary traditions are used in post-colonial Indonesian politics and influence land policies while often neglecting the rights of customary communities. Next, Widjaatmaja et al. (2023) analyzed how the Indonesian administrative law tries to accommodate the rights of customary communities but is hindered by differences in the applicable customary laws. After that, Swu and Roy (2025) illustrated the shift in communal land rights to private land rights in Naga society that can trigger land disputes, especially related to customary rights. Lastly, the relevant previous research was conducted by Sembiring, which uncovered a disalignment between the application of customary laws and the state's formal laws in managing customary rights, leading to a lack of clarity in the acknowledgement of customary communities' rights over the existing land (Sembiring, 2017).

Different from this research which highlights how customary laws are acknowledged through local and national legal products, previous research articles tend to emphasize legal uncertainty on the rights over unregistered customary land. Therefore, this research offers novelty as it analyzes the interaction between the customary law and the formal law in Indonesia as well as compares them with similar cases in African countries. This is different from previous research articles which focused more on the normative acknowledgement of customary laws. This research profoundly analyzes concrete legal decisions, especially Decision No. 20/PDT/2021/PTKDI, which reflects legal uncertainty for customary societies. Another aspect of this paper's novelty is that it uses a comparison approach, where the authors compared the legal decisions of judges in African countries with those in Indonesia. Thus, this paper provides a great contribution in providing insight into global challenges related to the acknowledgement of customary communities' land rights.

Then, this research also compares customary land disputes in Africa. This comparison encompasses District Court Decisions of African countries and regions, such as the Decision of the Nigerian Supreme Court No. SC. 204/2015 (Adewunmi vs. Obatomi), the Decision of the High Court of Ekiti State Suit No. HCT/33/2018 (Olatunji vs. Ijeoma), the Decision of the Oyo State Suit No. OY/45/2019 (Adeoye vs. Adigun), and the Decision of the Rivers State Suit No. RSH/57/2020 (Chukwu vs. Nwankwo). Apart from the court decisions of states in many African countries, customary land is regarded as an integral part of customary communities' socio-cultural identity and the rights to this land are often left unrecorded in the countries' formal agrarian system. This leads to legal uncertainty which often triggers customary land disputes. Customary communities in Africa are often faced with the issue of rights acknowledgement over their land that are often neglected by governmental policies that tend to focus on formal land and modernization (Bola, 2017; Simarmata, 2019).

Then, this research offers some advantages as follows: *first*, this research not only analyzes the Indonesian customary law but also provides a comparison with its practice in some African countries which have diverse customary laws. This approach is rarely found in Indonesian literary materials on law. Then, this research focuses on judicial considerations in deciding upon customary land disputes. *Second*, this research provides a detailed description of how judicial legal considerations are influenced by local values, the national law, and the justice principle as well as how this is practiced in two different legal systems. *Third*, this research provides a contribution towards the development of the national legal system by suggesting that the national law should better accommodate local wisdom and the principles of substantial justice as reflected in the judicial considerations in two jurisdictions.

In general, the land system in Africa can be categorized into two types, namely the system that is regulated by state law and that which is regulated by customary law. Many African countries, such as Uganda, Kenya, and Tanzania, adopt the dual legal system where the state law and customary law function in a parallel manner. However, in many cases, the state law does not fully acknowledge the customary law; thus, the land that indigenous communities manage in a communal manner is not legally acknowledged in the formal agrarian system (Davidson & Henley, 2007). This heightens the complexity in resolving customary land disputes as customary land is often left unrecorded in the state land registration, leading to a lack of clarity in the land's ownership status and usage rights.

The main issue that leads to customary land disputes in Africa is the state law's neglect towards customary laws. Many African governments prioritize more centered land policies, ignoring the land management traditions of indigenous communities. For instance, in Uganda, indigenous communities often lack valid legal documents for their land, rendering them more vulnerable towards claims by third parties, such as companies and the government (Smekal & Vyhnánek, 2020). Large-scale projects, such as mining and commercial plantations, often utilize political and economic power to gain ownership over customary lands that have been managed by local communities for centuries without providing adequate compensation and without acknowledging their customary rights (Rasyid, 2019).

Then, this research also compared legal decisions in customary land disputes as described by Rasyid (2019), which highlights the dynamics of the application of customary laws in court. However, this research specifically discusses Decision No. 20/PDT/2021/PTKDI and more profoundly analyzes how a lack of legal certainty can be reflected in judicial considerations that neglect the existence of customary laws regulated in regional regulations. Apart from that, this research also offers a new perspective in understanding the interaction between customary law and positive law that were not commonly discussed in previous research articles.

This decision was a legal effort proposed by the Defendant (local society) who carried out a legal opposition towards the Decision of the District Court No. 12/Pdt.G/2020/PN Psw. Then, this research aims to find a *rasio desidendi* (judges' legal considerations) in making decisions on customary land disputes.

Therefore, the objectives of this research are: (1) to analyze the *rasio desidendi* that judges use in this customary land dispute by focusing on how judges consider the customary law in making the Decision; (2) to compare the application of the customary law and the positive law as well as explain how judicial considerations reflect the influence applicable regulations have on the acknowledgement of customary land; and (3) to present the legal implications of this decision on the regulation of customary land in Kondowa Village, Buton Regency, Southeast Sulawesi Province, Indonesia as well as their impacts on the sustainability of customary land management in the future.

It is hoped that this research may provide a contribution to developing the understanding of how judges' legal considerations may create social order and justice in customary land disputes. This research not only enriches the literature on customary law but also provides

practical recommendations for the development of better policies on customary land management in Indonesia. Therefore, the problems of this research are: (1) What are judges' legal considerations in deciding on the case in Decision No. 20/PDT/2021/PTKDI related to customary land? And what are the forms of legal change implications of the customary land regulation in Kondowa Village after Decision No. 20/PDT/2021/PTKDI?

RESEARCH METHOD

This was normative legal research which applied the normative juridical research method (Marzuki, 2005). This study employed the statue approach, the case approach, and the conceptual approach to discover and analyze various legal concepts that are relevant to customary land disputes, such as the customary right concept, customary laws, as well as the authority of customary institutions (Irwansyah, 2020). These concepts were analyzed to understand their application in judges' legal considerations as well as the interaction between the applicable positive law and customary law (Md, 2013).

In this research, the data were sourced from primary data sources consisting of primary legal materials, i.e., the Regulation of the Governor of Southeast Sulawesi No. 56 on the Guidelines to Facilitating Community Organizations in the Cultural Sector, Palaces, and Customary Institutions in Preserving and Developing Regional Cultures in Southeast Sulawesi Province; the Regional Regulation of the Buton Governor No. 4 of 2015 on Customary Institutions; the Regulation of the Minister of Spatial and Agrarian Affairs/the National Land Agency No. 14 of 2024 on the Establishment of Land Administration and the Registration of Indigenous Communities' Customary Rights; the Regulation of the Minister of Spatial and Agrarian Affairs/the National Land Agency No. 10 of 2016 on the Guidelines to Determining Communal Rights Over the Land of Indigenous Communities and Communities Located in Certain Territories; and Decision No. 20/PDT/2021/PTKDI.

Then, the authors also utilized secondary legal materials, i.e., legal articles, papers, and reports related to the research topic and tertiary legal materials such as legal dictionaries and legal encyclopedia that support the resolution of this research. This research's source of data was Decision No. 20/PDT/2021/PTKDI, especially the legal consideration of judges in making decisions. Then, the data were qualitatively analyzed using content analysis to find the meaning illustrated in the judicial decision (Soekanto & Mamudji, 2012) as well as identify the themes and patterns related to the application of legal concepts in this decision. Then, the authors also

applied the philosophical analysis to analyze how judicial decisions reflect the justice values in the customary law and positive law contexts. With this approach, not only does the research provide a profound analysis of judges' judicial considerations but also explores how the customary law is applied in the social reality of indigenous communities.

RESULTS & DISCUSSION

1. Analysis of Judges' Legal Considerations in Adjudicating Decision No. 20/PDT/2021/PTKDI and Judicial Decisions in Africa

In Decision No. 20/PDT/2021/PTKDI, the judicial assembly did not find any evidence that the disputed land was customary land from the Kampirina Kondowa indigenous community, except evidence in the form of a Kampirina customary land statement letter that was issued by the Chief of the Kondowa Village dated April 9th, 1973 which was validated by the Head of the District. However, in other legal considerations, it is stated that the evidence of this letter was a product from customary figures without carrying out an identification on the indigenous territory as well as the boundaries of the customary land by a committee consisting of related customary figures, experts, and institutions that are announced to the public. Thus, it is known that there are individual rights above it that are determined by the Mayor/Regent and are registered as customary land. Thus, according to the judicial assembly, as evidence, the letter is too premature to determine that a particular place is a customary land.

Other reasons include that the regional government has never issued an ownership status determination/Kampirina customary land over the disputed land as an auspice for the protection and validity of customary rights and that there are already many individual ownership right certificates over the disputed land. Another consideration is that the Plaintiff has not registered the customary land as legally, it does not exist as Kampirina customary land. According to the legal assembly of judges, the Regional Regulation of the Buton Regency No. 4 of 2015 applies generally to all customary institutions. This Regional Regulation does not regulate the Kampirina Customary Institution and the Customary Institution as regulated in Article 1 clause (9) of the Regional Regulation No. 4 of 2015. Therefore, according to the judicial assembly, this Regional Regulation regulates customary institutions as societal organizations rather than owners of customary land rights. Apart from that, there is no clarity on the status of the land as a dispute object, whether that land as a dispute object is owned by the Kampirina Sara Kondowo

indigenous community, is an asset of the Kondowa Village Customary Institution, or is owned by the Plaintiff.

From the legal consideration perspective, some considerations in Nigeria have the same perspective in acknowledging the rights of indigenous communities in their decisions. Some of the decisions are as follows:

a. The Decision of the Nigerian Supreme Court SC. 204/2015 (Adewunmi vs. Obatomi)

This decision regards a dispute between two parties on customary land ownership that is managed by indigenous communities. The first party claims personal ownership over the land that has been given land certificates by the government, while the second party claims rights over that land based on customary law. Results of the Decision of the Nigerian Supreme Court acknowledge that even though a land certificate from the government exists, the rights for customary land that is managed by indigenous communities are still acknowledged. This decision firmly states that customary rights that are regulated in customary law cannot be neglected only due to the existence of a land certificate issued by the government. The legal implication of this decision is that it strengthens the position of customary law in the context of land ownership, even though there are formal regulations that govern land ownership. This provides legal protection for indigenous communities in preserving their rights to land.

b. The Decision of the High Court of Ekiti State Suit No. HCT/33/2018 (Olatunji vs. Ijeoma)

This decision firmly states that customary land cannot simply be shifted without approval from authorized customary institutions. It highlights the importance of customary land management according to local traditions and habits.

c. The Decision of the Oyo State Suit No. OY/45/2019 (Adeoye vs. Adigun)

The court decides that even though land certificates from the government exist, there are still acknowledgement over the rights for customary land that are inherited through traditions. Indigenous communities' customary rights cannot be nullified by government-issued land certificates. This decision states that indigenous communities' customary rights must be respected even though there are regulations that govern land ownership. This shows the importance of harmonization between customary law and positive law.

d. The Decision of the Rivers State Suit No. RSH/57/2020 (Chukwu vs. Nwankwo)

The court firmly states that the rights over customary land must be proven through the testimony of witnesses who know about the local traditions added with the decision of the authorized customary institution. The rights for customary land are still respected even amid the existence of opposing courtly decisions. This decision may strengthen the role of customary institutions in resolving land disputes and state that the evidence from customary witnesses' testimonies is the key in deciding upon customary land disputes. This shows the importance of an acknowledgement of customary procedures in the Nigerian legal system.

The court decisions in Nigeria on customary land disputes show a strong acknowledgement of indigenous communities' customary rights. Even though there are positive legal developments, they acknowledge the rights of customary land that have been inherited and managed by indigenous communities for many years and still respect them.

A similar issue has also happened in Kenya. One of the main considerations of Kenyan judges in resolving customary land disputes is the validity of land ownership evidence. Kenyan indigenous communities often do not have valid formal evidence of their land ownership rights in the state's formal land system. In many cases, judges must make a decision based on the state's legal principles that prioritize written documents, such as valid land certificates or land registration evidence.

For instance, in a customary land dispute case in Rift Valley territory, indigenous communities who have managed their land for many years often do not have written evidence of their land ownership rights. This makes judges prioritize ownership based on valid land registration evidence according to the state law, even though indigenous communities deem that they have collective ownership rights over the land that has been applicable for many centuries (Alarie & Green, 2017).

Apart from that, in many cases, Kenyan judges' judicial considerations are encouraged by governmental policies that tend to support land usage for economic development interests. Customary land disputes involving the shifts in land tenure for mining projects, infrastructure development, and plantation projects often trigger tension between indigenous communities' rights and state development interests. In this situation, Kenyan judges are often faced with a dilemma between protecting indigenous communities' rights based on customary law and protecting developmental policies regulated by the government. For instance, in a case

involving the shift in land tenure by plantation companies, judges must consider whether indigenous communities' claims over that land can validly be proven according to the state law as well as whether or not this decision will support more extensive developmental interests, such as creating job opportunities and economic development (Shetreet, 2013).

However, even though Kenyan judges are expected to consider the principles of social justice and protection of indigenous communities' rights, in reality, many decisions favor the acknowledgement of individual ownership and formal land registration. This is reflected in several court decisions that tend to ignore customary laws' communal principles and emphasize the state's land registration system that is deemed clearer and more valid (Rasyid, 2019). The negligence of indigenous communities' collective rights often ends with injustice, where these communities lose their rights to the land that they have managed for generations.

The comparison of customary land ownership issues in Kenya with those in Indonesia, especially Case No. 20/PDT/2021/PTKDI, can be analyzed using the theory of the creation of customary laws, namely the reality theory and the decision theory that illustrate the process of the customary law's birth. This is crucial to assess the existence of customary laws, where in Decision No. 20/PDT/2021/PTKDI, the customary laws tend to be perceived as static laws. Thus, in this research, the authors provided a review of the process of the customary law's birth in *a quo* cases.

To review the judicial considerations in the decision regarding customary land disputes, one must understand the "customary rights" concept and its existence. According to Ter Haar, "customary rights" are "*Beschikkingrescht*", which are communities' legal alliance rights. They are the collective rather than individual rights that a person or a family may have (Koentjaraningrat, 1975). Then, Simorangkir et al. in Hadikusuma (2003) state that customary rights are rights originating from legal alliance/communities to use/manage land around their villages/places of residence for the interest of that legal alliance or the people who wish to tend to that land by giving part of its proceeds to society (Hadikusuma, 2003). Therefore, customary rights are indigenous communities' rights over land, water, and everything therein in their territories in the form of the authority to use and manage all things related to land, water, as well as their territories' environment under the rule of the customary chief. Further, Vollenhoven (1918) explains six characteristics of customary rights:

- a. Only legal alliances and their members can use the land and bushes in their area;

- b. Those other than these alliances' members can use this right under the approval of these legal alliances;
- c. In using these rights, non-members must pay *recognitie*;
- d. Legal alliances are responsible for certain crimes that occur in the environment of their territory if the person who committed that crime cannot be sued;
- e. Legal alliances cannot shift their rights to anyone else forever; and
- f. Legal alliances have the right to become involved in the land that they have tended to, such as in the case of plantation division or trade.

Therefore, "*Beschikkingrescht*" customary rights are the rights of legal communities in exerting power over the land in their area. They have the authority and capability to manage and utilize their utilization/management for the legal communities' interests. These communities and their land have an everlasting relationship (not isolated) as one unity that is inseparable from the legal alliance. Based on these characteristics, according to the law, these customary rights are a series of certain indigenous communities' authority and capability over their territories, consisting of the rights and responsibilities of certain indigenous communities in an area that is their customary territorial land. The aforementioned authority containing rights and responsibilities is the rights of certain indigenous communities in gaining benefits from these natural resources.

If that customary rights concept is linked to judges' legal considerations in Decision No. 20/PDT/2021/PTKDI, it is stated that the customary land statement letter is a product of customary figures that are validated by the Head of the District without any verification by certain parties. If linked to the *Beschikkingrescht* that is carried out and run by the Kampirina Customary Institution as an authority that is attached to this institution, this legal opinion is deemed wrong. Apart from that, from the juridical standpoint, the existence of the *Beschikkingrescht* obtains normative acknowledgement in Article 6 of the Regional Regulation of Buton Regency No. 4 of 2015 on Customary Institutions which regulates customary institutions. It has the job to:

- a. Manage customary rights and/or richness to increase society's advancement and level of life in a better direction;
- b. Resolve conflicts that involve customary cases and related habits so long as the resolution does not violate the applicable legal regulations.

Therefore, the customary land statement letter issued by the Kampirina Customary Institution is a valid legal product issued by the Kampirina Sara Kondowa Customary Institution. The validity of this land statement letter is a manifestation of the *Beschikkingrescht*'s implementation that is attached to the Kampirina Customary Institution's authority. Therefore, according to the law, the evidence in the form of the legal product's existence that is issued by a customary institution should be strong enough to decide upon the customary land dispute. Apart from that, in another legal consideration, it is stated that the regional government has never issued a determination of the ownership status/Kampirina Customary Land over the disputed land as a legal protection for the existence and validity of customary rights.

Article 3 of Law No. 5 of 1960 on Basic Agrarian Principles states:

“By considering those similar to this from indigenous communities and the rights similar to this from indigenous communities as long as they still exist, must be treated like so according to the national and stately interests that are based on unity and that dos not violate the law and regulations of a higher hierarchy”.

Up to now, the stipulations of Article 3 of the Law on Basic Agrarian Principles still do not have implementing regulations. When seeing the legal norms regulated in Article 3 of the Law on Basic Agrarian Principles, i.e., as long as they still exist, similar rights have basically existed, proven by the existence of the Kampirina customary land that has been regulated by the Kampirina Customary Institution according to the customary law from generation to generation. Thus, they must be acknowledged and protected by the state just as the legal stipulation is regulated in the stipulations of Article 3 of the Law on Basic Agrarian Principles (Santoso, 2017).

As the core of laws regulating agrarian affairs, the Law on Basic Agrarian Principles should become the legal guidelines for judicial assemblies in making considerations and decisions on customary land disputes (Shetreet, 2013). This is based on judges' legal considerations. This decision used the Regulation of the Minister of Agrarian Affairs/The Head of the National Land Agency No. 5 of 1999 on the Guidelines to Resolving Indigenous Communities' Customary Rights Issues (hereinafter called the RMAA/HNLA No. 5 of 1999) as the judges' legal basis in identifying and verifying customary rights in customary land while that regulation has been revoked and substituted with the Regulation of the of the Minister of Agrarian and Spatial Affairs/The Head of the National Land Agency No. 9 of 2015 on the

Guidelines to Determining Communal Rights for the Land of Indigenous People and Communities Living in a Certain Territory (hereinafter called the RMASA/HNLA No. 9 of 2015). This revocation has been firmly regulated in the stipulations of Article 18 which states:

“In the present time, this regulation starts to be applied. Regulation of the Minister of Agrarian Affairs/The Head of the National Land Agency No. 5 of 1999 on the Guidelines to Resolving Indigenous Communities’ Customary Rights Issues is revoked and deemed no longer applicable.”

Therefore, based on stipulations of RMASA/HNLA No. 9 of 2015, in making judicial considerations, judges must refer to RMASA/HNLA No. 9 of 2015 rather than the legal stipulations of the RMAA/HNLA No. 5 of 1999 whose legal application has been revoked. Therefore, it is deemed wrong for judges to utilize the RMAA/HNLA No. 5 of 1999 as a legal basis in identifying customary land in their legal considerations in an *a quo* case.

Next, in judges’ judicial considerations, they stated that the Regional Regulation of Buton Regency No. 4 of 2015 on Customary Institutions generally apply to all customary institutions. This law does not regulate the Kampirina Customary Institution or Customary Institutions. This legal consideration of judges was based on the Regulation of the Ministry of Internal Affairs No. 52 of 2014 on the Guidelines for Acknowledging and Protecting Indigenous Societies. According to these legal stipulations, indigenous communities are determined through the Decision of the Regional Head based on recommendations of the legal community committee.

This legal logic is highly inaccurate as the regulation on customary land as stipulated in Article 3 of the Law on Basic Agrarian Principles still does not yet have implementing regulations. Therefore, the judicial assembly must still refer to the stipulations of Article 3 of the Law on Basic Agrarian as a legal basis. Regarding the legal subject as regulated in the Regulation of the Ministry of Internal Affairs No. 52 of 2014 on the Guidelines to Acknowledging and Protecting Indigenous Societies, this regulation only governs indigenous communities as legal subjects. On the other hand, regulations on customary institutions as regulated in the Regional Regulation of Buton Regency No. 4 of 2015 on Customary Institutions show legal legitimacy on the state’s acknowledgement of indigenous societies. The decision’s considerations see the definition of customary institutions as stipulations of Article 1 point 10 of Regional Regulation No. 4 of 2015 which states:

“Customary Institutions are community organizations whose history or origin was to carry out preservation and development activities for cultures and customs were are formed during the Buton Sultanate’s governmental rule.”

This definition of customary institutions is not only grammatically interpreted as stipulations of Article 1 point 10. In legal literature, indigenous communities include *nagari*, ethnic groups, and villagers. Indigenous communities refer to a group of people that are bound by their customary law system as people of a common legal alliance due to residential (territorial) similarities as well as based on the line of descendants or familial ties (genealogical ties). According to Ter Haar, to know whether or not a certain group of people can be categorized as an indigenous community, they must at least fulfill the following elements:

- a. There is a group of people,
- b. Who are bound to certain regulations,
- c. Who have their own government, and
- d. Who have their own wealth, both material and immaterial.

Disputing groups can be qualified as a legal society. According to the customary law, the related group must have its indigenous rights as one of its basic rights. Therefore, if this theory is linked to the Kampirina Customary Institution, these elements have been substantially fulfilled. Even, its existence has juridically been acknowledged based on the Regional Regulation No. 4 of 2015 as illustrated in several specific Articles governing the position of function and authority (Article 3 clause (1), Article 4, Article 5, and Article 6). Apart from that, the Decision of the Pasarwajo District Court No. 12/Pdt.G/2020/PN Psw dated January 6th, 2020 acknowledges the legal position of the Kampirina Customary Institution as a party in the *a quo* case. Thus, the judges’ legal considerations in this case are incorrect and they violate the legal concept of indigenous communities.

Another legal consideration of that decision related to this issue is that the customary land has not been registered by the Plaintiff. Based on the law, the Kampirina customary land/indigenous land does not yet exist. This legal consideration of judges is very wrong as in the legal consideration, the customary land is equated with common land with personal tenure rights. This is ironic as the customary land concept that is attached to customary land rights contains a different meaning compared to individual tenure rights (Swu & Roy, 2025). These collective rights give indigenous communities power over a legal area or territory that they inherited from their ancestors from generation to generation (in this case, precise measure of

time from the mathematical perspective cannot be applied) (Azima, Sivapalan, Zaimah, Suhana, & Yusof, 2015; Bola, 2017). Customary land is communally-owned land that cannot and is prohibited from being registered under the name of one or several parties (Ayano, 2018; Umar & Nyanga, 2023). Therefore, it is highly inaccurate for the customary land to be registered by the Plaintiff, as in the previous explanation, customary land rights that are attached to customary land apply a communal concept. In other words, indigenous community members have common ownership over that land. Thus, it is impossible for that customary land to be registered under the name of individuals (Rato, 2016).

Then, the next legal consideration is that there are already many individual land tenure certificates on the disputed land. In this context, judges' judicial considerations directly generalize the existence of customary land as previous legal considerations that the lack of indigenous land registration is deemed the non-existence of that indigenous land. Conceptually, the customary land status is differentiated into two, namely (Sembiring, 2017):

- a. Land with customary rights (the land is jointly owned by all indigenous community members). In principle, customary rights land cannot be used by people outside of the alliance and they cannot harvest the plants and
- b. Individual ownership of land: With the strengthening of individual rights, customary rights will decrease. On the other hand, if individual rights decrease (are abandoned), the land will become customary rights land.

Therefore, the existence of issued certificates as referred to in judges' judicial considerations must juridically be analyzed whether the existence of these certificates are purely customary rights or are they individual rights based on customary law principles. This is to give a sense of justice to the Kampirina Customary Institution.

2. Implications of Legal Changes on Customary Land Regulations in Kondowa Village

Legal implications of Decision No. 20/PDT/2021/PTKDI on the regulation of customary land in Kondowa Village have great implications on the order of customary laws and regulations on customary land in Kondowa Village. The legal implications are as follows:

1. To obtain acknowledgement and protection, customary land in Kondowa Village must be registered based on the applicable legal stipulations;

2. Legal products issued by Kampirina Customary Institution cannot be used as they must go through the verification and validation processes as stipulated in RMAA/HNLA No. 5 of 1999; and
3. There is an overlap of validity (legality) on the existence of the Kampirina Customary Institution that is perceived from two perspectives, namely Regional Regulation of the Buton Governor No. 4 of 2015 on Customary Institutions and Regulation of the Ministry of Internal Affairs No. 52 of 2014 on the Guidelines to Acknowledging and Protecting Indigenous Societies.

These three legal implications lead to debates on the application of customary law among Kondowa villagers. If perceived from the reality theory and the decision theory, the customary law in Kondowa is acknowledged and respected by the local citizens. The reality theory shows that the customary law cannot only be explained using theories but it must be explained based on the existing reality. If judges find that society follows the customary regulations that are deemed valid and obligatory to be respected by societal members, those regulations are deemed an applicable law (Prakoso, 2019).

Therefore, the customary law is sourced from society's legal awareness. Cornelis Van Vollenhoven states that customary laws were born as results of cultural construction that are developed and respected by those who respect themselves and their communities (Vollenhoven, 1918). Therefore, the Kampirina Customary Institution as further regulated in the Regional Regulation of Buton Regency No. 4 of 2015 on Customary Institutions regulates that generally, legal norms provide many stipulations that regulate customary societies' legal awareness. Based on the reality theory, this shows the existence of customary laws that exist in indigenous societies. Therefore, the existence of customary laws and the regulations that exist in the Regional Regulation of Buton Regency No. 4 of 2015 should become guidelines for the judicial assembly in making decisions on customary land cases.

Likewise, the decision theory states that applicable customary laws can only be seen and known in the form of those legal officials' decisions. Therefore, judges' judicial considerations that ignore the results of legal products from the Kampirina Customary Institution show negligence in the existence of customary laws' existence that indigenous communities have (Prakoso, 2019).

This happens even though the negligence of indigenous communities' customary laws will bring great legal changes to the existence of customary law. Theoretically, it is stated that

the law cannot live without society as society consists of a group of human individuals and human beings are supporters of rights and obligations. In other words, human beings are legal subjects. The law lives as its supporters or subjects support it to live, work, and be used as well as respected to be implemented. The law will die if the legal subjects do not support it and they oppose it or violate its prohibitions and sanctions. A dead law is a dysfunctional law that does not benefit society.

Based on the theory of the birth of customary law, the reality theory and the decision theory in Decision No. 20/PDT/2021/PTKDI should comply with and follow the legal values that live in society. As stated by Geny, the law is imperfect as it can never be able to perfectly present the existing holistic reality in the expanse of social life (Tanya, Simanjuntak, & Hage, 2019). A case cannot only be perceived from the literal-juridical construction of the law. However, it must be based on the spirit of the law and the context of the case. These two things must be combined in the legal application and interpretation. The correct legal interpretation is a proportional combination between the spirit of the law and the context of the case (Tanya et al., 2019). In linking Geny's opinion and the judicial considerations in Decision No. 20/PDT/2021/PTKDI, judges should be able to interpret this case according to stipulations of Article 18 B clause (2) of the 1945 Constitution in the case context, namely customary land dispute that involves legal interests of the Kampirina Customary Institution.

CONCLUSION

In Decision No. 20/PDT/2021/PTKDI, judges were wrong in utilizing regulations that are no longer applicable and failing to acknowledge the customary law of the Kampirina Customary Institution. As a consequence, customary land that must ideally be acknowledged by Article 3 of the Law on Basic Agrarian Principles does not obtain appropriate legal protection. The decision of these judges in neglecting customary laws leads to legal uncertainty on customary land in Kondowa Village, where the status of customary land becomes unclear. This legal change disturbs the acknowledgement of customary land in Kondowa Village. Due to inappropriate regulations, it becomes difficult to acknowledge customary land that must be acknowledged as communal rights of indigenous communities. The revocation and amendment of regulations increases the lack of clarity surrounding the status of customary land, influencing the legitimacy of the Kampirina Customary Institution.

This research offers a crucial contribution to the development of the agrarian customary laws in Indonesia by emphasizing legal acknowledgement of customary land regulated by indigenous communities. This research also shows the importance of legal accordance between the customary law and the positive law, as well as how judges must be more careful in making decisions on customary land disputes by respecting existing traditional rights. This can strengthen the sustainability of customary laws in the Indonesian legal system.

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