

Local Customary Laws and Decentralised Community Based Disaster Mitigation

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Abstract. This paper, based on secondary sources, seeks to analyse the utility of recognising local customary laws in decentralised governance, training, integration and empowerment of village-level traditional authorities, as delegates of the sovereign State, for Community Based Disaster Risk Reduction, Resilience and Mitigation (CBDRM), especially during disaster events when conventional governance through the local bureaucracy based implementation of statutory positivist State law may be constrained. Drawing upon the practical difficulties of centralised disaster mitigation governance encountered in top-down disaster relief response in developing countries during the recent COVID 19 epidemic, it makes an argument for the legal recognition and active inclusion of the regional customary socio-religious norms and actors, along with operative empowerment of existing local administrative authorities to act as effective State agents, first responders, information disseminators, and preservers of harmony, law and order during the critical initial period when isolation from, or absence of effective governance structures and severe curtailment of the statutory legal regime may be manifested following disaster events, especially in remote areas. The paper adopts the sociological jurisprudential approach to enunciate the legal theoretical basis for the recognition of customary socio-legal practises and the decentralisation of authority for dealing with natural and anthropogenic disasters.

Keywords: *disaster mitigation, decentralisation, community response, local resilience, customary laws*

INTRODUCTION

There is overwhelming scientific consensus that in the present Anthropocene epoch, the environment modifying activities of *Homo sapiens* is profoundly affecting global geo-meteorological cycles, even as the anthropogenic impacts on the biosphere, geosphere, hydrosphere, and the atmosphere are disrupting natural processes and thereby creating and /or exacerbating exposure of communities to natural hazard. International efforts to effectively address the issues related to disaster mitigation were first contemplated in the Hyogo Framework for Action 2005 – 2015 which was adopted at the second

World Conference on Disaster Reduction (WCDR) in 2015 at Hyogo, Japan. At the follow up third WCDR in 2015 at Sendai, Japan, the Sendai Framework for Disaster Risk Reduction (SFDRR) which was adopted by all the participating member States as the international framework of guidelines for State based disaster mitigation from 2015-2030, identifies “strengthening disaster risk governance” and “enhancing disaster preparedness for collective response” as two of the four key targets for achievement of its seven specific goals for improvement of the communities resilience to disaster risks, thus underlining the critical importance of the participation of local communities in disaster mitigation.

Community Based Disaster Risk Reduction, Resilience and Mitigation (CBDRM) which emerged as an eclectic mechanism for implementing community involvement in building community resilience to hazards and disaster risks, is the decentralised approach of public administration to reduce vulnerability and strengthen the capability of the local communities to prevent, mitigate and cope with disaster events as first responders through a cohesive localised approach for risk reduction, loss minimisation and recovery. Proactive participatory CBDRM, is increasingly acknowledged as the most effective strategy for disaster mitigation, and as an essential concomitant of good governance for sustainable development [1].

Participation of the local community through CBDRM in the construction, maintenance, and management of physical structural engineering works for disaster prevention and preparedness has been shown to substantially increase the effectiveness of disaster response, and reduce mortality and limit economic loss. Inclusion of the local social actors in CBDRM planning, decision making and implantation of disaster mitigation has been shown to increase community cohesion and response capacity to disasters [2]. Community participation and integration of customary law practises in CBDRM can also serve to protect the social values cultural practises and non-tangible scientific or practical indigenous knowledge to deal with disaster which have been transmitted through generations and have more persuasive value for the community. There is also an increasing recognition of socio-economic determinants that underlie disaster vulnerability such as, poverty, inequality, existing sectoral social discrimination and conflicts,

differential social capital, access to information and resources, food security and inclusiveness in critical infrastructure and services such as shelter, health services and post disaster recovery and reconstruction [3].

The potential of disaster events to heighten social conflict in fractionalised societies and spiral into violence due to increased competition for scarce resources in situations of existential crises causing political destabilisation, rebellion, contravention of laws, and gross human rights violations such as forced displacement, human trafficking and victimisation of women and children, following disaster events, is also well noted in the literature on the subject [4]. CBDRM does not entail a universal structural model of mainstreaming decentralisation and in practise displays spectrum of several levels of variations in the State mediated of involvement of the local community in the disaster preparedness and mitigation process. It is crucial to note here that CBDRM, though involving decentralised operational involvement of the local community, is an integral part of the National Disaster Management framework and is organically dependent upon the Government policy and institutional initiatives [5].

Since Government policy is actualised through law and administrative action is legitimated through legislation or other legally recognised norms, Local Customary Law, envisaged here as a part of the Legal Framework in a broad sense and as a recognised normative sociological imperative (rather than narrow Statist statutory enunciation) which can regulate and modulate social behaviour, acquires a central role in governance of disaster mitigation, including in the implementation of CBDRM.

METHOD

This paper follows sociological jurisprudence to justify the status of local Customary Law as a valid and effective category of legal application for disaster mitigation governance. This approach presumes that law in praxis is divergent from the Statist written text of statutes [6]. Sociological Jurisprudence favours the interpretation that law is a tool for organising and maintaining order in society based on the values that inform the social mores [7]. Sociological Jurisprudence enunciates that since law reflects the cherished and underlying value systems of the society, it is far more expansive in its conception of law as compared to the Statist positivist institutionalist jurisprudential approach. While acknowledging the primacy of statute made through the legislative process, Sociological jurisprudence also argues for the legal validity and recognition of social mores which though initially amorphous and indeterminate, over time acquire normativity through widespread adherence whether due to the social or religious custom prevalent

locally and achieve the status of local Customary Law inspiring observance of practise, penalising deviance, authoritatively settling social contentions through the obedience of decisions.

Customary Law though circumscribed in its jurisdiction, subservient to and mandatorily required to be in consonance with / not in conflict, with statute or public policy, is still considered to be valid "Law" since it is based on social practise and acceptance since time immemorial [8]. This paper focusing on Local Customary Law and decentralised disaster mitigation refers to examples from across the world. Despite evidence that CBDRM is more effective when locally contextualised and implemented with community participation [9], there are differences in scholarly opinion as to the level and extent of decentralisation which would be optimal for effective local disaster mitigation [10].

This paper focuses on the village or hamlet level initiatives as the loci for the deployment of decentralised CBDRM in developing countries although local Customary Law may be more territorially expansive and may encompass more than the village. It seeks to analyse the theoretical basis for integrating Customary Law and suggest some measures for increasing its effectiveness in disaster mitigation.

RESULT & DISCUSSION

Local Customary Law, as dealt with in this paper, may be broadly defined as a parallel, non-Statist, endemic, historically complied, (usually socio-religiously) substantive and (usually ritually) procedural, normative sub-structure originating from within community practise which commands social observance and due adherence considered binding by those who follow it, for governing social relations in the society or within the territory to which it applies, with (varying degrees of) constitutivity and prescriptivity approaching, and not inconsistent or conflicting with formal Statist legality. Society functions through a complex amalgam of a variety of normative orders at different levels exercised by various social authorities creating a diverse, fluid and interactive multiplicity of legal orders and legal pluralism, adherence or rejection of the prescriptions of which is negotiated by individual members of the community based on risk-benefit rational analysis as well as emotive affiliation factors [11].

The formal Statist legal system is not independent of the other social normative regimes, but influences and is influenced and even structured by social customary law and practises [12]. Public affiliation to competing alternative and parallel normative orders in the environment of legal pluralism thus act as a modulating constraint absolute State Legal Sovereignty [13]. This normative pluralism includes the traditional

Customary Laws which predate even the State, and despite the oft stressed hegemonic exclusionary authority of the Statist legal Order over other normative systems in society [14], people may prefer Customary Law even over Statist Statute [15] for rational or emotive reasons or even accept parts and reject other parts of the different normative regimes in a display of “interlegality” [16].

The Legal based on Legislative Statutory Statist control mechanism is but one of the many normative mechanisms governing individual behaviour in society [17]. Effective legal governance should, therefore, utilise the affiliations of the population for the achievement of policy goals rather than forcing normative structures which, especially during stressful post-disaster situations, may be perceived as external and resisted thereby affecting the achievement of disaster mitigation goals. The foundational legal maxim *Interpretare et concordare leges legibus est optimus interpretandi modus* also acknowledges this legal pluralism and mandates that the interpretations of Statute law must cohere and harmonise with the prevalent normative laws.

In most parts of the world Customary Laws, are afforded a degree of recognition as a part of the legal framework. This recognition could be through de facto acceptance as in Africa [18], through Common law maxims and principles in the United Kingdom, through Constitutional provisions or legislation as in Latin America, Australia, India, Indonesia and the Philippines or through case laws as in Malaysia [19]. The successful integration of Customary law and traditional social actors for decentralised local disaster CBDRM associated with Customary Law for raising pre-disaster awareness, and post-disaster rescue and rehabilitation has precedence in Africa and in the Philippines.

Customary law provides normative plurality in the legal jurisprudential structure and is often the bedrock of social contract. The effectiveness of voluntary localised community response in building hazard resilience in South East Asia is well noted in the literature on the subject especially in the context of the *Purok* system of the Philippines which demonstrates a successful Customary Law based decentralised approach to CBDRM [20]. The COVID 19 pandemic continues to ravage the world and has emerged as a preeminent public health disaster of global proportions [21].

Despite a scientific policy of staggering nationwide lockdowns, testing and Public Information, Education and Communication (PIEC) campaigns to increase societal awareness to restrict the spread of the novel Coronavirus contagion, the pandemic has grown exponentially in Indonesia with more than 42,000 cases of infection (18 June, 2020).

While there have been more than 16,000 recoveries from the cases of infection, there have been more than 2300 deaths making the COVID 19

pandemic one of the deadliest disasters to confront Indonesia. The rapid dissemination of the contagion poses a serious risk of infection of essential administrative staff and bureaucrats even as the coping capacity of medical institutions can quickly be overwhelmed despite the deployment of conventional Statist legal measures such as the Law 6 relating to Health Quarantine, 2016 and several executive Ordinances by the Executive such as the Presidential Decree Number 9 issued on 20 March 2020 to curb the pandemic. At such a time of pervasive fear and insecurity among the population, confusion and socio-economic factors compel a section of the population to risk health and life to venture forth for livelihood disregarding the quarantine and social distancing directives by the government increasing the hazard risk.

The curtailment effective execution of multifarious duties by the local administrative officers, themselves in infection also compounds the prevailing situation. Under these circumstances, the role of Customary Law to mitigate the disaster and of traditional Customary law actors to buttress the efforts of the government in disaster mitigation become relevant. The importance of local Customary Law in Indonesia is evident from the enactment of Act 22 of 1999 (Regional Autonomy) of the Republic of Indonesia under the authority of Article 18 of The Constitution of Indonesia, 1945, which affords recognition of the legal competence of *Hukum adat*, associated institutions and norms in governance of various aspects of village community life. It legalises the authority of the customary law leaders of the *Hukum adat* Council for resolution of minor disputes according to Local Customary Law within the sub-districts (*Kecamatan*).

The variations in the process of administration of local customary laws such as among the *Dayak* People of Kalimantan or the Hindu Balinese are also legally recognised especially in the norms of land tenure and access to natural resources and socio-religious membership and participation in the corporate life of the village community [22]. This aspect of natural resource management delegated to the local Customary Law actors in Indonesia can be interpreted to involve them in environment related policies for disaster resilience within their communities. Since the local community is most affected by disaster events, the involvement of the community through CBDRM addresses the defects of the top-down approach and bolsters community resilience [23], and usually the community is responsive to its inherent customary law as much, if not more, than directives or coercive measures by the centralised government.

The effective role played by traditional customary law and actors in local control measures related to disaster mitigation in Bali stands as an example of utilisation of customary law and actors for disaster mitigation [24]. However, untrammelled

capitulation to Local Customary Law may generate its own problems. The lack of universality and inherent exclusivity of local customary law to a community or to limited geographical territory implies the legitimization of a wide mosaic of laws especially in Indonesia which has a huge territory and diversity on multiple levels. Omnibus recognition of all aspects of all applicable Customary laws is also undesirable since a situation of extreme legal decentralisation and Legal Polycentricity would invariably raise complex issues of lack of redressal ubiquitous conflict of diverse Customary laws [25].

Even in the decentralised administration and State control of traditional Customary Law actors has the potential to turn unwieldy especially in cases where communalisation of disaster mitigation efforts through the nepotistic or corrupt allocation of crucial and life- saving resources with regard to minorities of non-normative populations, during periods of deficiency during crises. A balanced recognition of the common general principles of local Customary Law in consonance with the Basic Law, 1945 (Constitution of Indonesia) and not infringing any Statutory Laws made by the Federal and Provincial legislatures would be necessary. Moreover, the integration of the traditional authorities under the local customary laws formally designated as delegates and agents of the Sovereign State with a limited mandate to act as facilitators of the decentralised State Disaster Mitigation policy through training and under the overall control of the village administrative head can lead to optimal results for CBDRM.

CONCLUSION

Based on the foregoing discussion, it can be concluded there is substantial scope for legitimising local Customary Laws as a part of the formal Statist legal system since recognition, nuanced integration and regulated executive deployment of local Customary Laws as influencers of social behaviour and the inclusion of Customary Law actors at the local level in aid of the decentralised National disaster mitigation policy can have a force multiplier effect on the governmental efforts at CBDRM and promote local community resilience.

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