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Recognition of Customary Court: Perspective of Judicial Power and Special Autonomy of Papua

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Abstract: *The excellence of customary court for indigenous peoples of Papua as a peace justice institution which is one of the specific rights of Special Autonomy of Papua and it regulated in Article 50 paragraph (2) juncto Article 51 paragraph (1), and Article 43 paragraph (1) of Act No. 21 of 2001 in the field of executive. The recognition of customary court of Papua referred to as "traditional rights" in accordance with Article 18B paragraph (2) juncto Article 24 paragraph (3) and Article 28I paragraph (3) of the 1945 Constitution, its relevance to Article 35 paragraph (3) letter d and Article 58 No. 48 of 2009 and in Article 1 No. (5) of Act No. 49 of 2009 is not synchronized for indigenous peoples of Papuan that perform the function of customary court in the Judicial Power system in the field of judicative informally. The object of this study is related to the primacy of the recognition of customary justice: perspective of judicial power and special autonomy of Papua by using normative juridical method. The results indicate the weakness of the recognition of customary court of Papua against: 1) the institutional of customary court, 2) authority and 3) the decision of customary court over the case or the customary dispute and the principle of ne bis in idem in the function of Judicial Power. Its implementation raises the conflict of norms on the Acts of Judicial Power and the Special Autonomy of Papua. For future, the customary court of Papua needs to be a synchronization of the legal basis of the relationship of authority recognition in the Act of Judicial Power and the Special Autonomy of Papua, in order to fulfill a sense of legal certainty and justice for indigenous people of Papua as multicultural and customary law as the living law.*

Keywords: *Authority; Customary Court; Judicial Power; Special Autonomy*

INTRODUCTION

The study of legal-politic in Indonesia describes the recognized judiciary of Europe-continental legal system or *civil law* as introduced by the Dutch during the colonial period, and

then become part of the tradition of the Indonesian legal system, which prioritizes the characteristics of codification and legal unification, it is different something to indigenous peoples of Indonesia with customary law system as *the living law*. Prior to the Dutch introduces the western legal system, indigenous peoples has living law in indigenous peoples of Indonesia who *multicultural*, including customary court with law enforcement procedures and procedures for dispute resolution occurring within indigenous peoples of Indonesia. Although it is unwritten and codified, as well as legal unification well, it remains a guideline as the ideal norm and procedural norm for cases resolution or customary disputes. The Dutch made legislation to strengthen the status of indigenous people including customary court.[1]

In Dutch-Indies period, there were 3 (three) groups of population, namely European, the Foreign East and the Indigenous population,[2] subject to their respective legal systems, formally demonstrating a "*legal pluralism*" in indigenous peoples of Indonesia. This means that the enactment of more than one legal system coexist and interact with 3 (three) groups of population. The structure of customary peoples and the division of population group in Indonesia affects the formation and enforcement of different types and levels of justice and the legal system. The courts are: 1) Gubernemen Court (*Gouvernementsrechtspraak*); 2) Indigenous Court (*Inheemsche rechtspraak*); 3) Swapraja Court (*Zelfbestuur rechtspraak*); 4) Religious Court (*Godsdienstige rechtspraak*); and 5) Village Court (*Dorpsjustitie*) or now Customary Court.[3] The five of judicial institutions also showing the judiciary at the time, are in a "*situation of legal pluralism*" and are institutionalized in Indonesia.

Indonesia after independence eliminates the division of population class with its respective legal system and uniforms the judicial system into state court. Consequently, all types and levels of justice are eliminated and replaced by state courts (common justice), except for village courts that

[1] R. Soepomo, (1982). *Sistem Hukum di Indonesia Sebelum Perang Dunia Kedua.* Jakarta: Pradnya Paramita, Pages 100-103.

[2] *Ibid.*

[3] Hilman Hadikusuma, (1989). *Peradilan Adat Di Indonesia*. Jakarta : CV Miswar, Page 37

are interpreted as customary courts that should be different to customary peoples of Indonesia. Indonesia is a legal state firmly stating that a characteristic of the Indonesian system of government is to adhere to the principle of the rule of law, it means that the government or the ruler in the administration of the State is bound by the constitution and its implementation is not justified to act arbitrarily. It means that in the practice of constitutional law-political administration, the law must control the prevailing power as the essence of a constitutional state.

The essence of such a constitutional state emphasizes the subject of State authorities to the rule of law which is the legal product of the human history and constitutional law-political history of Indonesian, in accordance with the objective of State as formulated in the Preamble of the Constitution of the Republic of Indonesia (after the amendment of the 1945 Constitution) in paragraph IV that the Government of Indonesia to protect the entire Indonesian nation, promoting the general welfare, educating the nation, independence, eternal peace, and realizing social justice for all Indonesian people. This can be examined in Article 18B of the 1945 Constitution paragraph (1) after the amendment that "the State acknowledges and respects the special regional government units administered by the law", and paragraph (2) "the State acknowledges and respects the unity of customary peoples and their traditional rights as long still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia governed by the law." Article 28I paragraph (3) "the cultural identity and rights of traditional communities are respected in harmony with the times and civilizations." the 1945 Constitution as the basic law of the Republic of Indonesia acknowledges and respects the existence of customary peoples means recognizing the existence of customary court which is the inheritance of the ancestors prior to the existence of the Dutch-Indies government and the Unitary State of the Republic of Indonesia.

In order to uniform the national justice system, then issued Act No. 1 of

1951 on Temporary Actions for implementation the unity of power structure and the proceedings of the Civil Courts, then *Inheemsche Rechtspraak* and *Zelfbestuur Rechtspraak* are gradually dated 13 January 1951 eliminates all types and levels of justice that existed during the Dutch-Indies period. In accordance with legal-political developments, the last to be eliminated is the judiciary in the region of West Irian based on Act no. 6 Prps of 1966, except the village court which was later translated as customary court. After the reform era of 1998, by the government with the decentralization policy through Act No. 22 of 1999, jo. Act No. 32 of 2004, is amended by Act No. 23 of 2014 on Regional Government. Act No. 21 of 2001 on Special Autonomy for Papua Province is expected to be a middle ground and can act as a strategic government policy and Papua Province in the framework of adequate public services, increasing development in all fields.

The essence of recognition and reinforcement of customary court, according to Aristotle,[4] a Greek philosopher stated that human beings are social beings, human beings cannot live alone (*Zoonpoliticon*), humans as social beings in which always interact with other human beings to meet their life needs. No human can live alone without others. Customs have stronger binding forces, and regulate the present and future life order, in addition it must also regulate the rights and obligations of the society and for its offenders, reinforced by sanctions.[5] This is covered by ideal and procedural customary legal norms containing orders, prohibitions and permissibility. Sanctions are cosmic in the form of "fines" and prioritize the balance of social or cosmic justice of customary peoples. This viewpoint that underlies the concept of a legal problem resolution within Papuan customary group that promotes a principle of justice and collective peace based on cosmic be a basis for recognition and

[4] The Partnership, *Perlindungan dan Pengakuan Terhadap Eksistensi Peradilan Adat Di Papua*. In cooperation with Dewan Adat Papua (DAP), MRP, Lembaga Masyarakat Adat (LMA), Province Government of Papua, Legislative, High Prosecutor, High Court, Police of Papua, and Cenderawasih University, 2008, Page. 5

[5] *Ibid*, Page. 6

strengthening of customary justice in Papua.[6]

This situation may weaken the existence of customary peoples, including the institution of customary court in performing the functions of the judicial power system. The weak of juridical recognition of the Papuan customary court in Articles 50, 51, and 52 of the Special Autonomy Act of Papua, for institutional, authorities and decision in terms of synchronization and harmonization of philosophical, sociological and juridical values in Article 38 Paragraph (3) and Article 58 Act No. 48 of 2009 on Judicial Power, jo. Article 24 paragraph (3), Article 18A paragraph (1), Article 18B paragraph (1) and paragraph (2), and Article 28I paragraph (3) of the 1945 Constitution, as an effort to contribute to fill the legal void and function of Judicial Power for cases resolution or customary disputes, which are not reached by the State Courts (formal justice) in remote areas of Papuan customary peoples, as the philosophy of the Special Autonomy Act are alignment, empowerment and protection.

Another thing as supporting aspects is legal aspect to encourage the recognition and strengthening of institution, authority and decision of customary peoples can be justified the position into Act No.48 of 2009 jo Act No.49 of 2009, jo. Article 24 the 1945 Constitution, and Act No.21 of 2001, both recognition of the existence of customary peoples as well as recognition of customary leadership role in solving legal cases involving Papuan customary peoples and customary law as the living law.[7] In view of the fact that there are legal cases that interfere with collective or cosmic life, it is important to undertake an in-depth study of the relationship of recognition and regulation of the authority of the Customary Court in the Judicial Power and the Special Autonomy Act of Papua, in order for juridical synchronization and harmonization. The traditional society referred to in Article 28I paragraph (3) of the 1945 Constitution of the Republic of Indonesia, according to

[6] Frans Reumi, (2015), *Hakikat Pengakuan Peradilan Adat Dalam Perspektif Otonomi Khusus Papua*. Makassar: Prostgraduate Program of Hasanuddin University.

[7] *Ibid.*

Jimly Asshiddiqie,[8] is certainly not the same as the customary peoples referred to in Article 18B paragraph (2) of the 1945 Constitution, because the traditional society is wider and not all customary peoples. However, the State must respect both of them with the requirement that it be in harmony with the times and civilizations. The recognition of Papuan customary people according to the Special Autonomy Act of Papua has appropriate to the provisions of Article 18B paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which requires that recognition must be "regulated in law." Criteria "regulated in law" as a condition of recognition of customary people as referred to Article 18B paragraph (2) of the 1945 Constitution and *mutatis mutandis* applied to the recognition of customary peoples in the Special Autonomy Act of Papua. According to Rahardjo[9] gives notes in observing the four conditions for the existence of customary peoples is "along still life", "in accordance with the development of peoples", "in accordance with the principles of the unitary of the Republic of Indonesia" and "regulated in law."

Following the thought of Moh. Mahfud MD.,[10] indeed the existence of customary court in Papua may no longer have specific recognition in the Special Autonomy Act of Papua, although privileged customary court in Papua is explicit and specific in Article 50 and Article 51 of the Special Autonomy Act of Papua, because it has covered in the recognition of Papuan customary peoples as stated in Article 43 Paragraph (1) of the Special Autonomy Act which states "the provincial government of Papua is obliged to recognize, to respect, to protect, to empower and to develop the customary right by refer to the legal provisions applied." The principle of legal construction of customary court recognition, covering recognition about

[8] Abdurahman, "*Peranan Hukum Adat Dalam Aplikasi Kehidupan Berbangsa Dan Bernegara"*, (Paper). Jakarta 29-31 May 2006, BPHN, Page. 6.

[9] Satjipto Rahardjo, (2005/2006). *Hukum Adat Dalam Negara Kesatuan Republik Indonesia (Pespektif Sosiologi Hukum),* Dalam Mompang L. Panggabean & Dyah Irawati (Penyuting), Hukum Dalam Jagat, Bahan *Bacaan , Program Doktor Ilmu Hukum*, Semarang : Pacasarjana UNDIP, Pages 11-12.

[10] Mahfud, MD., "*Revitalisasi Masyarakat Hukum Adat Dalam Kerangka UUD 1945 Menyongsong Globalisasi"* (Paper), Bali 30 September 2010, Pages, 4-6.

institutional, authority and decision of customary court in the Judicial Power and the Special Autonomy Act in Indonesia. If the legal construction is entered into the provision of Act No. 48 of 2009 it can be formulated through the amendment of Special Autonomy Act of Papua and then must be reduced become auxiliary articles in Act No.48 of 2009 jo. in Article 1 letter (5) of Act No.49 of 2009 jo. Act No.2 of 1986 on Common Judicial (UUPU No.49 of 2009) states: "in common judicial can be established special judicial that regulated by the legislation."[11]

Furthermore, Mohammad Jamin,[12] by addition certain articles entered into Article 2 of Act No.48 of 2009 on the Principle of Judicial Power with Article 50 and Article 51 of the Special Autonomy Act of Papua. As well as restores the sense of belief on the government and State, and also develop the sense of nationalism as an Indonesia nation to develop the special autonomy in the territory of Papua province, including the institutional of customary court as a right of special autonomy for Papuan customary peoples that is multicultural in the field of judicative, and as informal peace judicial institution that has implemented the function of judicial power. Based on this, as legal issues of this writing is "how far the excellence of institutional judicial recognition, authority and decision of customary court in Judicial Power Act and Special Autonomy Act of Papua" as basis of authority for case resolution or custom dispute.

METHOD

This writing using normative-research method with processing technique of primary, secondary and tertiary materials and systematized for written legal (*positive law*) with selection and classification in accordance with logic need the relationship between one legal material and others, to obtain description of the result of research. While, legal material analysis is prescriptive analysis. Futuristic approach is used given that legal-politic is directly related to legal product, both current

[11] Mohammad Jamin, (2014), *Peradilan Adat : Pergeseran Politik Hukum Perspektif Undang-Undang Otonomi Khusus Papua.* Yogyakarta : Graha Ilmu, Page. 16

[12] *Ibid.*

applied and for future, then this approach is exactly used to study and to predict and also to formulate the concept of new legal that refer to the legal character are more responsive, accommodative, modern and fair. Synchronization approach, to study how far the positive law (written and unwritten legal/the living law) started from the 1945 Constitution of the Republic of Indonesia to legislation under it are synchronize one another both vertically or horizontally.

ANALYSIS AND DISCUSSION

The Excellence of Customary Court Recognition in the Judicial Power

The excellence and relevance of customary court recognition in the legal-political system of Indonesia to Papuan customary peoples has a philosophical, sociological and juridical basis based on the values contained in the fourth paragraph of the Preamble to the 1945 Constitution. The statement in the preamble of this constitution philosophically contains the value of affirmation about the obligation of the State to protect the entire nation and the entire country of Indonesia without exception. The nature of the philosophical value is elaborated in the realm of law which provides direction on the recognition and respect for the unity of the customary peoples (*constitutional respect and recognition*), that is in Article 18A paragraph (1) "the relationship of authority between the central and provincial governments, districts and municipal were regulated by law with respect to the specificity and diversity of the region," Article 18B of the 1945 Constitution Article 24 paragraph (3) of the 1945 Constitution "Other bodies whose functions relate to the judicial power are regulated in law."[13]

This means that the State recognizes a special area defined by the Act as a special autonomous region such as the Special Autonomy Act and the Special Autonomy Act of Aceh. On the one hand, customary court has no place and recognition in the legal system in the judicial power law since the Emergency Act No. 1 of 1951 until Act No. 48 of 2009. On the other hand, customary court actually gained

[13] Hero Poesoko, dkk., (2014). *Eksistensi Peradilan Adat Dalam Sistem Peradilan Di Indonesia*. Surabaya: LaksBang Justita Surabaya, Pages 101-102.

recognition in the legal system of legislation in the field of local government (executive) through Act No.21 of 2001. However, the recognition of customary court remains limited only to the Province of Papua which obtains Special Autonomy status. Therefore, to obtain special autonomy status more than that, it actually in legal and legal-politic system to recognition of customary court in Special Autonomy Act of Papua it still contains many weakness from juridical side to the meaning of Article 24 paragraph (3) the 1945 Constitution of Republic of Indonesia, jo. Article 38 paragraph (3) of Act No. 48 of 2009 is not reduced synchronously and harmonized into the formulation of Article 50, Article 51, and Article 52 of the Special Autonomy Act of Papua regarding the nature of the recognition of the institutions, authorities and decisions of the Customary Court of Papua as part of the state judiciary in the system of Judicial Power, conversely not part of the State judicial system.

The legal construction of the customary court recognition in the Indonesian legal system in the future (*ius constituendum*) according to Mohammad Jamin[14] should be used a futuristic approach with reference to responsive and autonomous legal theory that is the law accommodating the needs of customary peoples as a party having a constitutional right to customary court in the form of institutions as legal subject. In the case of customary court and State court arrangements in the Special Autonomy of Papua, then legal source of the existence of a State court consists of the common court, religious court, state administrative court, military court and the Constitutional Court according to Article 24 paragraph (2) of the 1945 Constitution and its amendment reinforced in Article 18 of the Judicial Power Act.

The existence of this State court has been regulated further with the rules of legislation. Meanwhile, the customary court is recognized implicitly through Article 18B of the 1945 Constitution and its amendment and the Regional Government Act and its implementing regulations. Customary courts are recognized and protected explicitly through Article 1

[14] Mohammad Jamin, 2014, *Loc. Cit.*

letter g, Article 50 and Article 51 of the Special Autonomy Act and the elaboration of the Special Regional Regulation of customary court without the delegation of its formation from the Special Autonomy Act of Papua. The legislation on State court as mentioned above applies throughout Indonesia, including Papua, but customary court regulated under the Special Autonomy Act which has been elaborated into the Special Regional Regulation of customary court is only applies locally in Papua. The enactment of legislation on State court throughout Indonesia and the recognition of the existence of customary court in Papua are affirmed in Article 50 of the Special Autonomy Act of Papua. The position of customary court is regulated in the elucidation of Article 51 Paragraph (2) which states: customary court is not a State court body, but customary peoples.[15]

The resolution mechanism or the procedural law is also set out in the explanation. All these materials must be further regulated by Special Regional Regulations (*Perdasus*). Special Regional Regulations have been established in 2008, namely Papua Special Regional Regulation No. 20 of 2008 on Customary Court in Papua. Adjudication of the customary court should be placed in the Judicial Power Act, not in the Act on the Recognition and Protection of Indigenous Peoples' Rights or the Act on Special Autonomy Governments as part of local government act. This author agrees with Mohammad Jamin[16] based on 5 (five) reasons:

(1) Based on the theory of hierarchy of legislation, Act No. 48 of 2009 on Judicial Power, which adheres to legal-politics does not recognize the existence of customary court as a political of ignorance to the rights of customary peoples unity are normatively contrary to Article 18B paragraph (1) and (2) of the 1945 Constitution of the Republic of Indonesia, which recognizes and respects the special regional government units and customary peoples units. According to the theory of legal hierarchy, which is contained in the norms of the basic law (*verfassungsnorm*) it must be further elaborated in the legislation (*gesetzgebungnorm*) where the legal norms are general and binding on all citizens. The juridical implications that arise

[15] Hero Poesoko, dkk., (2014). *Op Cit*, Page. 101.

[16] Mohammad Jamin (2015). *Loc Cit.*

if there is no change of Act No. 48 of 2009 inconsistency and have conflict of norms vertically with the constitution. There is an opinion which states that the Judicial Power Act is allowed to disregard Article 18B (2) of the 1945 Constitution because the article is part and "Chapter VI. Regional Government" while the judicial power is set apart in "Chapter IX. Judicial Power" in the context of the separation of powers and principles of cheek and balances. That is, Act 48 of 2009 cannot only be guided by Articles 24-25, Chapter IX on Judicial Power in the 1945 Constitution of the Republic of Indonesia but overlapped into Chapter IV on Regional Government, especially Article 18 B (2) of the 1945 Constitution. A law must be respect to the principle of all provisions of the Constitution. In addition, Article 24 (3) of the 1945 Constitution of the Republic of Indonesia, which states that "Other bodies whose functions relate to the judicial power are regulated in law", can actually serve as an entry point for the recognition of customary court in the Judicial Power Act. In addition to conflict with the legal-politics in the constitution, the legal-politics of Act No. 48 of 2009 also contains a horizontal conflict of norms with Act No. 39 of 1999 on Human Rights, in particular Article 6 Paragraph (1) which states: "In the context of human rights enforcement, the differences and needs of customary peoples shall be observed and protected by law, society and government."

(2) Actually, the judiciary is a central function of the judicial power. So, all judicial and customary justice institutions should be regulated in the Judicial Power Act, in order to create a synchronous, consistent, non-overlapping and integrated judicial system of justice, so there is no legal system of mutual negation. The conflict between laws due to the recognition of customary court laid down in a law separate from the Judicial Power Act was once criticized by I Gusti Ngurah Suparka (Chief Justice of the Papua High Court) in his paper "The Problems of Customary Court As Stipulated in the Legislation of the Republic of Indonesia No. 21 2001 on Special Autonomy for Papua Province." I Gusti Ngurah Suparka stated:[17] "It is necessary to review and reconsider the provisions in Article 50 to 51 of the Special Autonomy Act which regulates customary courts in relation to the provisions of Act No. 4 of 2004 on Judicial Power which is now amended by Act No. 48 of 2009 adheres to the principle that "all judiciary in all regions of the Republic of Indonesia is

[17] I Gusti Ngurah Suparka, Semiloka Kerjasama Lembaga Penegak hukum Yang Mengakomodasikan *Sistem Peradilan Adat Terkait Kemtibnas Dalam Rangka Implementasi Otonomi Khusus di Papua* Jayapura 23-29 August 2005.

a State court." Furthermore, I Gusti Ngurah Suparka suggested that the term "*customary court*" in the Special Autonomy Act of Papua replaced by the term "institution or indigenous deliberations institution to resolve indigenous dispute." The most appropriate solution is to put the recognition of the customary court in the Judicial Power Act. Listening to the opinion of I Gusti Ngurah Suparka above, it seems that there is still reluctance from the state law enforcement officers from the forming of Judicial Power Act to have a big heart to recognize customary court as an institution that actually helps state courts in expanding access for customary peoples to obtain legal certainty and justice. Because there is no legal basis for regulation of judicial power recognition in Judicial Power Act and Customary Court of Special Autonomy of Papua.

(3) The resolving of disputes in customary peoples, known as customary courts, is actually part of the function of judicial power, which is theoretically and practically including government affairs excluded from local government affairs. Article 18 Paragraph (5) of the 1945 Constitution of the Republic of Indonesia states: Regional governments exercise autonomy to the maximum extent except for government affairs which by law are determined as central government affairs. In Act no. 23 of 2014 on Regional Government Article 10 paragraph (1) stipulates that government affairs that are exempted from the authority of regional government are, a foreign politics, b. defense, c. security, d. judicial, e. national monetary and fiscal, and f. religion. Thus, the judicial affairs including the customary court of the judicial field are not part of the regional administrative legislation of the executive branch.

(4) The recognition of customary court must apply nationally, because the existence of customary peoples is not only in the land of Papua but is spread throughout Indonesia, while the Special Autonomy Act only has validity to the province of Papua. The recognition of customary court through the Special Autonomy Act can lead to jealousy for the unity of other customary peoples who wish to obtain juridical recognition from the State.

(5) The recognition of customary court outside the Judicial Power Act, whether in the Special Autonomy Act or the Draft on the Recognition and Protection of Customary Peoples Rights on a practical level may result in law enforcement of the state psychologically less concerned and bound to obey. In reality law enforcers understands that the main task and function is only regulated in one law namely the Judicial Power Act, has nothing to do with local

> government legislation. The judicial recognition in the Special Autonomy Act should be inappropriate, because the issue of special autonomy is a matter of local government, let alone related to the Special Regional Regulation on customary court. Actually, the recognition of customary court is recognized by the Judicial Power Act will be easier for the State court apparatus to assist the work of the customary court ... not to mention each district/municipal to make the local regulation that governs the customary justice will intersect with the judicial duty of the state, will become the normative reference of the relationship of state and customary court courts.

The Recognition of Customary Court in the Special Autonomy Act of Papua

The recognition and arrangement of Papuan Customary Court in the Special Autonomy Act of Papua recognizes the basic rights of Papuans, includes written in Chapter XI Article 43 of the Special Autonomy Act on "Protection of Indigenous Peoples Rights" and Chapter XII Articles 45-47 of the Special Autonomy Act of Papua on Human Rights including the Establishment of Representatives of the National Commission on Human Rights and the Human Rights Court. For Chapter XIV in Article 50, Article 51 and Article 52 of the Special Autonomy Act of Papua. Article 50 Paragraph (2) in addition to the Judicial Power as referred to in paragraph (1) there is recognized the existence of customary courts within certain customary peoples. Article 51 paragraph (1) customary courts are peace judiciary within the customary peoples, which have the authority to examine and adjudicate customary civil disputes and criminal cases among indigenous peoples concerned.

The provisions in Article 50 paragraph (2) regulate the States' recognition of the existence of the customary court of Papua. In Article 51 it essentially regulates: definition of customary court, objective (*adressat*), its authority; the composition of customary courts, cooperation with the public court. The position of customary court is even regulated in the elucidation of Article 51 Paragraph (2) which states: "Customary court is not a state court body, but a customary people court institution." The mechanism of case resolution or the procedural law is also described in the

explanation. All these materials must be further regulated by Special Regional Regulations. Article 52 paragraph (2) "The appointment of the Chief Prosecutor is conducted by the Attorney General of the Republic of Indonesia with the approval of the Governor."

The Special Autonomy Act of Papua recognizes the existence of the customary peoples as defined in the provisions of Article 1 letter g and Article 50 and Article 51. Whereas, Act No. 14 of 1970 on Basic Provisions of Judicial Power does not recognize the customary peoples, which has been amended by Act No. 4 of 2004 amended Act No. 49 of 2009 on General Court (UUPU) recognizes customary court. Article 14 of UUPU is expressly written "The court shall not refuse to examine and adjudicate a case filed under the pretext of the law not or less clearly, but obligatory to examine and prosecute." Further confirmation is contained in Article 23 paragraph (1) of UUPU that "all court judgments other than shall contain the reasons and grounds of the decision, shall also contain certain articles of the relevant regulations or sources of the unwritten law."

Article 17 Paragraph (1) of UUPU states that "judges as law and justice enforcer obliged to observe, follow and understand the values of living law." Then, after the enactment of Act No. 48 of 2009 on Judicial Power also does not respond to the presence of customary court explicitly. Although, there are certain articles that states but implicit only. For example in Article 38 paragraph (2) letter e and paragraph (3). Paragraph (2) letter e "The functions relating to the judicial power referred to in paragraph (1) include: a. examination and investigation, b. prosecution, c. execution of decision, d. provision of legal services, and e. dispute resolution outside court, (*blacklisted*). Paragraph (3) "The provisions concerning other bodies whose functions relate to the judicial power are regulated in the law." Whereas, in Article 58 "Civil dispute resolution efforts may take place outside the courts of the State through arbitration or alternative dispute resolution". For the decentralization or the Special Autonomy Act in the executive field also provides a strong

foundation for the implementation of the customary court, especially the implementation of customary court among Papuan customary peoples.

This is expressly stated in Article 51 paragraph (1) to paragraph (8). However, the practice of customary court administration among customary peoples of Papua has been long before the provisions in Article 51 paragraph (1) to paragraph (8) of the Special Autonomy Act of Papua. Customary court in Papua serves to resolve various forms of customary or civil violations (criminal offense) and/or with compensation sanctions that occur within the customary peoples of Papua. For the construction of customary courts in the Special Autonomy Act of Papua is an internal competence, then each customary peoples has the authority to administer customary courts within its own customary peoples. Relation to the government policy, local government through the Special Regional Regulation (Perdasus) of Papua about the customary court of Papua in relation to the authority of State court and customary court arrangement in which not appropriate to the philosophy of Special Autonomy of Papua are alignment, protection and empowerment. The court in the constitutional region of Province is free and independence court, and its implementation by the State Court Body consisting of General Court Body, Religion Court, Administrative Court and Human Right Court, as well Customary Court.[18]

The presence of customary court is one of the specialties of Papua Province in Special Autonomy status and at the same time solves various problems of customary peoples, if solved by the State Court, certainly not will fulfill the sense of justice for peoples. The customary court has been applied in Indonesia based on Article 3a *Rechterlijke Organisatie* but later amendment by Emergency Act No. 1 of 1951, and specifically in Papua was amendment by Act No. 6 of 1966. Nevertheless, among indigenous Papuans, both in cities and villages, are still known to the resolution of cases, both criminal and civil cases, according to local customary law, and in practice

[18] Reumi, F., Yunus, A., Irwansyah. (2015). "Recognition of the Customary Court: A Review of Decentralization in Papua as Special Autonomy". *Journal of Research in Humanities and Social Science, 3*(7), Pages 57-69.

it often happens that a case after being settled under customary law is still brought to the public court, and vice versa. The legitimacy of customary law and court in Papua is intended to give fair law certainty for customary peoples of Papua.

This case contains the important meaning as the principle of *ne bis in iden* (it can be also related to the Article 27 Act No. 14/1970 on the Principle of Judicial Power and Tap MPR RI No. 4/1998, Chapter IV Section A about Law, Item 1-10). The basic consideration in the formulation of Papua Special District Regulation No. 20 of 2008 on Customary Court in Papua is the opinion of scholars on the role of customary court in creating justice, peace and legal certainty in indigenous peoples in Indonesia generally and especially in Papua.

The State court with the simple, quick and low cost principle of court is not realized. This means that litigation in front of a state court is not simple, takes a long time, and costs a lot so that it can only be reached by rich people. The trial process is complicated with its levels (appeal, cassation) so that the time required is usually long. Decisions can lead to new conflicts or disputes. The village/customary peoples said the court only decides cases but does not solve the case.[19] The customary justice system is simple, low cost, the process is straightforward, the time is short and it brings about a sense of justice, certainty and usefulness in people's lives.

The customary court does not seek out who is wrong and who is right, but the courts reconcile, restoring a peaceful atmosphere before any conflict or dispute arises. Customary court as an *Alternative Dispute Resolution* (ADR) institution. Thus, the existence of Papua's customary court helps the economically disadvantaged legal community to solve the legal problems it faces. Customary court still exists in Papua, although it has come into contact with the outside world causing social, cultural, and legal changes in the life of customary peoples with 4 (four) customary governance structures in Papua, namely, *Keondoafian*, Royal, Big man and mixed. According to Hendrik H.J. Krisiffu, the customary peoples of

[19] Soerjono Soekanto, (1986). *Kedudukan Kepala Desa Sebagai Hakim Perdamaian Desa*. Jakarta: Rajawali Press, Pages. 43-44.

Papuan call "a forum of justice with the term *custom affairs*. To resolve disputes/cases each customary peoples in Papua have customary forums/institutions with the title according to their respective regional languages that serve as a place of custom convention. For example, in Jayapura district; the customary peoples of Sentani calls *Para-Para Adat* (*Obe Onggo*) or a custom house as deliberations place for village development and also serves as a judicial venue in resolving customary disputes."[20]

The recognition of Institutional, Authority, Decision of Customary Court in Special Autonomy of Papua

As the philosophy of Special Autonomy of Papua mentioned as part of the strategic measures of alignment, empowerment and protection in observing the basic rights of indigenous Papuans to participate in the development of Special Autonomy of Papua. However, all provisions on the implementation of the content of the *Perdasus* of customary court are not different from the provisions in Article 50, Article 51, and Article 52 of the Special Autonomy Act of Papua. Because there is no legal basis for the making of *Perdasus* of customary court of Papua from the Special Autonomy Act of Papua. The recognition of juridical of customary court in the National Law System, as part of the order of the national legal system is recognized juridically, sociologically, philosophically and theoretically contained in the 1945 Constitution of the Republic of Indonesia, MPR Decree, until Presidential Decree. "Customary court is recognized juridically, sociologically, philosophically and theoretically, for example in Article 18B paragraph (2), Article 28I paragraph (3), Article 24 paragraph (3) of the 1945 Constitution, MPR Decree IX/MPR/2001, Act No. 17 of 2007 and Presidential Decree No. 7 of 2005, "Lilik Mulyadi in the National Dialogue of the Supreme Court," formulates the position of Customary court in the National Judicial System", on Thursday, October 10, 2010 in Jakarta. So, according to Lilik Mulyadi, the presence of Article 1 of the Criminal

[20] Hendrik H.J. Krisifu, (2014). *Pengadilan Adat Masyarakat Adat Papua Dalam Sistem Peradilan Indonesia*. Bandung: LoGos Publishing, Page. 15.

Code in the Dutch colonial era led to the death of the customary court." In those days it is still understandable because it is in accordance with Dutch legal politics at that time, but it will be felt otherwise if the policy is still continued to this day," said the District Court official.

Hence, implicitly the customary court is actually set up, but explicitly not continued," said Lilik Mulyadi in the presence of *Pendamping Hukum Rakyat* (PHR) and a number of representatives of the District Court from various regions in attendance. The recognition of the 3 (three) basic principles of customary court that need to receive attention according to the expectations of Lilik Mulyadi as vice chairman of North Jakarta District Court are: principles of honored, independence customary court, and universal values. At the level of local legislation policy, the existence of customary court is also recognized," said Lilik Mulyadi, judging that the jurisprudence of the Supreme Court acknowledges the existence of customary courts, the Supreme Courts' jurisprudence determines the Supreme Court as the highest judicial body in Indonesia is remain respec to the decision of customary leader for customary law offenders.

Lilik Mulyadi proposed, there are 3 (three) models in initiating the ideal concept of customary court in Indonesia. *First*, customary court is independent, *second*; customary courts enter the general judicial chamber, and *third;* the general court adjudicates customary matters by accommodating customary values." However, the most important thing now is the political will of the law of the government," Will or not proceed in the form of legislation?". In line with Rikardo Simarmata argues that some Indonesians are caught up in the thought of colonial law that does not see the law as a representation of universal values, but as a representation of identity (cultural) and aspiration of power. Therefore, Rikardo Simarmata proposes two things in the national dialogue: *first*, recognizing and granting the position of customary court to customary law is not necessarily directly proportional to the lack of state power over the administration of justice and the narrowness of narrow cultural

identities. *Second*, the recognition and granting of customary court in the national justice system should endeavor to make law (both state law and customary law) as a representation of universal values, not a narrow representation of the values of interest groups.

One of specificities in the application of Special Autonomy of Papua is the recognition of customary court in the life of customary peoples. The existence of such recognition is governed by Chapter XIV of the Judicial Power, in Article 50 and in Article 51. In Article 51 paragraph (1) it is institutionally determined that "Customary court is a peace court" and customary courts are authorized to adjudicate civil disputes and criminal cases among customary peoples, while paragraph (2) "the customary court is arranged as the provision of customary law." Whereas paragraph (3) that the customary court adjudicates customary civil disputes and criminal cases under the law. Paragraph (4) that if one of the parties to a dispute or litigation object to the decision of the customary court it is entitled to request the district court to adjudicate the dispute or case, even paragraph (5) that the customary court is not authorized to impose a jail or imprisonment. Paragraph (6) indicates that the decision is stipulated that the decision of the customary court on criminal offense which is not requested for re-examination shall be final/permanent legal decision.... Paragraph (7) that in order to free the offender from criminal prosecution under applicable criminal law, approval from the Chair of the District Court is required through the Head of the Public Prosecution concerned. Paragraph (8) whereas if the request for approval for the implementation of the decision of the customary court is rejected by the District Court, the decision of the customary court shall be the legal consideration of the District Court in deciding the case. Based on the reference in Article 51 of Special Autonomy of Papua above, essentially regulates the recognition related to 3 (three) aspects of customary court, that is 1) institutional, 2) authority, and 3) decision. Further regulation of recognition in Article 50 through Article 51 is very important because it is precisely the model and the political quality of the law of recognition of

customary court determined by the recognition of these three aspects.

The Weakness of Recognition of Institutional, Authority, Decision of Customary Court In the Special Autonomy Act of Papua

The recognition of the weakness of customary court in the Special Autonomy Act is stipulated in Article 50 Paragraph (2) which affirms, "in addition to the judicial power in accordance with laws and regulations (the State court/judiciary), it is recognized the existence of customary courts within certain customary peoples, in addition Article 51 paragraph (1) and (2). The substance of the two articles it is expressly recognized in the existing national law, judicial and customary courts of Papua Province, as an informal peace justice institution among existing customary peoples. The status and position of customary court institutions is then regulated in the Elucidation of Article 51 Paragraph (2) stating "Customary courts are not the state court bodies, but the customary court institution."

The affirmation of the customary courts rather than the state court in an explanation of the article is in fact inappropriate. In theory of legislation, the elaboration of articles should not contain new norm but only provide an explanation of the relevant article redaction. Based on the explanation of the article, the customary court is a "not a State court body," which means a separate court, unrelated, not part, and outside state court system. In academic texts it is usually referred to as *non-state justice*, as opposed to *state justice*. As a separate court of the state justice system, customary court should have autonomy and autonomy in accordance with the autonomous theory of the unity of customary peoples.[21] In addition, the composition of customary courts is regulated according to the customary law of the local customary peoples. Thus, the customary courts are domiciled within Papuan customary peoples.

Understanding this provision is not in line with the spirit of autonomy in the Special Autonomy Act of Papua, which aims to recognize the existence and empowering customary people of

[21] Pelupessy, E. (2017). The Land Rights of Indigenous Peoples: Revaluation of Papua Special Autonomy. *Hasanuddin Law Review*, *3*(1), 77-90. doi: http://dx.doi.org/10.20956/halrev.v3i1.1047

Papua from the socio-anthropological aspect based on Article 18B paragraph (1) and (2) of the 1945 Constitution. But the juridical aspect in Article 18B should be formulated substantially by interpreting the philosophical values in Article 24 of the 1945 Constitution of the Republic of Indonesia in a good sense rather than stand alone from the function of judicial power. This means that in terms of redaction, the recognition of customary judicial institutions in Article 51 paragraph (1) can also lead to blurring with the phrase "Customary court is a peace court."

The term "peace court" is a vague definition and debilitating the existence of customary court in Papua, since the term is similar to the term village court (*dorpsjutite*) called "village peace judge" as referred to Article 3a RO (*Reglement Op Be Rechterlijke Organ isasi en het Beleid Der Justitie in Indonesie Reglemen* Justice Organization Regulation and Justice Policy in Indonesia) Staatblad Th. 1847/20 jo. 1848/57, which basically cannot be called a judiciary/court in the real sense of the word, as it is only a means of aiding for the state court. It is better to use the phrase "peace-based justice/court" rather than "peace justice/court", since customary court is not merely a peace institution but within certain limits it also carries out law enforcement functions through repression efforts in the form of reactions or custom correction to indigenous offenders.

This is in accordance with the legal nature of the customary offense, among other: in the case of conduct reaction or correction in the resolve of cases that upset the balance of society, the legal officer cannot only act against the perpetrator, but also against the family, or relative of the offender, or may be required to impose obligations on the community concerned or entirely to restore cosmic balance. Juridical recognition of the weak authority of customary court in handling cases can be read and Article 51 (1) and elucidation of Article 51 Paragraph (2). Article 51 (1) mentions "Customary court…has the authority to examine and adjudicate customary civil disputes and criminal cases among indigenous peoples concerned." In addition, recognition of the authority of customary justice is also mentioned in

the Elucidation of Article 51 Paragraph (2).

The essence of juridical recognition of the authority of customary court as mentioned above, according to Muhammad Jamin[22] contains 2 (two) disadvantages,: *First*, the vagueness and vague norms. Article 51 Paragraph (1) stipulates that the customary courts have the authority to hear "dispute over customary matters and customary criminal cases." If it refers to the redaction of this article, the customary court has the authority to hear all types of criminal cases without exception. The authority of the customary court is basically about two things, namely the person (*subject*) and the case (*object*). The related authority of the person (*subject*) in the Special Autonomy Act has been firmly stipulated in the Elucidation of Article 51 Paragraph (2). The substance of this provision is appropriate so it must be maintained. In the Special Autonomy Act of Papua, the vague of norms occurs concerning the arrangement of case related authority (*object*).

Here, there is uncertainty, what criminal case? Which is the jurisdiction of the customary court, whether the pure criminal matter is just indigenous delict, or includes the case of the indigenous delict which is also a criminal offense according to positive law. Second, the division of cases into customary civil and customary criminal as set forth in Article 51 paragraph (1) and (3) of the Special Autonomy Act of Papua, using the logic of division which can be found in Western law, which is not known in the customary law system.

The essence of legal action and procedure to resolving in customary law is comprehensive and unified," it not separating between criminal or civil cases, nor is it distinguished whether an act is intent (*opzet*) or by negligence (*culpa*). The handling of cases is united, if between one and the other is a series of events that disrupt the balance, and the whole is made one in the resolution before the judiciary (*consensus*) of customary law officers. The formulation of cases into customary civil and criminal cases as set forth in Article 51 paragraph (1) and (3) of the Special Autonomy Act of Papua is actually nothing in the Draft of Special Autonomy Act of as

[22] Muhammad Jamin, 2014, *Loc Cit.*

Initiative Proposal of Legislative. In Article 48 (1) the draft is formulated "Customary courts have the authority to examine and adjudicate cases and/or disputes under customary law and parties as victim and/or losers."

The substance of the explanation of Article 51 Paragraph (6) states "The decision of the customary court is a final and permanent legal decision in the case of the parties to the dispute or the litigant to receive it. Such decision may also release the perpetrators and criminal charges according to the applicable criminal law provisions. "The weakness of recognition to customary court decision is regulated in the Special Autonomy Act Article 51 Paragraph (4), (6), (7) and (8). In essence the substance of the article confirms 4 (four) things: 1) in the case of one of the parties objecting to the decision of the customary court, entitled to request to the State court authorized to examine and adjudicate the dispute or case concerned; 2) the decision of the customary court on criminal offenses whose case is not requested for re-examination to be final and permanent law enforcement; 3) to free criminal offenders and criminal charges in accordance with applicable criminal law provisions, a statement of consent is required to be made and the Head of the District Court of the territory acquired through the Head of the Public Prosecution concerned; 4) in the case that the request for approval statement is rejected by the District Court, the decision of the customary court shall be the consideration of the law of the District Court in deciding the case.

The writer agrees with the reference of Mohammad Jamins that the juridical recognition of the customary court decision in the Special Autonomy Act of Papua has some substantial weaknesses, includes: 1) Provision of Article 51 (4) of the Special Autonomy Act of Papua gives the parties the opportunity to object to the decision of the customary court, entitled to request to the State court authorized to examine and adjudicate the dispute or case concerned. This provision is inconsistent with customary law that develops in customary peoples in Papua who do not recognize vertical level court but horizontal cross-clan and surrounding ethnic (horizontal by the writer) and the

judicial decision is final. 2) The term "examines and re-trial" in terminology is contrary to the principle of *ne bis in idem*. The provision of Article 51 (4) of the Special Autonomy Act of Papua stating that such objector has the right to request to the First Court in the jurisdiction that is authorized to "examine and re-trial" dispute or case in terminology can be interpreted contrary to the principle of *ne bis in idem*.

CONCLUSION

The presence of customary court is recognized in Article 18B paragraph (2), jo. Article 24 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, but the regulation of the customary court under the 1945 Constitution of the Republic of Indonesia there is no explicitly recognized synchronization of institutional, authorities, court decisions relationship in Article 38 and 58 of Act No. 48 of 2009 function of judicial power in the field of judiciary, with the recognition of the Customary court in Article 50 paragraph (2) and Article 51 paragraph (2) of the Special Autonomy Act in the field of executive as a Peace Court and one of the special rights of Special Autonomy and the traditional rights of customary peoples of Papua.

There is no synchronization and harmonization of the authority relationship of the customary court in Act No. 48 of 2009 jo. Act No. 49 of 2009, and the Special Autonomy Act of Papua. Thus, the juridical implications of the weakness of institutional recognition, authority and decision of customary court over the resolution of cases or customary disputes with the principle of *ne bis in idem*, although customary court as a peace court institution has implemented the function of judicial power, thus causing conflict of norms in law enforcement for customary peoples of Papua is multicultural.

The future, the direction of recognition of customary court of Papua needs to have a special court which has a relationship of authority in resolve cases or disputes by considering the principle of *ne bis in idem* between the function of judicial power and the Special Autonomy Act of Papua. For customary peoples of

Papua to be peaceful, can access "justice in all spaces of life."

REFERENCES

Abdurahman, "*Peranan Hukum Adat Dalam Aplikasi Kehidupan Berbangsa Dan Bernegara"*, (Paper). Jakarta 29-31 May 2006, BPHN.

Frans Reumi, (2015), *Hakikat Pengakuan Peradilan Adat Dalam Perspektif Otonomi Khusus Papua*. Makassar: Prostgraduate Program of Hasanuddin University.

Frans Reumi, Ahsan Yunus, Irwansyah. (2015). "Recognition of the Customary Court: A Review of Decentralization in Papua as Special Autonomy". *Journal of Research in Humanities and Social Science*, *3*(7), 57-69.

Hendrik H.J. Krisifu, (2014). *Pengadilan Adat Masyarakat Adat Papua Dalam Sistem Peradilan Indonesia*. Bandung : LoGos Publishing.

Hero Poesoko, et al., (2014). *Eksistensi Peradilan Adat Dalam Sistem Peradilan Di Indonesia.* Surabaya: LaksBang Justita Surabaya.

Hilman Hadikusuma, (1989). *Peradilan Adat Di Indonesia*. Jakarta : CV Miswar.

I Gusti Ngurah Suparka, Semiloka Kerjasama Lembaga Penegak hukum Yang Mengakomodasikan *Sistem Peradilan Adat Terkait Kemtibnas Dalam Rangka Implementasi Otonomi Khusus di Papua* Jayapura 23-29 August 2005.

Mahfud, MD., "*Revitalisasi Masyarakat Hukum Adat Dalam Kerangka UUD 1945 Menyongsong Globalisasi"* (Paper), Bali 30 September 2010.

Mohammad Jamin, (2014), *Peradilan Adat : Pergeseran Politik Hukum Perspektif Undang-Undang Otonomi Khusus Papua*. Yogyakarta : Graha Ilmu.

Mompang L. Panggabean & Dyah Irawati (Penyuting), Hukum Dalam Jagat, Bahan *Bacaan, Program Doktor Ilmu Hukum*, Semarang: Graduate School UNDIP.

Pelupessy, E. (2017). The Land Rights of Indigenous Peoples: Revaluation of Papua Special Autonomy. *Hasanuddin Law Review*, *3*(1), 77-90. doi: http://dx.doi.org/10.20956/halrev.v3i1.1047

R. Soepomo, (1982). *Sistem Hukum di Indonesia Sebelum Perang Dunia Kedua.* Jakarta : Pradnya Paramita.

Soerjono Soekanto, (1986). *Kedudukan Kepala Desa Sebagai Hakim Perdamaian Desa*. Jakarta: Rajawali Press.

The Partnership, *Perlindungan dan Pengakuan Terhadap Eksistensi Peradilan Adat Di Papua*. In cooperation with Dewan Adat Papua (DAP), MRP, Lembaga Masyarakat Adat (LMA), Province Government of Papua, Legislative, High Prosecutor, High Court, Police of Papua, and Cenderawasih University, 2008.