

**THE IMPLEMENTATION OF CUSTOMARY COURT
WITHIN THE FRAMEWORK OF LAW NUMBER 21
OF 2001 CONCERNING SPECIAL AUTONOMY OF
THE PROVINCE OF PAPUA
(A Study on *Adat* People of Kampong Waena,
the District of Heram, Jayapura City)**

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Abstract: The *Adat* (customary) community in the province of Papua is of a diverse culture that respects and maintains *Adat* law. Under Law Number 21 of 2001 concerning Special Autonomy in the Province of Papua, an *Adat* community is defined as a group of native people of Papua who, since their birth, have been living in a particular territory, bound to, and compliant with a particular *Adat* law with solidarity upheld by the members of the community. This research seeks to analyse the legal tenets of the *Adat* court that the people of Waena have to abide by, how criminal offences are settled under an *Adat* court of Waena, and the impacts of the implementation of special autonomy in the *Adat* community of Waena within the scope of *Adat* law. This research employed an empirical-legal method, supported by primary and secondary data. Data were collected from in-depth interviews, observation, and documentation. The research results reveal that the locals of Waena uphold the *Adat* law passed from their ancestors, while also abiding by the state's law as the general law (unification).

The special autonomy in place in the community of Papua under Law Number 21 of 2001 reinforces the existence of *Adat* law and the role of an *Adat* court in resolving both private and criminal cases faced by the native people of Waena. The judiciary structure of the *Adat* community concerned consists of *Ondofolo/ondoafi* as the Chief Judge/chief of deliberation and *koshelo* in Kampong Waena as the members. Three pillars serve to govern the life of the people of *Adat* institution, churches, and the government of Kampong.

Keywords: *Law, Adat Court, Special Autonomy, Papua*

Introduction

Although it is unwritten, *Adat* peoples always respect their law, as it imposes sanctions as legal consequences representing complex standards of the outcomes of social justice living in the community. With its role in maintaining the connection between the spirits of the ancestors believed to have supernatural power and God, as well as maintaining the connection between humans and their natural environment, *Adat* law has a set of rules representing beliefs, principles, institutions, structures, and value that people are adherent to and develop at all time.

The term “*Adat* people” represents a group of individuals attached to their lineage from their ancestors rooted in a particular geographical area. These individuals develop their own beliefs, political ideology, social structure, economic systems, and traditions, as in line with the International Labour Organization (ILO) Number 169 of 1989 Article 1 (1.a) stating “*Tribal peoples in independent countries are those whose social, cultural, and economic conditions distinguish them from other sections of the national*

community"¹. *Adat* people—the native people—consist of a community of people whose ancestors were pioneers who found, resided in, and survived from the agricultural sources in a particular area. They live in a community and identify themselves as a unity distinguished by their lineage, tradition, language, law, and way of life. In essence, *Adat* peoples should not be associated with backwardness or incapability, but they are rather recognised as a community committed to upholding a tradition.

The existence of *Adat* peoples and their traditional rights must be respected and recognised because these rights are fundamental human rights, as emphasised in the Universal Declaration on Cultural Diversity.

Human rights, as defined by Albie Sachs, a legal expert from South Africa, encompass the rights to be equal to and different from others. That is, every person is entitled to the same right to freedom, independence, safety, and peace, while also having the right to identity, personality, and culture.²

The Province of Papua is home to cultural diversity, and its *Adat* people remain adherent to and uphold *Adat* law, passed down through generations from their ancestors. Every tribe of Papua holds customary rules and institutional frameworks which remain intact to date. This structure of *Adat* institutions plays a role as an *Adat* court assigned to settle private and criminal cases in the tribal community involving the members of the *Adat* community.

¹ Rahmad Syafa'ad, "Eksistensi Tata Hukum Daerah Yang Berbasis Pada Kearifan Lokal" (Tinjauan Kritis UU Otoda Dalam Konteks Pengakuan Hak-Hak Masyarakat Adat)" (Arena Hukum Majalah Fakultas Hukum Universitas Brawijaya, April 2001), 135.

² Judith Blau dan Alberto Moncada, *Teori Sosiologi Dan Hak Azasi Manusia: Dua Logika Satu Dunia, Dalam Bryan S. Turner, Teori Sosial Dari Klasik Sampai Postmodern* (Yogyakarta: Pustaka Pelajar, 2012), 826.

Historically, tribal leadership and structure of the communities, especially those in Papua during the New Order, were marginalised by the legal politics of the regional autonomy that was in place. In terms of the territorial rights of *Adat* communities, the government in the New Order enacted Law Number 5 of 1974 concerning Basic Principles on Administration in the Region. This law departed from the political direction of the New Order oriented on the following main challenges:³ First, how to rest assured to hold valid authority; second, how to maintain peace for development; third, how to rest assured to be a strong central government under the control of regions. To attain all these three aspects, the implementation of the use of authority was greater, wider, and stronger than freedom for subordinates through the implementation of a security approach. These three components gave soul to the provision in Law Number 5/1974, underlying the autonomy during the New Order that was more centralised and authoritarian.

Law Number 5 of 1974 did not govern village governments, but Law Number 5/1979 did. The latter did not view villages as a unity of law-abiding people, but they were rather seen as uniformed regions of the nation. Such uniformity caused damage systematically and structurally for the local institution of *Adat* peoples, raising social, economic, political, and cultural disadvantages, and also affecting the religious systems that have existed for long.⁴

³ E. Koswara, "Upaya Reformasi Perundang-Undangan Tentang Otonomi Daerah," dalam Seminar Nasional Sosialisasi RUU Otonomi Daerah Dan Aspirasi Publik, (Jakarta: Yayasan Pariba, 1999).

⁴ R. Yando Zakaria, "Kembalikan Kedaulatan Ulayat Masyarakat Adat," Wacana, Jurnal Ilmu Sosial Transformatif 2 (1999): 124–150.

The enactment of Law Number 5/1979 concerning Village Government (henceforth referred to as Law 5/1979) directly paralysed all traditional functions of the autonomy of *Adat* organisations. With this regulation, all socio-political structures at a rural level were forced to blend into one institution called *Lembaga Masyarakat Desa* (Rural Community Organisation/LMD) led by *lurah/a* village head under the supervision of the District Head and a Regent. A Village head is directly elected by the members of the rural community to take office for eight years, and not a few tribal leaders were appointed as village heads. Practically, a Village Head holds the responsibility under a District Head and a Regent, not under the community members as voters. This condition seems to raise the likelihood of political manipulation, where a Village Head serves as a tool that helps validate particular matters for the sake of political and economic interests. As a consequence, most village heads could not do anything when they were faced with the political and economic interests of the government intending to take control over natural resources in a particular area. Only those with personal integrity are bold enough to represent and fight for the rights of the members of the community against ambitious authorities.

Village and/or community of law-abiding people as part of what is specified in Law 5/1979 share similar provisions. Village social partnership not relevant to the structure of the village as outlined in Law 5/1979 must be amended through village regrouping, omitting the nature of the village itself. Villages now represent the lowest administration under the District Head since their existence has been modified into a centralised command.

The idea of Law 5/1979 concerning Villages (and Sub-District) forced regional governments in regions other than Java

and Madura to change the structure of the unity of *Adat* communities to fit the legislation. Regional governments revoked the unity of *Adat* peoples (*rechtsgemeenschap*) not using the term “village” as specified in the law, considering that the word “village” is like the word Nagari in Minangkabau, Huta, Sosor, and Lumban in Mandailing, Kuta in Karo, Jorong in West Sumatera, Negeri in North Sulawesi, Temukung in West Nusa Tenggara, and Nusa in East Nusa Tenggara, yo in Sentani Papua, and many more. Regional governments must consider village regrouping to realise the “villages of the new order”.

According to Law Number 5/1979, the following are the regions changed from a hamlet to a village: Kampong, Nagari, Temukung, Dusun, Marga, Huta, Sosor, Kuta, Lumban, Jorong, Nagari Gampong, and Yo. A village is only authorised to form its own administration, but not authorised to “take care of its own government”, rendering the rural communities no longer autonomous.⁵

The implication and configuration of legal politics of the regional governments during the new order on the existence of *Adat* peoples would be to create legal products which would often be oriented on the measures to accommodate the absolute position of the state as a central holder of policies, further creating the law that highlighted its positive-instrumentalist feature.

The policy of the government during the New Order has paralysed local wisdom, local institutions, and the rights of *Adat* peoples as the owners of the land. Abdon Nababan as the secretary *Aliansi Masyarakat Adat Nusantara* (the Alliance of *Adat*

⁵ Syafa'ad, “Eksistensi Tata Hukum Daerah Yang Berbasis Pada Kearifan Lokal” (Tinjauan Kritis UU Otoda Dalam Konteks Pengakuan Hak-Hak Masyarakat Adat),” 135, 143.

Communities in the Nusantara), commonly abbreviated as AMAN, said *“to strengthen the grip of military-colonialistic regimes as a threat to the people during the New Order, the autonomy for Adat communities in special regions are to be revoked following the enactment of Law regarding Political Control, including centralised government laws and laws concerning the “democracy of Pancasila” in terms of repressive floating mass. The idea of village governments across Java Island is systematically referred to as to replace all the indigenous governments in Indonesia. Thus, the intervention of the third phase that extremely eroded the social vitality of Adat communities was made by the government of the New Order.*⁶

The downfall of the New Order and the beginning of the reform era in 1998 seemed to have brought the wind of change for *Adat* communities. The vigour of reform sparked democratic ideas of changing centralised patterns that have so far positioned *Adat* peoples as marginalised individuals. To slow down the almost-unstoppable flow of development and investment that violates the rights of *Adat* people, those rights demand recognition.⁷

The desire of Indonesia for recognition, respect, and protection of the rights of *Adat* communities since the era of reform has been very strong, including the protection of cultural identity and the rights of *Adat* peoples, as marked by the second amendment to the 1945 Constitution of the Republic of Indonesia with the enactment of Article 18 B paragraph (2) stating *“The State shall recognize and respect, to be regulated by law, the monogeneity of societies with customary law along with their traditional rights for as long as they remain in existence and in agreement with societal*

⁶ ICRAF, Aliansi Masyarakat Adat Nusantara, and Forest People Programme, *Satu Yang Kami Tuntut: Pengakuan*, 2003, vi.

⁷ Mas Ahmad Santosa, *Good Governance Hukum Lingkungan* (Jakarta: ICEL, 2001), 100.

development and with the principle of the Unitary State of the Republic of Indonesia” and Article 28 I paragraph (3) stating “The cultural identities and rights of traditional communities are to be respected in conjunction with progressing times and civilization.” This Constitution serves as the constitutional juridical basis in the recognition of the existence of Adat communities. Other legislative products further followed as responses to Article 2, including Article 6 of Law Number 39/1999 concerning Human Rights paragraphs 1 and 2 stating “to recognise human rights, both differences and necessities of Adat peoples must be given attention and protected by the law, public, and government. The cultural identity of Adat peoples, including the rights to ulayat land are protected in line with progressing time”; Law Number 21/2001 concerning Special Autonomy for the Province of Papua; Law Number 32/2004 concerning the Regional Governments Article 2 paragraph (9) stating “The State shall recognize and respect the monogeneity of societies with customary law along with their traditional rights for as long as they remain in existence and in agreement with societal development and with the principle of the Unitary State of the Republic of Indonesia”; the Constitutional Court Decision Number 35/2013 concerning State’s Forests into Customary Forests, and Law Number 6/2014 concerning Villages.

Satjipto Rahardjo suggests that the Constitutional Court and other judiciary institutions accordingly enforce the mandate specified under Article 18B paragraph (2) of the 1945 Constitution for the purpose of safeguarding and maintaining the interests of Adat law.⁸ For a better understanding of the four constitutional juridical requirements of the recognition of the existence of Adat

⁸ Satjipto Rahardjo, “*Hukum Adat Dalam Kerangka Negara Kesatuan Republik Indonesia, Perspektif Sosiologi Hukum*,” (Jakarta: 2005), 55.

peoples by the state as referred to in Article 18B paragraph (2) of the 1945 Constitution, further definitions are given as follows:⁹

First, the phrase “*as long as they remain in existence*” should be defined as the condition where the people of *Adat* law must be respected and recognised by the state so long as *Adat* peoples and their traditional rights exist (having value systems, customary institutions, stakeholders, customary values, the members of *Adat* communities, and clear territories in which customary systems apply). That is, “the unity of the peoples of *Adat* law must be respected and recognised by the state” and currently those customary values are utilised to control the attitude of society. This practice is obvious in some customary tendencies in some regions such as “Lembang” in South Sulawesi, “Gampong” in Aceh, “Nagari” in Minangkabau, “Kampong” in the Province of South Kalimantan and the Province of Papua, and “Negeri” in the Province of Maluku.

Second, the phrase “*in conjunction with progressing time and civilization*” refers to the condition where social value is not against the system of customary value that governs an *Adat* law community (internal), while it is respected and recognised by all the members of the *Adat* community (external). Therefore, traditional values must be upheld, safeguarded, and respected by other members of the public when they are present in such a customary milieu. This condition may refer to an adage “*dimana bumi dipijak disitu langit dijunjung*” (When in Rome, do as the Romans do). For instance, the matrilineal system that the people of

⁹ Dardjo Sumardjono, “*Penjabaran Empat Persyaratan Yuridis Masyarakat Hukum Adat Dalam Peraturan Daerah dalam Inventarisasi Dan Perlindungan Hak Masyarakat Hukum Adat* (Komisi Nasional Hak Asasi Manusia; Mahkamah Konstitusi RI; Departemen Dalam Negeri RI, 2005), 93–95.

Minangkabau have adhered to is considered appropriate so long as this system does not contravene the norms of other communities. In a more specific example, a man from the tribe of Mandailing/North Sumatera must respect and follow the matrilineal system living in the system of Minangkabau when he proposes to a girl of Minangkabau.

Third, the phrase “with the principle of the Unitary State of the Republic of Indonesia” can be interpreted as “accepted or respected by all the citizens of Indonesia unless something contravenes this principle and the traditional value and jeopardises the unity of the state. Respecting and preserving the *Adat* value of traditional communities is, therefore, essential.

Fourth, the phrase “to be regulated by law” refers to “the unity of the people of *Adat* communities” which governs the monogeneity of the *Adat* community along with its traditional rights regulated by the positive law in Indonesia. Therefore, it must be further regulated under the following laws; Law concerning Regional Governments, Article 2 paragraph (9) (General Provisions) and Article 216 (concerning Villages), all regulating the existence of *Adat* peoples. These provisions imply that “(1) further regulatory provisions regarding villages are specified under Regional Regulations according to Government Regulation; (2) Regional Regulations must recognise and respect the rights, origin, and the traditions of villages.”

Those regulations should give room for expressions and access for *Adat* peoples to ensure that their role is revitalised. The enforcement of the special autonomy of Papua under Law Number 21/2001 seems to reinforce the existence of *Adat* law and the role of an *Adat* court in settling both private and criminal disputes. The recognition and the authority to settle disputes should involve the

Adat people of Papua, and this involvement should contribute to the foundation of the *Adat* court in the region.

The enforcement of judiciary power is performed by the judiciary institution in accordance with the legislation, as specified under Chapter XIV of Law Number 21/2001. Both *Adat* and national courts are recognised in Papua.

An *Adat* court is not the court of the state; it is rather the court of the local community abiding by the customary law of the locals. It settles customary disputes peacefully according to traditional rules. Existing evidence is often presented to settle both private and criminal disputes, and enquiry and resolution take place according to the traditional rules of the locals. An *ondoafi* (Tribal Leader) of Waena, Ramses Ohe, argued in a discussion that customary people of Waena tended to uphold traditional rules over the positive law because they favoured the rights of the victims in resolving private and criminal cases of the locals. When a crime takes place, the punishment imposed on the offender often involves an animal kept as livestock, cash, land, or another form of asset worth millions of rupiah. That is, this sanction is more aggravating than that imposed by a District Court. considering that the *Adat* court is fairer and accepted by the community, the members of the community tend to settle their disputes in this traditional judiciary setting.

The *Adat* court is often referred to by the locals simply because it is deemed more just, and the court works in the hands of senior community members agreed upon by the two parties in dispute, thereby not leaving any conflict between the parties.¹⁰

¹⁰ Patricia Pasapan, Juanrico Alfaromona Sumarezs Titahelu, dan Denny Latumaerissa, "Delik Adat Dalam Sistem Hukum Pidana Di Indonesia," TATOHI: Jurnal Ilmu Hukum Vol 2 (2022): 195.

Research Methods

This research employed a socio-legal method to analyse and observe the function of the law in society. This empirical research studied primary data represented by community members or individuals directly involved in the subject observed.¹¹ Regarding a socio-legal study, this research focuses on the attitude of the community or something pertaining to the law. Empirical research can also be understood as research activities to reveal the feelings of the locals about the expectations of the state in governance.¹²

Research data consisted of primary data obtained from in-depth interviews and non-participant observation. The primary and secondary data were further classified, categorised, systemised, interpreted, and analysed according to descriptive-qualitative techniques.

The laws used as references in this research include the 1945 Constitution of the Republic of Indonesia, Law Number 5/1974 concerning Basic Principles on Administration in the Region, Law Number 5/1979 concerning Village Governments, Law Number 21/2001 concerning Special Autonomy for the Province of Papua, Law Number 6/2014 concerning Villages, and other regulations related to the topic of this research.

¹¹ Soerjono Soekanto ; Sri Mamuji, *Penelitian Hukum Normatif Suatu Tinjauan Singkat RajaGrafindo Persada* (Jakarta: RajaGrafindo Persada, 2010), 14.

¹² Muhammad Fajar Sidiq Widodo; Rezki Suci Qamaria; Hutrin Kamil, "Metode Penelitian Hukum Normatif," dalam *Ragam Metode Penelitian Hukum*, (Kediri: Lembaga Studi Hukum Pidana, 2022), 48.

Socio-Cultural System of the People of Waena

One of the key components of the socio-cultural system is the social structure. The social aspect encompasses established social norms that the locals abide by. This structure is constructed from hierarchical social networks and particular work distribution supported by tradition, law, and cultural norms. Social structure portrays diverging but consistent interaction patterns. This research will give a brief overview of the socio-cultural aspect of the locals of Waena.

The *Adat* people of Waena reside in Kampong Waena, administratively located in the District of Heram, Jayapura City, the Province of Papua. The residents have varied livelihoods and are from different ethnicities. Not only Papuans, but those from Toraja, Bugis, Java, and other communities also reside in Waena. The population of Waena is about 1530 people, and their livelihoods depend mostly on agricultural produce such as sago, sweet potatoes, betel, and many more. Some of the population also work as fishermen at Sentani Lake. Kampong Waena is structurally part of Sentani society. They speak Moi and their organisational structure encompasses several tribal clans. Departing from this structure, Waena has *Ondofolo/Ondoafi*.¹³

The kinship in Waena follows a patrilineal system, drawing the lineage from the line of a father. The son must be an heir in the family and, therefore, he is forbidden to leave the house. Women, however, are allowed to leave the house and live with their husbands after marriage. The nuclear families in Waena are monogamous (marrying only one husband or one wife), but sometimes they can be polygynous (a husband having more than

¹³ An interview with Mr. Kostam Modou, the Tribal Leader of Modou and simultaneously serves as the Leader of Kampong Government.

one wife). Uniquely, being polygynous is only for *ondoafi* and *khoselo*. Waena community also follow exogamy, where men are not allowed to marry women from the same *khoselo* (tribe). It has been the norm that after marriage, the married spouses are to live in the residence of the husband, following the patrilocal/virilocal system.

The structure of leadership of the people of Waena consists of: “*Apu Along*” or “*Apu Afaa*” serving as the advisor of an *Ondoafi*. To date, the position of *Apu Afaa* is held by Mr. Lines Modou, while the *Ondoafi* position, the highest customary rank in the government of the Kampong (yo), is currently held by Mr. Ramses Ohe. The local administrative work encompasses matters like religion referred to as “*pulo-yo*”, security as “*phuyo-ayo*”, welfare “*phume ameyo*”, and social order as “*yommeyo*”—all tasked to assist the *ondoafi*. The leadership structure of *ondoafi* is passed down from a tribal leader according to a patrilineal pattern for life. The candidate of the next leader has always been prepared long before the position is taken over, and this process often takes initiation and announcement to the *Adat* community.

The position held by the *ondoafi* has been passed to the eldest child of *ondoafi*. *Ondowai*, meaning majesty and honour, is the term which the word *ondoafi* is derived from. A person appointed as an *ondoafi* is often referred to as *ondiwai*. The attachment of *yomalo*, a belt made of tree bark presented to the *ondoafi* to represent the power passed down through generations, symbolises the inauguration process. According to the patrilineal system, only the son can be throned to replace his father, like in other patrilineal systems. Daughters, however, can only join the clan of their father unless they are married or have children; a married woman lives in the clan of her husband.

The leader of a small clan, often termed '*marga*' or '*imea*', is referred to as *khoselo* or *khotelo* who is responsible under the *ondoafi* and works under the same the *ondoafian* system at the village level. The community of Waena encompasses five types of *imea*, namely *ohe*, *modoue*, *endamboue*, *yepese*, and *kamboue*. The *khoselo* is assisted by his subordinates—*abu akho* (spokesperson) and *akhona fafa* (treasury). *Akhona* is the leader in a family responsible under *khoselo/khotelo* (the head of *marga*/clan) and from one lineage.

In essence, the leadership in a Kampong often adheres to both formal government (the government of Kampong) and customary government. Unlike the formal government, the customary government is more influential in and respected by the community members because the formal government has the nature of serving bureaucratic interests from the top. On the contrary, the customary government is growing in the community and has been rooted in the tradition of the community and is more community service-oriented. Supranatural-religious aspects also seem to be the triggering factors that make the locals more obedient to the customary government. This condition indicates that the *ondofolo* or *ondoafi* possesses supernatural power as something that the leader of Kampong may not have. The authority of *ondofolo* consists of general authority (control over *ulayat* land/*ulayat* rights) and special authority (social, security, religious control, economy, social order, and justice).

The typical nature of *Adat* law is different from those of other laws. F.D. Hollemann in his work entitled "*De Commune trek in het Inonesische Rechtsleven*" proposed this idea. He further constructed four general characteristics of the peoples of *Adat* law, namely supernatural-religious, communal, concrete, and current. The supernatural-religious is related to sacredness. Long before

religion existed, a belief was constructed in pre-logic, animism, and dynamism. The belief that the *Adat* peoples are adherent to does not separate the real world and the supernatural realm, and *Adat* communities, in general, maintain harmony between the two.¹⁴

The Customary Law of the People of Waena

Law Number 21/2001 concerning Special Autonomy for the Province of Papua defines *Adat* people as “the native people of the community of Papua living within a particular milieu bound to and abiding by particular customary law with firm solidarity among the community members” (Article 1 letter (p) of Law Number 21 of 2001), while the people of *Adat* law are rather differently defined as “the native people of Papua who have lived in a particular milieu since they were born and they are bound to and abide by particular customary law with firm solidarity among the community members.

The existence of an *Adat* community, according to Titahelu, can be identified by considering the following conditions: “There exists a community that labels themselves as *Adat* people, living in a unique customary structure of the government along with influential authorities in the governmental administration of the community, embracing other social, political, cultural, and economic facets as a unity on a certain large land, not just a small area of dwellings with ordinary life.”

Departing from the above information, this research sees that the people of Waena can be categorised into an *Adat* community notwithstanding their modern surroundings. They are

¹⁴ Otje Salman Soemadiningrat, *Rekonseptualisasi Hukum Adat Kontemporer* (Bandung: Alumni, 2001), 29.

consistently adherent to the customary rules passed down from their ancestors, and these rules are also consistently maintained under customary institutions (under *ondofian* leadership).

Law Number 2/2001 states “*Adat law covers unwritten rules or norms living in the society of Adat peoples; it governs, binds, is maintained, and imposes sanctions*”. Christian Snouch Hurgronje points out “*Adat law serves as an instrument with sanctions (reactions), while Adat (custom) itself does not possess any sanctions (reactions) and represents only a normative tradition through attitude in the community.*”¹⁵ The *Adat* community of Waena strongly clings to the *Adat* law passed from their ancestors throughout generations, while still complying with the law of the state as the general law (unification). The criminal law of the *Adat* community is the living law in the community of Waena. The Penal Code is the public law that is nationally codified, while criminal *Adat* laws are the source of law recognised in the regions heavily affected by supernatural-religious surroundings with their apparent traditional uniqueness. Every such region has its unique *Adat* criminal law. *Adat* laws are varied, depending on the local tradition of a region, and they are codified or unwritten.¹⁶

The criminal *Adat* or customary law is a set of rules regulating conduct or circumstances necessitating legal actions to ensure that they do not jeopardise public order. The criminal *Adat* law is laden with the value of kinship and is supernatural-religious, prioritising communal justice (kinship) above individual interest. Peaceful dispute resolution based on established kinship is the best way to settle disputes. Aiming to restore interrupted

¹⁵ Tolib Setiyady, *Intisari Hukum Adat Indonesia Dalam Kajian Pustaka* (Bandung: Alfabeta Bandung, 2008), 8.

¹⁶ Hilman Hadikusuma, *Hukum Pidana Adat* (Bandung: Alumi, 1984), 20.

balance in the community, *Adat* law aims to respond to and settle criminal offences in the community.

Something can be categorised as a criminal offence when it meets the following aspects: *first*, the conduct is committed by a person, a group, or administrators (leaders/officials) in the community; *second*, the conduct contravenes the norms in the community; *third*, this conduct is likely to cause chaos and interrupt the harmony in the community; and *fourth*, this conduct triggers reactions from the members of the community in the form of sanctions.¹⁷

For the people of Waena, every violation interrupting the harmony in the community should be responded to under the *Adat* law. The following are some criminal offences deemed to be within the domain of *Adat* law and must be settled under this law:¹⁸

1. Murder; this offence is considered a serious crime in the *Adat* law, and, therefore, this case transcends the involvement of the national law, especially when it involves two different tribes or more. Immediate action under the *Adat* law must be taken, or further tribal war between the two tribes may take place. The murderer, under the *Adat* law, is required to marry his/her daughter to one of the family members of the murdered to continue the lineage of the murdered. A fine is also imposed with the amount discussed and agreed upon in the deliberation in the community (in an *Adat* court).
2. A woman conceived with an illegitimate baby; the woman in this case is required to be present in an *Adat* court to reveal the man behind her pregnancy. The man must marry the pregnant

¹⁷ Riduan Syahrani, *Rangkuman Intisari Ilmu Hukum* (Bandung: Pustaka Kartini, 1991), 347.

¹⁸ An interview with Ondoafi of the adat community of Waena, Mr. Ramses Ohe.

woman to show responsibility. When the man remains irresponsible for the pregnancy, a fine applies with the amount discussed and agreed upon in the *Adat* court.

3. Carrying off a girl or a woman; this offence is subject to an aggravating fine that the offender cannot afford, with the value equal to that of the stone bracelet or axe owned by the Ondoafi worth 23 million rupiahs. The money is kept in the deposit of the community. This offence creates too much interruption and ruins the peace in the community. Immediate measures to settle this crime are essential to avert any further criminal offences like a murder between two families and tribal war.
4. Same-clan marriage; this marriage is forbidden simply because it is viewed as inbreeding, as those of the same clan are from the same ancestor. When it happens, the *Adat* authority will immediately inform the church to prevent baptism.
5. Theft; the thief is sanctioned by paying for the item stolen and being fined. For example, a person caught to have stolen a pig has to pay an amount of money worth the value of the pig stolen and is imposed with a fine with the amount agreed upon in the local court.

Every criminal offence is every reason why a law is written. When a rule is legally binding, violations of customs tend to be committed. From this point, the obedient start to get disturbed by the offence committed, sparking an interruption that hampers the harmony in the community.

Similarly, I Made Widnyana mentions five characteristics of *Adat* law; "**First**, *Adat* law is far-reaching and uniting because it grows from connected cosmic elements. This law does not distinguish criminal and private cases". Both criminal and private cases are under the responsibility of *ondhoafi* and *khoselo* to settle

the issues. “**Second**, open provisions exist because of the incapability of predicting what might happen; therefore, it is uncertain and is always open for any possibilities that might take place”. “**Third**, bothering with distinguishing violations tends to bring one further to revealing what is behind those violations and who committed the violations instead of focusing on the violations that have taken place. Such a tendency will lead to varied ways of settling the problems”. “**Fourth**, the Adat law settles disputes upon request or complaints, or lawsuits filed by aggrieved parties or by those treated unjustly.” “**Fifth**, correctional action may not only be imposed on the offender, but it may also affect the offender’s family members or relatives or even other related community members to recover the balance”.¹⁹

Hilman Hadikusuma holds that the realm of traditional thinking reflected in the nature of *Adat* law is far-reaching, unifying, open, distinguishing issues, judiciary action upon request, reactions, or correctional actions and non-*Prae-Existente*.²⁰

The Structure of Adat Court and the Resolution in Adat Court

The *Adat* court of Waena consists of *ondofolo/ondoafi* as the chief of the deliberation and several *koshelo* in the Kampong as the members. Every Kampong holds three pillars serving to govern the life of the people, consisting of Batu Tungku including customary institutions, churches, and the government of Kampong with their authority to handle the case under the criminal judiciary system of the community involving *ondofolo* and all the *koshelo*. The church and the government of Kampong can contribute their views or opinions for the court to justly decide the case.

¹⁹ I Made Widnyana, *Kapita Selektta Hukum Pidana Adat* (Bandung: Eresco, 1993), 3–4.

²⁰ Hilman Hadikusuma, *Pengantar Hukum Adat Indonesia* (Bandung: Mandar Maju, 2003), 232.

When something occurs and interrupts the balance in the community, the case can be settled peacefully between the parties involved or between the families of the parties at one of the residences of the parties. This step often involves peaceful deliberation, where both parties forgive each other and agree upon the compensation and other related matters in the meeting.

The *Adat* court must be involved when the approach as above fails to settle the dispute between the two. To begin with, the aggrieved party can file a complaint to *ondofolo* with the following steps: 1) the report is accepted and learned, 2) a trial is arranged in the residence of *ondofolo* and scheduled, 3) *koshelo* are invited as they need to assist the *ondofolo* in the trial, 4) *apu along/apu afaa* as the advisors of the *ondofolo* are also invited as senior community members. The representatives of the church or the head of Kampong may also be considered as advisors to help decide for justice, 6) opening trial, 7) conducting an enquiry into the case, hearing testimonies from witnesses and ideas from the senior members, 8) all tradition-related cases related to kinship, inbreeding marriage, and inheritance, among others, can be tried in an *Adat* court, but extraordinary cases like murder are transferred to the national law involving police and other formal authorities. That is, the sanctions imposed at the customary level do not necessarily exempt violators from the law of the state; 9) verdict is delivered and a sanction is imposed on the violator according to the result of the deliberation (*Adat* law) to bring about the harmony between the two parties and recover the interrupted balance.

The state recognises the existence of the *Adat* law by enacting Article 18B paragraph (2) of the 1945 Constitution as specified earlier. Furthermore, Law Number 6/2014 concerning

Villages recognises this existence as specified under Article 103 letters d and e, affirming that village authorities serve to settle legal problems in the community. An *Adat* court is tasked to settle disputes peacefully under national law. The peoples of *Adat* communities in general comply with *Adat* laws within diverse milieus, while the structure is governed under *Adat* laws adopted from the ancestors. The authorities concerned decide the cases according to the *Adat* laws.

It is important to remember that the customary mechanisms serve as guidance for the community and are not binding to the judges of the court. Judges can bend the rules only on the strong grounds for doing so.²¹ Judiciary decisions and the *Adat* court hold functional but non-binding nexus. That is, the court of the state recognises the authority of the *Adat* court in deciding a case through reconciliation notwithstanding its non-binding judiciary power in the *Adat* court.²²

The *Adat* court in this context does not hold power to punish or put violators under arrest, but its authority is only restricted to imposing fines as sanctions. Considering that the *Adat* court is not categorised into the jurisdiction of the national court, the court is not authorised to investigate and decide a case within the scope of private and criminal cases when one of the parties involved is not a member of the *Adat* community.

If the parties involved in the dispute receive the verdict under the *Adat* court, the decision is conclusive and holds permanent force. According to the applicable legal norm (the Penal Code), the decisions of the *Adat* court can also acquit the violator

²¹ Arasy Pradana A. Azis, "Kedudukan Keputusan Pengadilan Adat," *Hukumonline.Com*.

²² Tody Sasmita Jiwa Utama and Sandra Dini Febri Aristya, "Kajian Tentang Relevansi Peradilan Adat Terhadap Sistem Peradilan Perdata Indonesia," *Mimbar Hukum - Fakultas Hukum Universitas Gadjah Mada* 27, no. 1 (2015): 57–67.

from the charge under the statement issued by the Chief of the District Court of the relevant jurisdiction. This statement also revokes the obligation of the prosecutors to investigate further. On the contrary, police and the prosecutor's office can conduct investigation and enquiry when the Chief of the District Court refuses to issue the statement of consent for the issuance of the decision of the *Adat* court. In this context, the offender will be taken into consideration regarding the case filed. If one of the parties in dispute raises an objection to the verdict delivered by the court, Article 51 paragraph 8 allows the district court to re-assess the case, or this case can be brought further to the court of the first instance.

Taking a closer look at the provision of Article 51 of Law Number 21/2001, the author views that the existence of the *Adat* court is not fully independent because, despite its final verdict, the District Court could still meddle with the case, particularly when one of the parties objects to the decision made by the *Adat* court. This indicates that there is still a likelihood that the District Court will deny the verdict of the *Adat* court, leaving the court powerless. When this is the case, the *Adat* court is nothing but an informant whose information may be taken into consideration by the District Court.

Conclusion

Amidst its modern surroundings, the people of Waena are the people of *Adat* law because they have consistently adhered to the traditional rules in their community and have labelled themselves the members of *Adat* community. They have always complied with the rules passed down from their ancestors and have consistently maintained them. The structure of the *Adat* court

of Kampong Waena consists of *ondofolo/ondoafi* as the Chief of deliberation and all the *koshelo* residing in Kampong Waena as the members. The enforcement of special autonomy for the Province of Papua under Law Number 21/2001 reinforces the existence of *Adat* law and the role of the *Adat* court in settling both private and criminal cases. The *Adat* court possesses a strong position because the court is recognised by the law and authorised to deal with offences involving the members of the community.

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