



Understanding the Nebis in Idem Principle on Customary Court in Papua According to the Law No. 21 of 2001

Hendrik Krisifu; Yustus Pondayar

Faculty of Law, Cendrawasih University, Indonesia

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Abstract

The aim of this research is to understanding how nebis in idem as it is referred on Article 51 of the Law of Special Autonomy for Papua Province and what is the obstacle faced by the law enforcer; police, prosecutor, and judge in implementing Article 51 of the Law of Special Autonomy for Papua Province. It is confirmed on the Article 50 Paragraph 2, beside the judicial power as stated on the paragraph (1), it is recognized a customary court in certain indigenous people. Customary court is not a new thing in Papua Province. Because apart of the acknowledgement of “customary law” and “indigenous people” it is stated on the Constitution 1945 Article 18B Paragraph (2) (second amendments) and Broad Outlines of State Policy 1999 (GBHN 1999) (development in the field of law in other terms namely unwritten law), factual-empirically this customary court institution is maintained in the realm of indigenous people in every Papua Province. The recognition of customary court is giving a new nuance in law enforcement in Indonesia and especially in Papua. The new nuance that is expected is that there is now conviction twice for the same case. In the event that a case has been resolved in a customary law, it is no longer continued or retried on a general court or district court. Thus, with the principle of nebis in idem can also be applied in a customary court.

Keywords: *Customary Law; Customary Court; Nebis in idem.*

Introduction

Indonesia as a state law, then the rule of law that has to be executed and enforced truthfully, it means that every act, as a part of society or government apparatus must comply and must not deviate from the laws that is forced in the state of Indonesia law. In the history of law in Indonesia before the proclamation, 3 (three) legal system is applied, namely: customary legal system, religious legal system, and colonial legal system. The existence of the legal system then still continued until this day. So, since Indonesia independence, government keep trying to change the colonial legal system and customary law that is not in accordance with the development of law and the society in Indonesia through unification and codification national law. This effort was done systematically and planned manner with the of forming a national law and also to eliminate dualism or pluralism of the legal system in Indonesia.

In fact, the legal and unification effort to eradicate customary law and the customary court practice in the indigenous people in Indonesia, its not easy to eradicate or change the role of customary law with the state justice system. In certain region in Indonesia, in reality it showed that the customary court still exists in solving a dispute outside the court, the practice has strongly institutionalized in the indigenous people in Indonesia. Customary law of justice is an old legal system and actively playing a role in creating order and peace in culture so it is still maintained and continued until today on every part of indigenous people in Indonesia.

From several literature and the result of research that has been done it can be identified that several regions still acknowledge the existence of customary court. Those regions such as:

Kainkain Karkara Biak; as a Dispute Resolution Institution for Biak People in Papua. In settle the dispute both civil or crime, the indigenous people of Biak always make a choice on the legal institution that will be used to settled the dispute. This is done according to the experience that is seen and feel on the process on dispute resolution through state judicial institution and though customary court. Because, the most important for indigenous people of Biak is prioritizing harmonic, the feel of peace and secure between people and environment. In the case of settlement of murder cases, it is done through traditional ritual “*tiup kapur*” (*skou uf afer*) and “*potong bamboo*” (*owapuk ambober*) as a symbol that have a religious value and sacredness in reconcile the dispute parties.¹

Dayak Kanayatn People in Landak and Pontianak Regency in Kalimantan, in imposing a customary sanction always based on the principle of “*kade’ labih Jubata bera kade’ Kurang Antu bera*” that means, if its more than god will be mad, but if its less than the ancestral spirit/ghost will be mad. This principle is clearly stated that in imposing a customary sanction, it needed to adhere the value of justice and balance. Not only on that level, if the customary leader decided the sentence, then the cases which is believed can bring a bad effect to the community such as unwed pregnancy case *Ngampakng* or murder cases or taking away people lives, will be always done a peace ceremony between two parties and the village community and the surrounding nature.²

Likewise, in Papua the history of customary court in Papua has been responsible on making a law order in the indigenous people on every region and people in Papua. This customary court used to solve a customary dispute such as: marital dispute, carrying off girls and land dispute and a fight between village and many other cases in society. In the case settlement, there is a sanction that is set. The sanction always in form of customary fine such as; objects/goods (plates, beads, *tomaku batu*, etc.), money, animal (pig) and there also payment of fines with a woman. The settlement through customary court is believed by the people that this institution settling the cases fairly.

In the Province of Papua through the Law No. 21 of 2001 concerning of Special Autonomy for Papua Province in the Article 50 Paragraph (1) it is determined, the judicial power in Papua Province is done by judiciary in accordance with the laws and regulation, and Article (2) besides the judicial power as it is stated on the Article (1), it is recognized a customary court in certain special indigenous people. And on the Article 51 Paragraph (1) stated; customary court is a peace court within the customary law community, which has authority to examine and adjudicate customary civil dispute and criminal cases among the members of the related customary law community. On the explanation part of Article 51 Paragraph (1) it is expressly recognized the existence on the national law a customary judicial institution in Papua Province, as a peace court institution between the indigenous people in the existing customary law community. The customary judicial institution in Papua is not a state judicial institution but a customary law community court institution. Actually, in customary law it does not differentiate between customary dispute and criminal case as it is stated by Soepomo, that customary law is not differentiate

¹ Krisifu, H., (1997). *Kainkain Karkara Biak: Lembaga Penyelesaian Sengketa Pada Orang Biak*. Thesis, Prog. Studi Antropologi, Prog. Pascasarjana Universitas Indonesia. Jakarta. p. 111.

² Gawing, L., (2006). *Peradilan Adat: Keadilan Yang Ternafika*. Forum Keadilan: No. 21, 17 Sept. 2006. Kerjasama Forum Keadilan dan HuMa. Jakarta. p. 2.

between violation (e.g rape) law that oblige the prosecution to revise the law in the field of criminal law (before a criminal judge) and violations of the law which can only be prosecuted in the field of civil law (before a civil judge). Related with that, in the customary law system, there is no differentiation between procedure in terms of civil procedure prosecution (civil) and crime procedure prosecution.³

To implement Article 51 of the Special Autonomy for Papua Province, the government of Papua Province issues a special regional regulations (perdasus) No. 20 of 2018 concerning on Customary Court in Papua. On the general explanation, it is stated the basic matter that is regulated in this special regional regulations which is:

- First : Government recognitions of the existence of customary court which so far has only been recognized from the political and administrative aspects, while the form of judicial power is not recognized; strengthening the position of customary court; and assisting government in law enforcement.
- Second : Strengthening the government on the customary court in Papua through financing and providing supporting facilities.

Therefore, with the recognition of the customary court in Papua as a peaceful court, it is expected a criminal case of civil case that is settled amicably through customary court will not continue by the parties to the district court level. This is one of the goal by the maker of the Law of Special Autonomy of Papua Province, so there is no repetition of punishment on the same cases or *nebis in idem* in the principle of criminal law as it is regulated on the Article 76 of Criminal Code. These goals are reasoned because of the lack of attention, by the state judiciary on the decision that is taken by the customary court. This condition is one of the main factor of injustice and various social inequalities in indigenous people in Papua.

A peace settlement is all about creating harmonious, peaceful, and balanced between people/community who is litigating with the natural surroundings, as well as rebuilding social relation. On the legal side, the role of customary court and state court actually has the same legal objective, namely the creation of an orderly society. According to Mochtar Kusumaatmadja, the order is the main goals and the first of all law. The need of this order is a fundamental requirement for the existence of orderly community. Apart from all the longing for the other things which are also the goals of law, order as the main goal of law, is an objective fact that applies to all human in all forms.⁴

Apart from all the longing for other things which are also the goal of law, order as the main goal of law is an objective fact that applies to all human societies in all forms.

Literature Review

Theory and Concept

Several library materials that is related in this research as the base theory and concept is:

- a. Indonesia Rule of Law Theory

Sri Soemantri also pointed out there are 4 (four) most important element in a rule of law theory, namely:

³ Soepomo. (1993). Bab-Bab Tentang Hukum Adat, PT Padnya Paramita. Jakarta. p. 108.

⁴ Kusumaatmadja, M., (2002). Konsep-Konsep Hukum Dalam Pembangunan. Alumni. Bandung. p. 3.

- 1) The government on carry out the duty and obligation should base on a principle of law or laws and regulations;
- 2) The guarantee of human rights;
- 3) Distribution of power;
- 4) Supervision (from judicial authorities).⁵

According to Wirjono Prodjodikoro, a state of law means a country within its territory is:

- 1) All tools and equipment from state, especially tools from the government in their action both against citizen and in their respective relationship, must not be arbitrary, but must pay attention to the applicable law regulations.
- 2) Everyone (resident) in relation with community must comply with the applicable laws and regulation.⁶

State of law is defined as a state where the act of government or the people is based on law to prevent arbitrary action from the authorities and the people according to their own will.⁷ But, it need to remember that law is a protection for human interest, law is for human, so governance not by man but by law cannot be defined as the people is passive and become a slave of law.⁸ To prevent such things, as pictured by Jimly Asshiddiqie above it need a guarantee on making a law that is democratic and participatory, also free press and principle of transparent and accountable state power management with the effectiveness of an open social control mechanism.

b. Criminal Law

Criminal Law is part of Law. Pompe stated that criminal law is the entire rule of law that determine kind of action that is threatened with punishment and the crime is incarnate. So, if we see from the definition of criminal law by Pompe, it can be concluded that criminal law consists of 2 (two) element. First, in form of legal regulation that determine kind of action that is threatened with punishment. And second legal regulation regarding the crime, weight and type, and how to apply them.⁹

1. Criminal Law Principle

i. The Principle of Legality

The principle of legality is listed on Article 1 Paragraph 1 of Code Penal that stated: “No act (*feit*) shall be punished unless by virtue of a prior statutory penal provision”

In latin: “*Nullum delictum nulla poena sine praevia lege poenali*”, which if it’s translated into Indonesian by word per word means “*Tidak ada delik, tidak ada pidana tanpa ketentuan pidana yang mendahuluinya*”. It also often used other latin term *Nullum crimen sine lege stricta*, that mean “there is no offense without strict provisions”.

⁵ Soemantri, S. (1992). Bunga Rampai Hukum Tata Negara Indonesia. Alumni. Bandung. p. 29.

⁶ Prodjodikoro, W. (1971). Asas-Asas Ilmu Negara dan Politik. Eresco. Bandung. p. 38.

⁷ *ibid*, p. 91

⁸ Mertokusumo, S. (1986). Mengenal Hukum. Liberty. Yogyakarta. p. 21.

⁹ Pompe. *Handboek van het Nederlands strafrecht* on Abidin, A. Z & Hamzah, A. (2010). Pengantar dalam Hukum Pidana Indonesia. PT. Yarsif Watampone. Jakarta. p. 1.

This such provisions have been included into French Code Penal which came into force on 1 March 1994 which stipulates: “*La loi penale est d’interpretation stricte*” (a criminal law has to be interpreted in detail/strictly). The offense must strict is also included on the International Criminal Court (Rome Statute).

There are two things that can be concluded:

- 1) If an act that is prohibited or an act of neglect is required and threatened with punishment, then the act of neglect must be listed on the criminal law.
- 2) The provisions may not apply retroactively, with one exception listed in the Article 1 Paragraph 2 of the Code Penal.

Moeljatno has write, that the principle of legality contains three terms:

1. There is no prohibited act and threatened with punishment if that has not been stated on the statutory regulations.
2. To determine the existence of a criminal act, analogy (*kiyas*) should not be used.
3. The rule of criminal law is not retroactive.¹⁰

ii. *Nebis in idem*

The principle of *Nebis in idem* is regulated on Article 76 Paragraph (1) of Code Penal except in the event that the judge’s decision can still be repeated (*herziening*), people cannot be sued twice because the act that by the Indonesia judge toward themselves has been tried with a decision that becomes permanent.

In terms of Indonesia Judge, including judge at the *Swapraja* and customary court, in places that have these court.

Paragraph (2) if the decision that becomes permanent comes from other judge, then toward these people and because the criminal act, prosecution should not be held in this case: 1st verdict in form of exemption from charge or waiver of the lawsuit; 2nd verdict is in the form of conviction and the penalty has been served in full or has been given a forgiveness or the authority to carry out has been cancelled due to the expiration of case.

The principle of *Ne bis in idem* (*kracht van gewijde zaak*) have two side which is personal (*persoonlijk*) and incident (*zakelijk*). The first mean that is the same person that is demanded. What does *feit* (incident) on the Article 76 of Code Penal mean? At first *feit* is often known as act, it also means *lichamelijke daad*, *lichamelijke handeling* or physical actions based on materialistic view. Then the materialistic view is changed into a *verimmaterialisering* view or *vergeestelijking* incident or the act, as a term that is stated by Mr. Taverne, that according to the authors can be defined as an incident that causes the person who made it to be punished.¹¹ H. R on its arrest, 27 June 1932 has stipulated that drunkenness in public by disturbing order by hitting and kicking a policeman who carrying out its duties according to law. According to Supreme Court, the first characteristics of the defendant actions is an offense according to Article 492 of Code Penal, while the characteristics of the second action is offense against the officials who carrying out their legitimate duties according to Article 351 Jo. 356 Code Penal.

¹⁰ Moeljatno. Perbuatan Pidana dan Pertanggungjawaban dalam Hukum Pidana. Yayasan Badan Penerbit Gajah Mada. Yogyakarta. p. 25

¹¹ Abidin, A. Z., & Hamzah, A. (2010). Pengantar dalam Hukum Pidana Indonesia. PT Yarsif Watampone. Jakarta. p. 270.

It can be concluded, even though a physical action created two different offense but it is done in the same place and time, according to the criminal law, two different offense is happened and each one is stand alone, and both can be accounted for to a defendant. As it is confirmed by public prosecutor *Advocaat General Wijnveldt*. According to Wijnveldt, the act of disturbing order with attacking a police that carrying out its legitimate duties. Both offense is standing alone even though it is realized by a physical action, because the defendant's objective for the two offenses were different.¹² In several *Hoge Raad* arrest, such as arrest 12 July 1939, that an indictment, except regarding the timing, contains the same material (physical) action, is the same incident.

c. Sanction

i. Criminal Sanction

Sanction coming from latin terms *sanctum* means affirmation (*bevestiging* or *berkrachtiging*) that can be positive in form of gift, and can be negative in form of punishment, therefore sanction basically is a stimulant to do or not to do. However, the legal community usually interpret the term of sanction as a negative sanction of punishment. in this relation, Sudarto define sanction as a punishment that is threatened to the violators of a norms, so the criminal law stated as a negative sanction system.¹³

From here, it seen that the criminal law could be differentiate with other law. Hence, sanction in wider terms could be classified in three type, namely:

- a. As a remedy for situation, which is usually found in the field of civil law;
- b. As a fulfillment of condition, which is usually found in the field of civil law;
- c. As a punishment in a broad sense, including crime and action

ii. Customary Sanction

According to Soepomo, on the customary law every act that is contradicting with the customary law regulation is illegal act, and customary law also known an endeavor to fix the law (*rechtshersel*) if the law is raped.¹⁴

Then Soepomo stated, customary law does not make separation between violations (rape) of law which oblige the demand to restore the law in the field of criminal law (before criminal judge) and violation of law that can only be prosecuted in the field of civil law (before civil judge). In accordance with that, in the customary law system there are no differentiation between procedure in the case of civil procedure prosecution (civil) and crime procedure prosecution (civil) and criminal prosecution. If the violation of law is happened, then the legal officer (customary chief, etc.) will take a concrete actions (*adatreactie*) to restore the law that is violated. An act against the law, such as not paying debt will require legal reparation. In this case, the law could be repaired with punishing the debtor to pay his debt.

According to I Made Widnyana, customary sanction or customary reaction or customary correction is a form of an act or effort to restore the balance including the balance that is magical caused by the disturbance that is a customary violation, then the terms customary sanction has a synonym definition with the definition of customary reaction or customary correction.¹⁵

¹² *Ibid*, p. 270.

¹³ Sudarto. (2015). *Hukum dan Hukum Pidana*, dalam I Dewa Made Suartha, *Hukum dan Sanksi Adat Perspektif Pembaharuan Hukum Pidana*. Setara Press. Malang. p. 20

¹⁴ Soepomo. (1993). *Bab – Bab Tentang Hukum Adat*. Pradnya Paramita. Jakarta. p. 108

¹⁵ Widnyana, I. M. *Eksistensi Tindak Pidana Adat dan Sanksi Adat dalam KUHP on Suartha, I. D. M.*, (2015). *Hukum dan Sanksi Adat Perspektif Pembaharuan Hukum Pidana*. Setara Press. Malang. p. 22.

According to Koentjaraningrat, as quoted by Soerjono Soekanto and Soleman B. Taneko, social control in society can be done in many ways, such as:

- a. Strengthening the society beliefs of the community in the goodness of certain social principles;
- b. Giving rewards to the people who are obey certain social principles with applying positive sanctions;
- c. Developing a sense of shame in the community, if they deviate from or from certain social values or principles
- d. Make a fear
- e. Develop a set of legal rules.¹⁶

From this statement, it can be seen that the sanction (negative) handling is one of effort from social control system which are owned by certain society to make order in the society, because the requirement of a society is an order.

- d. Customary Law and Customary Court Theory
 - i. Customary Law

The term “customary law” (*hukum adat*) – “*adat recht*” for the first time used by Snouck Hurgronje to indicate to customa that has a customary sanction “*die rechtsgevolgen hebben*” (mean legal consequences), different with habit or view that doesn’t have legal meaning.¹⁷ Likewise according to Ter Haar not all customs are customary law, but on the other hand customary law is part of the customs to which sanctions haave been added or “*die rechtsgevolgen hebben*”.¹⁸ Ter Haar used the terms that is already introduced by his predecessor to show what is customary law.

Furthermore, Ter Haar that is known with his *beslssingerleer* said that customary law covers the whole of regulation which incarnates in the decisions of legal officials, who have authority and influence, and in their implementation, they are automatically enforced and obeyed wholeheartedly by those who are governed by that decision. The decision can be regarding something that is regulated by the decision. The decisions could be about a dispute, but it can be taken based on the harmony and deliberations.¹⁹ So, according to the concept above, customary law occurs when there is a decision from the ruler or from the community.

- ii. Customary Court

Hilman Hadikusuma, giving the definition about Customary Law Court or Customary Court is a Customary law that regulates about how to solving a case and or establishing legal decision of case according to customary law. From the process of implementation about settlement and decision of the case.²⁰ While about customary court, it is further said that the term “court” (*rechtspraak*) basically mean a conversation about law and justice that is done with court system (deliberation) to solving a case outside the court and or before the court. If the conversation is based on a customary law, then it is a “Customary Law Court” or “Customary Law” only. The decision of settlement dispute is taken based on a deliberation and unanimous consensus by panel of judge, who know very well about the condition of the community and the customary law of community.

According to Soepomo, village justice in law is known as a customary law.²¹ Also Abdurrahman stated, that between village courts and customary court there is actually no differences in principle.²²

¹⁶ Soekanto, S., & Taneko, S. B., (1986). *Hukum Adat Indonesia* cetakan ketiga. Rajawali. Jakarta.

¹⁷ Van Vollenhoven, C., (1987). *Penemuan Hukum Adat*, Djambatan, Karangan Terjemahan KITLV Bersama LIPI. p. 141.

¹⁸ Afdol. (2006). *Hukum Adat & Haar*, T. Jentera Edisi 14 – tahun IV Oktober – Desember. p. 146.

¹⁹ Soekanto & Soekanto, S. (1978). *Pokok-Pokok Hukum Adat*. Penerbit Alumni. Bandung. p. 16-17.

²⁰ Hadikusuma, H. (1992). *Pengantar Ilmu Hukum Adat Indonesia*. CV Mandar Maju. Bandung. p. 24.

²¹ Soepomo. (1972). *Pertautan Peradilan Desa Kepada Peradilan Gubernur*. Bharatara. Jakarta. p. 7.

²² See Suara Pembaharuan Daily, 20/9/2004, on <http://www.huma.or.id>

The indigenous people in Papua usually refer to customary court as the term of *Sidang Adat* (Customary Assembly). The customary assembly aims to settle a customary cases in a harmonious and peaceful family atmosphere.

Methods

In understanding the positive law and customary law in the Jayapura Regency that is focused on Customary Court, which is Jayapura District Court, Jayapura District Attorney, Jayapura City and District Police, Sentani Customary Council, the Port Numbay Customary Council in Jayapura and Biak Customary Council in Jayapura. This research using 2 (two) approach namely: juridical-normative and juridical-empiric. The data needed for this research is taken from library research and field research through literature review, interview and observation. The analysis is done qualitatively.

Result and Discussion

Customary Court in Papua

Customary court in Indonesia, in fact it is known various form of customary court on many indigenous people in Indonesia. According to Hilman Hadikusuma in the life of society, the customary court is still existed. The customary court following the customary law that is change on the life of society that changed.²³ Also as stated by Satjipto Rahardjo, even though the national law/state law trying to eradicate the customary law (including customary court) through artificial act with the law construction, but the living law including customary law is not dead, but will be stored in the heart of community of legal awareness and waiting the right time to showed into surface.²⁴

Customary court or in the indigenous people in Papua called customary assembly (*siding adat*). It aims to solving a customary dispute in the sense of a family that is harmonious and peaceful. There also type of customary dispute that is settled through customary court such as; on the case taking away a girl, taking away another guy wife, fornication, damaging a plant/garden, land, fighting between village, murderer and tribe war, also other dispute according to the custom.

A. The Period Before Indonesia Independence

The history of customary court in the traditional life of indigenous people in Papua is already known since the ancestor period on solving customary dispute, customary court according to the local of each indigenous people such as:

- 1) *Rat Hadat*, on the indigenous people of Sailolof Village in the Samate Regency in Raja Ampat. *Rat Hadat*, serve as a customary court that solving a customary dispute in peace and decided the guilty person to pay customary fine or *geras*.²⁵
- 2) *Ema Owa* (The House of Right "*rumah benar*"), on the indigenous people of Mee Tribe in Pania. The people presume that what is decided/settled on the *Ema Owa* is right and should be obeyed by them who are in dispute.²⁶

²³ Hadikusuma, H. (1989). *op.cit.* p. 109.

²⁴ Rahardjo, S. (2006). *Membedah Hukum Progresif*, Buku Kompas. Jakarta. p. 177.

²⁵ Krisifu, H. (2014). *Pengadilan Adat Masyarakat Adat Papua dalam Sistem Peradilan Indonesia*. LoGos Publishing. Bandung. p. 135.

²⁶ *Ibid.*

- 3) *Obe Onggo* (The Indigenous People “*para-para adat*”), on the indigenous people of Sentani. *Obje Onggo* also served as deliberation place for develop the village and also a place for customary court.²⁷
- 4) *Kainkain Karkara Mnu/Byak*, on the indigenous people of Biak. *Kainkain Karkara byak*, is a deliberation institution to speak and finding a solution on the problem that is important and useful for village development.²⁸
- 5) Customary Deliberation Institution *Imbuti*, on indigenous people of *Anim Ha* or *Malin Anim* in Merauke.

Before Papua joining the State of Indonesia, in those period the customary institutions that develop and grow according to the situation of their people. In West Irian (now Papua) there is already a customary court with the determination by Netherland Queen date 29 December 1949 (*Besluit Bewindsregeling Nieuw Guinea*), while the provisions regarding customary court in *Nederlands Nieuw Guinea* or West Irian is regulated on Article 125 until Article 149 of the *besluit*.²⁹

B. The Period After Indonesia Independence

After independence of Republic of Indonesia, issued Emergency Law No. 1 of 1951 concerning of Temporary Action for Implementing Unitary Structure, Power, and Agenda of Civil Court (LN. 1951 No. 9) which in the essence regulated 4 (four) things which is:

- 1) The elimination of several court that is not in line with the atmosphere of the state;
- 2) Gradual elimination of self-governing court in several region and all customary court;
- 3) Continuing religious court and village court; and
- 4) Establishment of district court and prosecutor in region where *Landgerecht* is eliminate or district court and the establishment of High Court in Makassar and transferring the domicile of High Court Jogja and Bukit Tinggi, each to Surabaya and Medan.³⁰

The removal is intended to unify the judicial bodies and this is one of basic change toward the judicial bodies in Indonesia. Therefore, the judicial bodies which already operate after the Emergency Law is applied is Governorate Court of District Court; Religious Court of Village Court (which the verdict is conciliatory)

Specifically, for West Irian, the elimination is done with the President Decree No. 6 of 1966 concerning of the Elimination of Customary Court/self-government and the Establishment of District Court in West Irian. On the Article 1 of this President Decree it is emphasized that eliminate the Customary court/self-government in the region of West Irian Province and authorized its implementation to joint decision of the region head and the chairman of high court of West Irian Province. Then the Presidential Regulation through the Law No. 5 of 1969.

With the basis of Article 1 of President Decree No. 6 of 1966, for West Irian the implementation is based on the Joint Decision of the Governor Head Region of West Irian Province and the Chairman of High Court of Jayapura No. 11/GIB.1970 and No. 11/IV/1970 concerning of the Implementation of Elimination of Customary Court/Self-government in certain region on West Irian Province. On the Article 1 Paragraph (1) it is stated that for the first step has been eliminated the Customary Court/Self-Government as follows: Self-Government Court of Jayapura, Lembah Baliem, Nabire, Biak, Manokwari,

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ Mertokusumo, S. (1970., *op.cit.*, p. 60.

³⁰ Mertokusumo, S. (1970). *Sedjarah Peradilan dan Perundang-Undangan Di Indonesia Sedjak 1942 Dan Apakah Kemanfataannya Bagi Kita Bangsa Indonesia*. Jogjakarta. p. 86 – 87; also see Emergency Law No. 1 of 1951.

Sorong, Raja Ampat, Fak-Fak, Kaimana, Serui, Bokondini, Customary Court in Merauke, Tanah Merah, and Mindiptana.

C. Reformation Period

After more than 30 (thirty) years the new order era is collapse and then the reformation era was born. In line with the spirit of reformation which had relatively driven progress in the political and security field, and indirectly affecting to the disintegration of the nations. The social conflict and the disintegration strengthening in several regions such as Aceh, Maluku, and Papua are a distraction for the unity of Republic of Indonesia which if it's not handled, it will threaten the existence and the life of nation and state. Especially for Special Region of Aceh and Papua those thing is much more a dissatisfaction of the central government policy that need to be corrected directly in quick and precisely.

In line with it, the People's Consultative Assembly of Republic of Indonesia has set the need of giving a special autonomy to the Irian Jaya province as it is mandated by the People's Consultative Assembly Decree No. IV/MPR/1999 concerning of Broad Outlines of State Policy 1999-2004 Chapter IV Letter G Region Development Number (2) specially confirmed that, in order to settle fairly and thoroughly a problem in the region that need an immediate and earnest handling, then to the Irian Jaya Province given a Special Autonomy Status. The Special Autonomy Status given to the Papua Province is set through the Law No. 21 of 2001 concerning of Special Autonomy for Papua Province.

Customary Court on the Special Autonomy for Papua Province Law

Through the law No. 21 of 2001 concerning of Special Autonomy for Papua Province on Chapter XIV Judicial Power giving a recognition to the existence of Customary Court in Papua. This is one of the important provisions that is unique and also as the *lex specialis* in this case is that the Special Autonomy of Papua Province Law, is recognized the existence of customary court. As it is confirmed on the Article 50 Paragraph (2), besides the judicial power as stated on the Paragraph (1), it is recognized a customary court in certain indigenous people. Even though it is said as *lex specialis*, but customary court is not a new thing in Papua Province. Because other than recognition of "customary law" and "indigenous people" also stated expressly on the Constituion 1945 Article 18B Paragraph (2) (Second Amandments) and Broad Outlines of State Policy 1999 (the legal development with other terms which is unwritten law), in empirically-factual this customary court is maintained in the indigenous people in every region on Papua Province.

On the provisions of Article 51 stated that:

- (1) Customary Court is the reconciliation within the indigenous people, which has the authority to examine and judging customary civil dispute and criminal cases among the members of indigenous people concerned.
- (2) The customary court shall be formed under the provisions of customary law of the indigenous people community that related.
- (3) The customary court shall examine and judging a customary civil dispute and criminal dispute as referred on the Paragraph (1) based on the customary law of the indigenous people concerned.
- (4) If one of the disputing or litigating parties shall object the judgement passed by the adjudicating customary court as referred on Paragraph (3), the objecting party shall have the right to request to the first instance court within the competent judicature body to re-examine and judging the dispute or case concerned.
- (5) Customary court is not competent to pass a sentence of imprisonment or confinement.

- (6) The judgement of the customary court of a criminal offense the case of which has not been requested for re-examine as referred on Paragraph (4) shall become final and binding judgement.
- (7) To release the criminal offender from criminal charges according to prevailing criminal laws, a statement of approval is required from the Chairman of the District Court obtained through the Head of the District Prosecutor Office concerned with the scene of crime referred in Paragraph (3)
- (8) If the request for statement of approval to execute for customary court as referred in Paragraph (7) is rejected by the District Court, the judgement of Customary Court as referred in Paragraph (6) shall become the legal consideration of the District Court in deciding the case concerned.

Therefore, this customary court in Papua is one of customary institution that is recognized by state and have a special position and only applied for the indigenous people of Papua. Also served to adjudicated a customary cases to guarantee an order, justice, and legal certainty through a reconciliation court.

To implementing Article 51 of the Special Autonomy for Papua Province, the government of Papua Province issuing Special Regional Regulation (*perdasus*) No. 20 of 2018 concerning on Customary Court in Papua. On the general explanation part, it is mentioned the basic that is regulated in this special regional regulation such as:

- First : Government recognitions of the existence of customary court which so far has only been recognized from the political and administrative aspects, while the form of judicial power is not recognized; strengthening the position of customary court; and assisting government in law enforcement.
- Second : Strengthening the government on the customary court in Papua through financing and providing supporting facilities.

The Principle and Purpose of Customary Court

On the Article 2 of Special Regional Regulation No. 20 of 2018 it is emphasized Customary Court is based on:

- a. Family;
- b. Deliberation and consensus; and
- c. Simple, fast, and low-cost justice system.

On the official explanation of Article 2 stated that the basis of Papua Customary Court is reconciliation court in the indigenous people environment, that have a competency to examine and judging a civil and criminal customary dispute between the indigenous people concerned. This principle then further emphasized on the explanation of Article 51 Paragraph (1) of the Special Autonomy of Papua Province Law that emphasized the recognition in the national law, court institution, and customary court that exist in the Papua Province, as a reconciliation court among the indigenous people in the existing environment of the customary law. The legal spirit that contained in this principle is in line with the characteristics of customary law that tends to prioritize the cosmic balance.

While on the Article 3 of the Special Regional Regulation No. 20 of 2018 emphasized Customary Court in Papua is aimed to:

- a. As a form of recognition from government to the existence, protection, respect, and empowerment to the indigenous people of Papua and not Papua;
- b. Strengthening the position of customary court;
- c. Guaranteeing the legal certainty, expediency, justice;

- d. Maintain the harmonization and cosmic balance; and
- e. Assisting government on law enforcement.

The Essence of *ne bis in idem* Principle on Article 51 of the Special Autonomy for Papua Province

a. The Reason of Indigenous People Choose Customary Court

There are several reason indigenous people choose to settle the customary dispute to the customary court, namely:

1. Customary and Cultural Reason

Customary Court is a part of customary law that is influenced by the social strength of the indigenous people, that the existence is already merged with the life of the people. The customary court is carried out by the customary functionaries known as the customary judge, who is the customary chief, tribal heads, and the community leaders which is in the community and have authority over their own citizens. They are working to carried out justice based on customary law to create a peace, order, and harmony in order to made a safe and orderly manner life of indigenous people.

Traditionally, the indigenous people in Papua already known, understand, and practicing the customary court as part of their legal culture that is continuously used to solving a dispute that faced. The indigenous people put a hope and believe into this institution because it can settle a customary dispute and giving a justice and legal satisfaction for them who is litigating.

Other than that, the dispute settlement through customary court with using their local language that is well known by them is one of arena that revive the harmony and order in social relationship, a sense of kinship and togetherness on a customary community. A peace reconciliation eradicating a feel to revenge, resentment and dissatisfaction of person, kinfolk, and its tribe to the other parties that made a jolt in indigenous people. Peace is essentials in the indigenous people life. it can be seen from the desire of the people to supporting each other and encouraging the dispute parties to immediately settle the dispute that happened. Those encouragement is accompanied by shared responsibility to settle the required fine. Because through the customary fine there is an appreciation to the dignity of the concerned person, family, tribe, and the unity of indigenous people.

There also a view on the indigenous people of Papua said that “the judge on district court might punish, but couldn’t reconcile” (*“hakim pada pengadilan negeri dapat menghukum, tetapi tidak dapat mendamaikan”*). This view showed from the decision of district court judge placing one party on the winning position and other party in losing position. And how the end result and the consequence of the decision in the middle of indigenous people that dispute is not being the concern of judge. While what is expected from court/customary court decision is reconciliation that is harmonious, order, and safe in the indigenous people so it is made a balance between human and universe.

2. Geographic Reason

The geographic situation is one of main factor that encourage people to keep settle their dispute in the customary court. Therefore, most of the indigenous people (the native people in Papua Province) live in a village that is far from the center of city and center of government, so if a dispute happened, such as murderer and land dispute and fornication that always made a conflict which result a criminal act, they will handle it and settle the dispute independently according to the customary law mechanism through customary assembly or customary court.

The law enforcement and settlement of dispute according to the positive law/state law, is still hard to well implement it because not every regencies have Police Office and not every region in Papua have comprehensive legal institution such as police, attorney, and court. If there’s one, it is very far away

from the village where the dispute is happened. It also complicated the legal apparatus and indigenous people to perform the law that is accepted by state.

3. Cost Reason

The geographical condition in Papua is closely related to the cost that is need to settle a dispute to the district court which in the capital regencies. For society that living in the district and villages that is far, it needed a big cost, if he wanted to find a justice through district court institution. The cost that will be used including transportation to the place where the legal institution placed, and living cost that need to be used while waiting the dispute process in the capital regencies.

The geographical obstacle in Papua made a settlement of dispute to the end of the process in the District Court is expensive. On the middle mountainous area and swampy area that could only be visited by small airplane such Twin Otter and Cessna (a light and small plane). So, it is on people who live in the coastal area and island which could be visited with Johnson Boat or with pioneer ship. How, they whom is dispute and the witness could arrive into the court room that placed in the Capital Regencies.

This condition forced the indigenous people that disputing to choosing compromise with the government officials in the village level or district to settle their own case that faced before the customary judge/customary chief/head of tribe through a justice/customary assembly that is much cheaper than have to settle it in the district court in the city.

4. Past Experience Reason

Other reason that more important and encourage the indigenous people in Papua to keep choosing settlement of the dispute through the customary court is past experience. Those condition is experienced by the society especially who lived in the villages (mountainous, valley, and islands) that is isolated and far away from city. In settle the customary dispute they trying to avoid settlement that involving security apparatus such as police and military in the district level. This is done, because they have several past experience because the society have a *memoria passionis* note when Papua is still become Military Operation Area (DOM). Therefore, it also the reason why indigenous people in Papua choose to settle their customary dispute to the Customary chief, customary judge, tribal chief, and church leaders on the village or district.

From the reason above, it can be outlined to make it clear, why until now the indigenous people on Papua is still choosing the institution and law (choice of law) that is suitable with their legal way which is a customary court and to settle a dispute that they faced. The option of institution and law that is stick firmly, because the indigenous people understand that the law that is close to them and could giving a sense of secure is through customary court. Besides, through customary assembly they settle the dispute in a dignified manner, appreciate, and respecting fellow indigenous people.

Moreover, if seen from the duty, purpose, and role of the customary court institution on the indigenous people in Papua, in fact has taken responsibility in settle a customary dispute in understanding the civil and criminal case to creating peace, justice, harmony, and legal order in the life of indigenous people.

The Essence of *Ne bis in idem* Principle

The principle of *Ne bis in idem* is regulated in the Article 76 of Code Penal Paragraph (1) except on the case of repeated judge decision (*herziening*), people cannot be sued twice because the act that by Indonesia judge toward themselves has been tried with the permanent verdict.

It defined the Indonesia judge, is also a self-government and customary court judge, in region which have those court.

Paragraph (2) if the permanent verdict comes from other judges, then to the people and because the criminal act, prosecution should not be held in form of:

1st verdict is in form of exemption from a charge or waiver of the lawsuit;

2nd verdict is in the form of conviction and the penalty has been served in full or has been given a forgiveness or the authority to carry out has been cancelled due to the expiration of case.

In the explanation by R Sugandi toward Article 76 of Code Penal that the aim of this principle is:

- a. So that the government doesn't repeatedly talk about the same criminal incident, so that for a criminal act there may be a several verdict, which can reduce the public trust in their government.
- b. Occasionally someone who is considered as defendant, to him given a sense of calm so that in his heart he doesn't continue to feel threatened by the danger of being prosecuted for a criminal act that has been decided.³¹

The *Nebis in idem* as stated on the Article 76 of Code Penal is desired on the Article 51 Paragraph (6) of the Special Autonomy for Papua Province, so there is no more second sued on the incident/legal act that already decided by the customary judge. The decision of customary court is a final and legally binding in terms the parties which is disputed or litigate are accepting. Article 51 Paragraph (6) emphasized the verdict and the customary court about criminal offence where the case doesn't ask for re-examination as stated on the Paragraph (4), is being the final decision and legally binding. And on the explanation or Article 51 Paragraph (6) stated that the customary court decision is a final and binding in terms on both parties that is disputing or litigating accepting it. The related verdict could release the perpetrators from criminal charges according to the provisions of the applicable criminal law. The statement of approval for the implementation of the decision from the Chairman of District Court which is in charge is obtained through the Head of District Prosecutor's office concerned. If the statement of approval for the implementation of the decision has been obtained then Prosecutors office cannot carry out an investigation and prosecution.

Therefore, the decision of customary court in settle the customary dispute is being the basis law to not prosecuted twice in the same cases and have a legal force. According to Joram Wambrau, the official provisions through Article 50 and Article 51 of the Special Autonomy for Papua Province is part of effort on recognition and protection of the basic rights of the native people of Papua, also intended so this institution provide a better and more objective sense of justice for justice seeker in the settlement of cases or disputes that occur within the indigenous people itself.³²

The role of the customary chief and the customary functionary is responsible to solving the customary dispute that happened in its people in peace with giving a sanction or customary fine. Example; a *Tonowi* (big man) on the people of *Mee* in Paniai, act to reconcile the hostile parties to sit together in *Emwa* (men honai) to make peace.

In reconciliation, the guilty party will be given a sanction or customary fine. The customary fine could be in form of; goods (antique plate, cloth, gong, weapon), money, and pet (pig) in a certain amount. While the customary fine because murderer could be paid with ha woman as a change of the payment of head pay, fined with certain amount of money, and fined with pet/pig. Other than that, the reconciliation in the case of murderer there is a customary obligation to made a reconcile ceremony. Example on the indigenous people of Biak they done a *Gosok Kapur Ceremony ngopyos aver* and cutting bamboo/feathers as a reconcile symbols with the word "*aver ine ngopyos rik mamun ine nokaberma kobe*

³¹ Sugandhi, R. (1981). *KUHP dan Penjelassannya*, Usaha Nasional. Surabaya. p. 94.

³² Wambrau, J. (2002). *Kumpulan Makalah tentang UU No. 21/2001*. Jayapura. p. 11.

oser ma koswar yaye ngo” which mean *this chalk is to eradicate the murder blood and we can return to being one to love each other.*

The Obstacle in Implementing *Ne bis in idem* Principal on Article 51 of the Special Autonomy for Papua Law

the implementation to the *Ne bis in idem* principle as regulated on the Article 51 of the Special Autonomy for Papua Law which is furthermore elaborated on the Special Regional Regulation No. 20 of 2008, in its implementation facing several obstacle structurally and administratively, such as:

1. There is a different view and interpretation between the law enforcer especially the judge that the regulation about customary court as mentioned on the Article 51 of the Special Autonomy for Papua Law which is furthermore elaborated on the Special Regional Regulation No. 20 of 2008, that the characteristics and the scope of this Special Regional Regulation is only applicable in the province level so it can't be implemented in the regency or city.

Indeed, in the Special Regional Regulation Article 10 Paragraph (1) the mechanism to accept, manage, judging, and taking decision is done according to the customary law of indigenous people that concerned; Paragraph (2) the provisions which referred to the Paragraph (1) shall be regulated through city/village regional regulation.

The provisions on Paragraph (2) is being the obstacle toward the implementation of Article 51 of the Special Autonomy for Papua Law through the Special Regional Regulation No. 20 of 2008 which is:

- a. That this Special Regional Regulation is only applicable in the provincial level;
- b. That the instruction of the Special Regional Regulations cannot be implemented to the Regency/city with a mechanism reason and the hierarchy of laws and regulation, because on the Article 51 of the Special Autonomy for Papua Province there is no delegation of authority to regulated more through the form of the Special Regional Regulation.

As for example, the Merauke Court Decision No. 120/PID.B/2012/PN.MRK date 4 December 2012. In the murderer case where this case already settled through customary court according to the customary law concerned and also traditional ritual has been done.

In the decision of the customary court in settle the reconciliation between parties, the defendant have hand over a daughter to the victim parties and already accepted well in a customary assembly so according to the advisor of the defendant by having tried in the customary assembly then the defendant cannot be tried twice according to the positive law. The advisor of defendant has filing a defense which in the principal the act of the defendant is part of the customary process so the Article 51 Paragraph (6) of the Law No. 21 of 2001 concerning of Special Autonomy for Papua Province is applied and that the recognition of this customary court is then elaborated more in the Special Regional Regulation of Papua No. 20 of 2008 concerning of Customary Court in Papua.

On the consideration of the judges, after the council observe the payment that is done by the defendant and the witness in form of handing over a daughter to the family of the victim parties, then according to the council those thing is:

- c. That it is not a result of a customary court because there is no customary court in the region of Merauke Regency;
- d. That according to the provision of Article 10 of Special Regional Regulation No. 20 of 2008 concerning of Customary Court it is stated that the mechanism for accepting, managing, judging, and decision making is carried out according to the customary law in the indigenous people concerned and on the Paragraph 2 stated that the provisions referred on the Paragraph (1) shall be regulated through municipal/regency regional regulations;

- e. That the defendant had done the settlement through friendly manner;
- f. That about the handover of daughter to the victim family that is accepted well by the victim family, those thing will not eradicate the criminal liability of defendant, but it is wide to make this incident as a thing that will be lighten the defendant, therefore, for him a sense of justice that exists in society has been established (social justice and moral justice)

On those criminal case the judge imposed a sentence to defendant of 2 (two) years and 6 (six) month and reduced entirely from the sentence imposed;

2. The work relationship system between agencies of law enforcement that is authorized on receiving the customary court decision and or rejecting, as referred on the Article 51 Paragraph (7) that to release the perpetrator from criminal charge according to the provisions of applicable criminal law, it is done a statement of approval to implemented from the Head of the District Court which in charge of it obtained through the Head of the District Attorney concerned with the place where the criminal incident happened as referred in Paragraph (3).

The work relationship system as referred on Article 51 Paragraph (7) and (8), until today there is no mechanism that regulated between the Head of District Court, Chairman of Attorney Office, and Indigenous People. The work relationship referred can be in form of cooperation of Head of District Court, Chairman of Attorney Office, and Indigenous people. With will giving a legal certainty in settle a customary dispute that is decided by customary court.

The customary court in Papua, legally has effectively act in helping the law enforcer and government in making order in the society. Especially on the remoted area that is far from the center of government service and not yet reached by the law enforcer. Therefore, the indigenous people in Papua still put a great trust on the customary court, to settle a dispute that they faced. Because through the customary court, the dispute could be settled in peace, dignified, and giving a sense of justice.

Conclusion

From the explanation above, it can be concluded that the *Nebis in idem* principal as referred on the Article 76 of Code Penal is in line with the Article 51 Paragraph (6) of the Special Autonomy for Papua Law, so there should be no repeated charged on the incident/legal act that is already decided by the customary judge. The decision of customary court is final and binding in terms both parties in dispute or litigate accepting it. Beside through the customary assembly of indigenous people, settle their dispute in dignified, appreciating, and respecting fellow indigenous people. The obstacle in implementing the *ne bis in idem* principle as referred on article 51 of the Special Autonomy for Papua Law that furthermore elaborated with the Special Regional Regulation (*Perdasus*) No. 20 of 2008, in implementing it, there is a structural and administrative obstacle between the working relationship system that is built well.

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