

The Existence and Position of Adat Judicature in Papua

DR. BUDIYANTO, S.H., M.H.

Senior lecturer at Faculty of Law, University of Cenderawasih, Papua

Abstract

Law is a social institution that is created by man to create his own order. The order therefore is intentionally made by the collective agreement made by the groups of individual, as their natural needs. In the context of adat judicature in Papua, its existence and position is placed under the approaches of legal substance, legal structure, and legal culture. The rise of specialized autonomy for Papua will basically mean that there shall be bigger competence given to local government and the indigenous of Papua in terms of regulating their own government within the framework of the Unitary State of the Republic of Indonesia. Such competence also means to empower the socio-culture and economy potentials of the people of Papua; giving the adequate role for the indigenous Papuans through their traditional, religion and community figures altogether in formulating the local policies, which includes greater responsibility on the administering local authority without ignoring their part of being the people of Indonesia in accordance with statutory regulations.

Keywords: Existence, Position, and Adat Proceedings

1. Introduction

Law is a social institution that is created by the men to invent their own order. The order thus desires through the mutual agreement from the people who naturally emerged, as their common needs. Realization on this collective order is vested onto legal institutions, whether it is substantial, administrative and even legal cultural.¹ The existence of social institutions governing the behavior and discipline of the society is reflected in the provisions of state law and customary (adat) law. The 'degree of despicable act' and the 'appropriateness on punishing someone' are determined from the rules codified by the legislature. It can also base on the adat law to embody the community.² As the living law, its existence is followed, respected and adhered by the local custom community for generations, from one to others. However, on daily basis, it is not infrequent for the tensions arise when someone or a group is violating the adat (customary) rules, which are enforced in the live of indigenous peoples. Violations on the adat codes (adat criminal law) are believed to cause disruption and cosmic balance where the offender shall receive the adat (customary) sanction (the adat reaction, the adat correction) for the offense he/ she is responsible for.³

Article 18(B) paragraph 2 of the 1945 Constitution of the Republic of Indonesia reflects recognition and respect towards the adat law. It holds that: "The State is to recognizes and respects the community units of customary law so long its remains applicable and relevant to the development of society and to the principles of the Unitary Republic of Indonesia as regulated by the laws." Similarly, Article 28 paragraph (3) of the Constitution states that: "The cultural identity and the rights of traditional communities are to be respected in line with the progress of civilization". Pursuant to Article 18(B)(2) and Article 28(1)(3) of the Constitution, it may be inferred that the customary law are to be recognized its existence in so far its remains acceptable with the statehood principles of the Republic Indonesia.

In regards to criminal justice system, the recognition of the adat law is enshrined in Article 5(1) of the Law No. 48 of 2009 concerning Judicial Power. It holds that: "Justice and Constitutional Justice shall explore, follow, and understand the values of law and justice embodied in the community". The article is extremely essential for furthering the development of statehood law, given that there are people who live on the village and implementing their adat law. Therefore, the existence of the Law No. 48 of 2009 serves as the gateway for any judge to discover, follow and understand the adat law (law that live among the community) and set it as a basis for consideration in examining and deciding cases handled. The verdict is based on the values of law and a sense of justice in the community can then be used as a precedent by another judge in examining and deciding future case with similar pattern. So, it can evolve into the positive law.⁴

Recognition of the adat law can be seen in Article 6(1) of the Law No. 39 of 1999 concerning Human Rights, which states: "In order to uphold human rights, diversity and the needs of the community, the adat law must be observed and protected by customary law, including the protection of adat land rights, attuned with the flows of time." Then subsequently in Article 6 (2), as quoted: "The cultural identity of indigenous communities must be considered and protected by customary law, including the protection customary land rights, attuned with

¹Pujiyono, *Paper Collection on Criminal Law Issues*, CV. Mandar Maju, Bandung, 2007, p. 66.

²Ahmad Ubbe, *the Adat Law of Malaweng Morality: Its Continuity and Change*, Yarsif Watampone, Jakarta, 2008, p. 1.

³I Made Widnyana, *Paper Collection on the Criminal Adat Law*, PT. Eresco, Bandung, 1993, p. 3.

⁴Ade Saptomo, *the Law and Local Wisdom of Revitalization of the Indonesian Adat Law*, PT. Gramedia Widiasarana Indonesia, Jakarta, 2010, Pg. 36.

the flows of time."

Similar recognition may be seen in Article 3 of the Law No. 5 of 1960 concerning Basic of Agrarian Law (Undang-undang Pokok Agraria/UUPA), states that:

"Bearing in mind the provisions of Articles 1 and 2, implementation of adat rights and the other similar rights from community adat law, so far as reality is required, in way that such rights are accordanced with the national interests and the nation itself, which is based on the unity of the nation and should not be in contrary to the higher laws and regulations".

Later on, Chapter I Section 1 of the State Minister of Agrarian/Head of National Land Agency Regulation No. 5 of 1999 concerning Guidelines for the Settlement of Land Rights for the Indigenous Peoples, states that: "the community of the adat law is a group of people who are bound by the order of customary law as citizens of the community due their to similarities in the residence or lineage". The communal land is the area of land on which there is a communal right of particular for the adat community. This means that the community has been recognized for its customary rights and other similar rights by the fact that it still intacted, managed and used accordingly to its designation by the citizens who joined together in fellowship law or through the customary law communities.

The recognition and respect towards the adat law communities in Papua are stressed within Article 43 of the Law No. 21 of 2001 concerning Special Autonomy for the Province of Papua, as follows:

- (1) Provincial Government of Papua is obliged to recognize, respect, protect, cultivate and develop the rights of adat communities guided by the regulations in force.
- (2) The rights of the adat community within the ambit of paragraph (1) is covered the communal rights and individual rights of the adat law community concerned.
- (3) Implementation of communal rights, in so far believed to remain exist, is to be exercised by traditional ruler of the adat community concerned in accordance with the local custom law, by respecting the former owner of communal land which was obtained by other party through legal means consistent with the existing regulations.
- (4) Any usage of communal land or individual land of the adat law communities shall be deliberated through discussion between adat law communities and the local citizens in order to conclude an agreement on the merits of land takeover and the compensation that entails.
- (5) Provincial, Regency and City Government are to provide active mediation in attempt to resolve communal law dispute fairly and wisely, thus a deal could be secured which satisfies all parties concerned.

The rise of Special Autonomy for Papua Province is generally provides wider competences for local government and indigenous Papuans to organize and govern themselves within the framework of the Unitary of Republic of Indonesia. This authority would also mean authority to empower the potential socio-culture and economy of the people of Papua, providing role adequate for indigenous Papuans through traditional leaders, religious leaders and community leaders in formulating regional policies, including a great responsibility towards the regional administration, without forgetting themselves as part of the people of Indonesia in accordance with statutory regulations. In reality, however, the variety of policies in the governance and development tend to be centralized and has yet not satisfy the sense of justice, the welfare of the people, supporting legal enforcement, as well as not fully respecting for the human rights in Papua, in particular for its people. Such conditions lead to gaps in almost all sectors of life, especially in education, health, economic, cultural, social and political. Violation of human rights, ignorance on the basic rights of indigenous people and their differences regarding the history of the unification of Papua into the Republic of Indonesia (NKRI) are among the main issues need to be solved completely. It is conducted to prevent disappointment and dissatisfaction.

Papua's specialty may actually lie in 4 (four) aspects, namely:

1. Geographical Aspect. It is estimated that Papua possessed the area which is 3^{1/2} wider to Java Island (421.981 km²) with such varied topography comprised of under sea level area to mountains that always covered in snow;
2. Physiology aspect. The Papuans are originated from Negroid race with the clump of Melanesia;
3. Historical and Political Aspect. Papua is a part of the Republic of Indonesia through a separate legitimation process of New York Accord and Pepera in 1969, though it remains highly debated by the Papuan society. Papua also is a region that directly bordered with Papua New Guinea; and
4. Social Culture Aspect. The social conditions of the people of Papua is still limited (quantity and quality), approximately 75 percent of the population are not getting a proper education, poor nutrition, and health care is very limited, and has a unique cultural diversity (ethnic and language).¹

The focus of this paper based on such explanation as mentioned above is to discuss the existence and

¹Yohanis Anton Raharusun, *Special Region on Indonesia Perspective: Legal Analysis to Special Autonomy of Papua Province*, Konstitusi Press, Jakarta, 2009, p. 200.

the position of the adat judicature in Papua.

2. The Existence and Position of the Adat Judicature

The existence of indigenous judicature in Papua province could be traced long time before and has been practiced by indigenous people to settle any infringement of their custom order or customs codes. The indigenous people in Papua have long known the adat court to resolve the disputes among them and disputes between the indigenous people with another indigenous person. Way before this study, the indigenous people in Papua have known that the adat judicature may take various types and forms, but has the same function. Basically, the adat judicature is to solve any adat problem. We may for instance identify various terms of similar meaning with the adat judicature. Those are *lembaga adat*, *para-para adat*, *kainkain karkara*, *pembayaran adat*, *denda adat*, *rapat adat*, *pertemuan adat*, *musyawarah adat*, custom based settlement and custom based reconciliation.

These terms are parts of peaceful settlement mechanism that are enforced to maintain the balance or restore the circumstances which is disrupted due to violations of the customs codes. The adat judicature is a form of settlement that is enacted outside the state court forum. Its position is not as the part of the state judiciary. The adat judicature in its actuality is the part of justice system accorded by the indigenous people in Papua based on the leadership system of monarch, *ondoafi*, authoritative man, and the mixture of leadership system. Therefore, to analyze problems of the existence and the status of the adat judicature system, the theory of law, as stated by Lawrence M. Friedman, is applied to elaborate it. According to Lawrence M. Friedman, a legal system consists of three (3) components, namely, structure of the law, substance of the law, and culture of the law. Each component will be explained as follows:

2.1 Legal Structure

Law by its nature is not simply a set of rules, which stood on their own. The importance of a rule of law is due to the systematic relationship with other regulations. Law is a system that creates the order of singularity consisting of parts or elements that are closely linked to one another. In other words, the legal system is a unit consisting of elements that have interactions with each other and work together to achieve the purpose of unity. Such unity thus applies within the complex juridical elements such as legal regulations, legal principles, and legal definition.¹

Speaking of legal system, there is strong relevance on Lawrence M. Friedman's theory as expressed by Syukri Akub and Baharuddin Badaru. According to them, the legal system consists of 3 (three) components, namely, legal structure, legal substance and legal culture. Component on the legal structure is the law enforcement agencies which exercise and overview the law. The legal substance is the legislation that became the workings reference for the law enforcement agencies. The legal culture itself is a culture of law embodied the patterns and behaviors of the law enforcement and community. Similarly affirmed by Achmad Ali, he reiterates the the legal system, as follows:

- a. Structure is the overall legal institutions that exist along with its officials that is covering among others, the police with its officers, the prosecutor's office with its prosecutors, the courts with its judges, and others;
- b. Substance is the overall rule of law, norms of law and principles of law, both written and unwritten including court decisions;
- c. Legal culture is covering the opinions, doctrines, ways of thinking, and how to acts, both from the law enforcement agencies as well as from citizens, concerning the various law-related phenomenas.

Related to the components above, Achmad Ali adds additional 2 (two) elements of the legal system. Those are: (a) Professionalism. It is an element of personal skill and qualification as a law enforcer; and (b) Leadership. It is an element personal skill and qualification as a law official.

According to Lawrence M. Friedman, "*legal structure is the structure of a system as its skeletal framework; it is the permanent shape, the institutional body of the system, the tough rigid bones that keep the process flowing within bounds.*"² It was further explored by Syukri Akub and Baharuddin Badaru,³ that: "*structure, we describe the structure of a judicial system when we talk about the number of judges, the jurisdiction of courts, how higher courts are staked on top of lower courts, what persons are attached to various courts, and what their roles consist of.*"

According to Stephen Laksanto Utomo,⁴ the structure of a single legal system is a framework that has a

¹Rahman Syamsuddin and Ismail Aris, *To Knit Laws in Indonesia*, Mitra Wacana Media, Jakarta, p. 2.

²Lawrence M. Friedman, *The Legal System: A Social Science Perspective*, Russel Sage Foundation, New York, 1975, translated to Bahasa Indonesia By M. Khozim, *Legal System in Social Science Perspectives*, Nusa Media, Bandung, 2009, pp. 15-16.

³Syukri Akub dan Baharuddin Badaru, *op.cit.*, p. 32.

⁴Stefanus Laksanto Utomo, *Legal Culture of Sami Community*, PT. Alumni, Bandung, 2013, p. 67.

permanent form, or an institution of a robust system that is able to maintain the bond of employment process. Ahmad Mujahidin, on the other hands, notices that a structure is made of either framework or foundation, the part of which shall be supporting, the part that gives some kind of form and limits of the whole.¹ When discussing the structure of the Indonesian legal system, it may include discussion on the institutional structures such as of the judiciary, law enforcement and the office of the prosecutor. In referral to Ahmad Mujahidin, Achmad Ali states that the elements of the structure are constituted by the amount and type of judiciary institution, its jurisdiction (cases under the authority that subject for examination, as well as how and why) and the quantity of Supreme Court's justices and the other judges.²

Based on the views expressed by Lawrence M. Friedman, the structural component of a legal system includes various institutions created by the legal system with various functions in order to support the operation of such systems. One of the strutiral of legal systems is the court.³ Therefore, when linked with the customary governance system (the adat judicature) in the province of Papua, the structure of the customs administration in question are leaders or traditional authorities (in this case the chieftain, head of clan '*keret*', *Ondoafi*, the village chief, or elders). Conditions in the field indicate that the indigenous people in Papua province recognize the duality of the system of government, namely the formal government and non-formal administration.

This formal government may take form of village government where it is subordinated under to the sub-district or the district governments. While non-formal administration is also called customs administration, which is a system of native administration or customary rule which has existed since time immemorial hereditary⁴System of customs administration in each region or tribes have customary leadership themselves according to the type of leadership that is embraced by each customs administration, including the type of leadership Men's charismatic leadership of King, *ondoafi* leadership (Head of Clan), and mixture system leadership.

To illustrate, the customs administration system known by indigenous tribes in Papua province is traditionally called as *Ondoafi* or *Ondofolo*. Such system is obtained through direct inheritance from parents to children until the eldest offspring and onwards. *Ondoafi* word stems from the word "*Ondo-Wa*", "*Ondofolo*", and "*Ondoafi*". *Ondowa* word means dust of the earth. This is the designation for a group of people first came inhabit the *phuyakha bhu* (Sentani). It is called as *Ondowa* because the first group of people who came from Sentani are long gone today and have become dust (*Ondowa*). Therefore, the first group of people who had exhausted their generation is to be called "*Ondowa*".

Ondofolo word is comprised of two syllables of "*Ondowa*" and "*Holo*". *Ondo* word meaning "ground ash", while the "*Holo*" means a group or generation. To simplify the word, *Ondoholo* would then be called *Ondofolo*. While *Ondoafi* word derived from the original two syllables of "*Ondowa*" and "*Hi*". The word "*Ondo*" means the dust of the earth. Meanwhile, *Hi* carries other means. Through progressive developments and easiness to pronounciate, the term *Onda-Hi* was turned to *Ondoafi*. Thus the original word of "*Ondoafi*" is "*Ondo-hi*" which means the dust or ash of others.⁵ In Sentani there are several villages, namely: Puay, Yoka, Waena, Ayapo, Asei, Netar, Khabetlouw, Ifale, Hobong, Yobe, Yahim, Yoboi, Putali, Atamali, Abar, Khameyakha, Simporo, Babrongko, Dondai, Kwadewar, Doyo Lama, Doyo Baru, Sosiri and Kanda. These amounted to 24 villages, making it 24 Ondofolo and 120 Kose.

The leadership system of Sentani's tribe as it was understood by Philip Kopeuw and Elsa Suebu⁶ is the 3 (three) layers of governancy structure, namely customs chief (*Ondoafi* or *Ondofolo*), chieftain called *Koselo*, and head keret called *Akhona*. *Ondofolo* in charged with 5 chiefs, where those chiefs are to supervise 5 head keret. Head keret on the other hand, in charged to lead some families. Thus, 155 (one five-five) would be the ideal password for this government structure. Within such structure, *Ondoafi* and chiefs were known to possessed royal blood, because they are the descendants of the kings in Sentani where their leaderships are hierarchical in nature.

Ondoafi leadership structure in the system is divided into 3 (three) levels, namely the small clan (*imea*), the village (*yo*) and confederation. There is functional hierarcy relationship among these levels of leadership. Mansoben further explaines that the concept of small clan (*imea*) in the language Sentani contains 3 (three) terms: (1) The core family, which is the smallest social unity in the form of a family consisting of a husband, wife and unmarried children; (2) Housed single-family dwellings; and (3) a small clan which is a combination of several

¹Ahmad Mujahidin, *One Roof System of Judicature in Indonesia*, PT. Refika Aditama, Bandung, 2007, p. 41.

²Ibid.

³Stefanus Laksanto Utomo, op.cit, p.97.

⁴Dyah Irawati and Hiniwati Widjaja, *the Existence of Social-Politic of Papua Adat Council in Endeavoring of the Society, (Study case of Sentani Adat Council in Sentani, District Jayapura)*, UKI Press, Jakarta, 2006, p. 30.

⁵ Philip Kopeuw dan Elsa Suebu, *The History of Ondoafi Words*, Tuesday, Januari 3rd, 2012. Accessed on: <https://pealtwo.wordpress.com/asal-usul-kata-ondoafi/> 4 March 2015. 17.39 Eastern Indonesia Time (Hereinafter referred as "EIT").

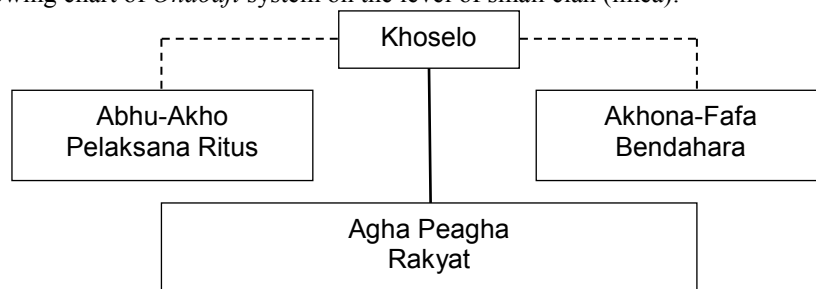
⁶Ibid.

core families that can clearly show the origin is patrilineal descendants of a common ancestor.¹

In the leadership structure of small clan (*imea*), a chief called *khoselo* is leading the clan assisted by two spokesman called (*abu-akho*) and treasurer (*akhona-fafa*). Under the adat rules on working position, the head of small clan (*khoselo*) shall be given to the previous leader's eldest son, so the position is considered to be derived from the lineage of the father (patrilineal). Except that, the leader is a member of kin lineage, which may be pulled straight from the founder of a small clan. The role of a *khoselo* as head small clan is to manage and supervise matters concerning the interests of his clan. A *khoselo* has no right to intervene the internal affairs of the other small clan. The main tasks of a *khoselo* within a group are:²

1. Marital affairs, a *khoselo* has a duty in managing the payment and the dowry offering process to the woman and other parties involved. In case of girls who are old enough with strong certainty of getting married, the wives of *khoselo* are responsible to train these girls in taking care of the household. *Khoselo* have full authority to regulate the marriage of all the sons and daughters of his clan (*imea*).
2. *Khoselo* acted as supervisor on the exploitation of various natural resources, lands and forests (i.e. hamlet forest or sago village) whom belong to the group of his relative for the common good of his entire group.
3. *Khoselo* is the leader of traditional ceremonies for instance; he shall lead any the marriage ceremony in his clan.
4. As a judge assigned to hear and decide disputes among the citizens of his clan.

In principle, a *khoselo* as leader of small clan (*imea*), aside carrying duty as head of the group, he also has a specific task in accordance with his position as a functionary in the village-level governance structure "*yo*". In carrying out the task of leading citizens' kin group, a *khoselo* assisted by two officers called "*abu-akho*" and "*akhona-fafa*". The task of a *abu-akho* (spokesman) is helping *khoselo* in taking care the implementation of traditional ceremonies or parties in the group, including processing of the body and the organizing the funeral when *khoselo* died. The task of other officer, namely *akhona-fafa*, is to become the treasurer, which keeps all the assets of the group, in the form of beads and stone axes. According to the interviews with Philip Deda as the Secretary of the Board Sentani Tribal Customary Courts, and as what was stated by Mansoben, we could at least illustrate the following chart of *Ondoafi* system on the level of small clan (*imea*):



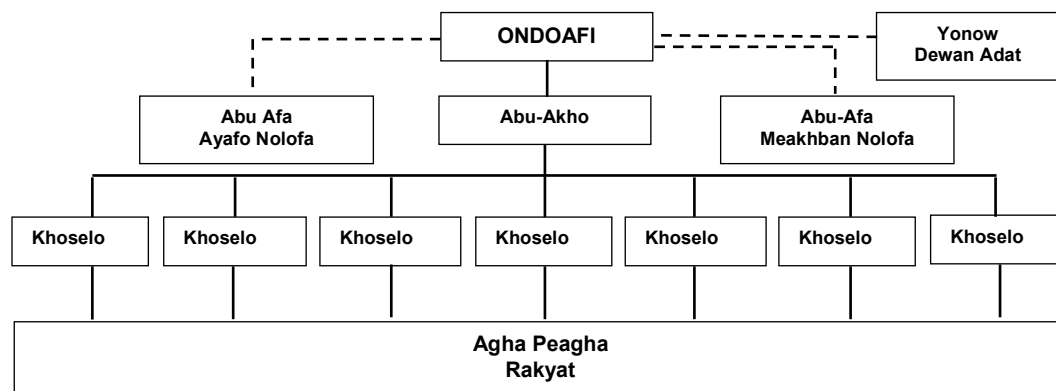
Notes: ----- Coordination Line
 _____ Command Line

In the leadership structure at the village level (*yo*), led by a chief called *Ondoafi*. Each of the "*yo*" is a legal alliance that is economically and politically sovereign and does not ties to another village hierarchy. Each "*yo*" has a territory consisting of land and waters with clear boundaries, the historical origins of the population and the establishment, as well as the leaders and the people. Residents who formed a small community called "*yo*" consist of one or more groups of kinship called *imea* or small clan. According to the origin, the small clans of the "*yo*" or some "*yo*" is derived from a common ancestor. *Imea*, which comes from the origin of the so-called "*Yoho*" or large clan. Traditionally the whole population "*yo*" is divided into two social lines. Social layer above has a privileged status because it holds the hereditary rights over the leadership in "*yo*". This group is called *kose yokolom*; consist of a family group village leader (*yo-Ondofolo*) and family group's small clan leader, *khoselo*. Under the social layer comprised of ordinary citizens called *yobu yokolom* or *akha pakhe*.

Below is the chart of *Ondoafi* system on the village level (*yo*):

¹ See Johszua Robert Mansoben, *Political Traditional System in Irian Jaya*, (Seri LIPI-RUL No.5), Indonesian Institute of Sciences Jakarta-Indonesia and Leiden University-Leiden The Netherlands, 1995, p. 202.

²Ibid.



Notes: ----- Coordination Line
 _____ Command Line

Sentani kinship system is based on patrilineal principle. Therefore, most important kinship group would lie in *imea*. An *imea* comprises a number of core families, which may clearly show the origin of their common ancestor. Each *imea* has a certain name for their identity. These names are what we referred to as *keret*, *gelet*, for Biak and Maya people, or the Batak clan or known as familiar commonly used in Eastern Indonesia.¹ An *Ondoafi* in performing his tasks is assisted by a complementary staff which are divided into 4 (four) areas of management, namely the religious field (*pulo-yo*), the field of security (*phuyo-ayo*), the field of prosperity (*phume-ameyo*), and field order (*yomme-yammeyo*). In the field of management of each, one or more functionaries are responsible for their respective fields. In addition to the four areas, there are additional 2 (two) complementary bodies to help the *Ondoafi* for important government organizations arrangements, namely the institution of indigenous councils (*yonow* or *aranggae*) and special assistance staff for *Ondoafi* (*abu-afa*).²

Indigenous Council (*yonow* or *aranggae*) is a sort of legislative body that serves as a place to discuss all matters and important issue that concerns the life of the community before a decision is made. Custom board function is reflected in *aranggae* own words literally because the word means the furnace, a place to cook, which implies that all indigenous affairs should be discussed before it is decided. Traditional council convenes at any time if there are important issues that need to be resolved through consultation, such as the selection and validation of new leaders or the payment of fines from one party to another in the same village. Membership consists of the traditional council itself and the *khoselo* of *Ondoafi*. In the organizational structure, traditional council has positioned level with *Ondoafi*, therefore the traditional council responsible to *Ondoafi*.

Ondoafi have special auxiliary staff called *Abu-akho*, which serves as an errand boy to serve *Ondoafi* both in matters concerning the interests *Ondoafi* and his own family as well as the public interest. *Abu-akho* consists of two or more persons, appointed from among the common people, not *khoselo*, and also not a member of a small clan originated from *Ondoafi*. One of the *abu-akho* act as senior lackey, called *abu-akho khabam*, which in addition has the function to coordinate the tasks of *abu-akho* also has a function as treasurer who take care of income and expenditure *Ondoafi*. Another figure that is a junior is called *abu-akho khandin*. The *abu-akho* task is to convey messages or commands from *Ondoafi* to the officers and villagers. He also held the ceremony for *Ondoafi*, caring sick *Ondoafi*, serving *Ondoafi*'s guests, divide the groceries from *Ondoafi* supplies to villagers who suffered deprivation, and take care of the bodies *Ondoafi* in preparation for the burial ceremony at the time of death.

In addition to *Abu-akho*, *Ondoafi* also has the main helper called "*Abu-afa*", which acts as the main adviser for *Ondoafi* in terms of providing advice and consideration to *Ondoafi* before making an important decision. In addition, *Abu-afa* also acts as spokesman *Ondoafi*; it is common for any official event related to indigenous issues for *Abu-afa* to accompany *Ondoafi*. Moreover, the *Abu-afa* is required to remain loyal and being able to keep a secret, because he possessed all information on *Ondoafi*'s wealth and his government secrecy. *Abu-afa* assistant consists of two people, each so-called right-wing assistant called "*ayafa nolofa*", and the left wing assistant called "*meakhban nolofa*".

The right wing assistant, *ayafa nolofa* has the task as the representative or official who replaces the function *Ondoafi* whenever *Ondoafi* unable to perform his duties due to illness, old ages or have died where his successor has not been appointed officially. He also acts as a protector of *Ondoafi* and their families against witchcraft attacks from other parties and as a liaison between *Ondoafi* with the ancestral spirits in the spirit world. While the left wing assistant, *meakhban nolofa* has a special duty to save and take care of all the heirlooms and treasures including the village treasury objects *Ondoafi* attributes. Some would even assume

¹Ibid, p. 198.

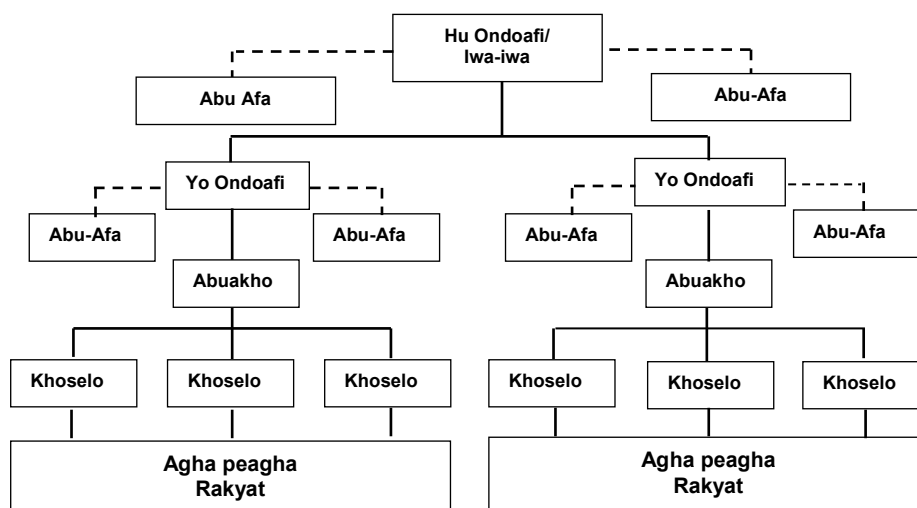
²Ibid, p. 204.

nolofo meakhban's function as village treasurer. A member of a small clan of which Ondoafi is originated from must carry these positions according to customary provisions. Usually the oldest brother of *Ondoafi* is entitled to assume the title. One's position as *Ondoafi*, according to customs regulations, endorsed by line drawn through the straight line with the founder of the village and is the eldest son Ondoafi earlier. Thus *Ondoafi* positions are based on patrilineal system. The implication is that the position of the leader or the head acquired by inheritance system. Every firstborn male child of *Ondoafi* entitled to take over the position or the position as successor to his parents, with the proviso that if the *Ondoafi* could no longer perform their duties as elderly, ill, or deceased.

In the leadership structure at the level of the confederation, it is commonly led by a chief - called the Greater *Ondoafi* (*hu Ondoafi* or *iwa-iwa Ondoafi*). The confederation is comprised of several villages, which recognize the power of a leader among their leaders as their supreme leader. The confederation is formed for the mutual benefit of some political unity "yo", such as against the common enemy and to held a joint ceremony. The primary reasons to form a joint confederation are: (1) they historically come from a common ancestor, and (2) they came from the same parental village.

Greater Ondoafi (Hu Ondoafi) at the confederation level has the authority to lead the traditional ceremonies in their own group, as well as the authority to deal with matters concerning the group with a group of outsiders. In performing his duties, he concerns to the internal affairs or inter-confederation. Two higher assistants of the abu-afa and a special assistant of the abu-akho always accompany him. *Ondoafi Hu* is also called *dali-wai Ondoafi*. It means that having the right *Ondoafi* engage directly with other *Ondoafi*. A *yo-Ondoafi*, which held position in *hu Ondoafi* has the authority and sovereignty beyond his own village, while the other *Ondoafi yo* only has authority in his village alone, therefore did not have the authority to deal directly with other villages.

Below is the chart of *Ondoafi* system on the confederation level (*yo*):



Notes: ----- Coordination Line
 _____ Command Line

Characteristics and identification of traditional leader names within the organizational structure of tribal governments are different for each tribe in Papua, for example, the Skou's uses the term "*bari*" for leaders and "*bari magite*" for a great leader, while the Arso's calling its leaders "*yuskwanto*", the Waris people called their leader "*mendir*", and the Tobati's called him as "*harsori*". Sentani people called their leader "*Ondohoro*" (Western Sentani) or "*Ondofolo*" (Central and Eastern Sentani) and the *Nimboran* called it "*Iram*". People of Tabla (Tanah Merah) called the leaders *Ondowafi* or *Ondoafi* and finally Biak people refer their leaders as "*Mananwir Mnu*". Although the terms used by each ethnic group are different from each other, but in essence all contain a singular meaning, which is to refer the degree that is used to for to the leaders in communities whose position is inherited.¹

With regard to the organizational structure, indigenous people in Sentani employ the leadership of *Keondoafian* (*Ondoafi*), which would look differently when compared with the Biak Indigenous Tribe. In indigenous tribe Sentani have traditional leaders known as *Ondoafi*, the indigenous tribe Biak itself is embracing the type of mixture system of leadership, the leader in the structure of traditional governance was called "*Mananwir*" on the level of small clan (*Keret*) or village (*Mnu*). Each head of tribe or *Ondoafi* has traditional house, *para-para adat* or *obe Onggo*, which serves as a place of deliberation and also to carry out the custom

¹Ibid. p. 183.

(adat) session. Whereas in Biak tribal community has a consensus organization called *Karkara Kainkain Mnu* acting as their village council. *Mnu Karkara Kainkain* institutions created to solve problems that are important and beneficial to the development of the village and also to resolve outstanding issues and custom infringement (custom codes).¹

Social unity in a group of relatives (small clan) on Biak is referred to as "*Keret*". A *Keret* would be composed by core families called themselves "*sim*".² Each of them will occupy rooms or cubicles called "*sim*". The conditions of the "*sim*" families nowadays are generally having their own home, but usually grouped according to their respective *keret*. If somewhere there is one house *keret* or more, then the place would then be known as village or "*Mnu*". Essentially, each *Mnu* only inhabited by members of the public who comes from one *keret* line, but in the subsequent development, it develops further to, for example, marital relations and trade, or because of the danger of war that often occurs between residents. At this rate, then the *keret-keret* of settlements (*Mnu*), different places situated join settle on settlements of certain *keret*.

Thus, the number of *keret* in a residential area called *Bnu* can grow to be more than one. So, the number of *keret* varies with others *Mnu*. Each unity settlement called *Mnu* has certain areas with natural boundaries such as hills, mountains, rivers, capes, large trees or other natural boundaries. *Mnu* (village) consists of *keret-keret* (clans small) and in *keret* consists of *sim-sim* (core families). The grounds that unify the residents of a village are largely due to heredity factors and the similarity of economic and political interests. The characteristics of *Mnu* are to have residents, buildings such as houses of *keret* (*aberdado*), house the ceremony (*rumsram*), and certain regions, and have a village leader (*Mananwir Mnu*).

The position *mananwir* or head *keret* is not based on the holder's age, but is determined by the ability to pursue the interests of groups. A willingness to sacrifice themselves for the sake of community members of *keret* has extensive knowledge on the rules that applied in *keret*. It has a lot of experience and know how to speak in public. Position of a *mananwir* subsequently passes from the former holder's to his younger brother and not to his eldest son. Except, when the holder's has no younger brother, thus the position can be handed over to the eldest son. Indeed, the eldest son must meet the criteria and requirements as a *mananwir*.

Above the *Keret* and the *Mnu*, there is a chief called *Mananwir Mnu*. A *Mananwir Mnu* is not elected per se, but rather appointed by the villagers from one of *Mananwir Keret* based on 2 (two) criterias; firstly, he must origin from the founder *keret* village and has a greater ability than the others *mananwir*. In *Mnu*-styled governance structure (village), there is an institution called the "*kainkain karkara mnu*" (village councils),³ which as Hendrik HJ Krisifu referred as 'village deliberation institutiton'. *Mananwir Mnu* shall responsible for any problems that arise within the village. *Mnu Mananwir* duties are to resolve disputes, to regulate the payment of fines, to oversee the sanctions, and to seek the way for peaceful settlement for the sake of customary law and the society order.⁴

Kainkain Karkara Mnu in its development has been changed into *Kainkain Karkara Biak*. Etymologically speaking, *Kainkain Karkara Biak* have the following meanings: word *kainkain* is meant as sit and deliberation. *Karkara* means talking and thinking of taking decisions on important issues that benefit the community, and finally word *Biak* shows a whole area of indigenous people's occupied by Biak. Thus, conceptually it can be concluded that *Kainkain Karkara Biak* is the institution where deliberation to speak, and to seek solutions to problems which are important for the beneficial of Biak people.⁵

In legal sense, the institution for Biak people to settle any offense on adat codes is commonly known as "*Kainkain Karkara Biak*", while indigenous tribe such as in Sentani and Port Numbay Jayapura City called such institution as "*Para-para Adat*", or also known as "*Obe Ongge*". In its development, indigenous peoples in East Sentani refer such institution as "*Kopemaho*" which means Group or Observer Forum for the Ohey's Customs. These insitutions worked to resolve cases and address any customs offense on their respective tribe. In its processes, the institutions are runned by a board of indigenous judges and customs officials. These institutions serve as an alternative forum for indigenous people to seek justice and to restore the inbalance, so as to create the peace and harmony in customary law society.

Basically, Any adat court decision shall be final and binding for both parties on the dispute. Therefore, another judicial institutions, for example, the State Court or District Court, may not overturn the adat court ruling. The current in force provisions of Article 8 (4) of Specialized Local Regulation of Papua No. 20 of 2008 concerning Papua's adat court (*Peraturan Daerah Khusus Papua 'PERDASUS'*) that provides opportunities for

¹Abdul Rahman Upara, *the Existence of Adat Court Decision in Papua Based on Pespective of Principle of Nebis in Idem*, Jurnal Konstitusi Pusat Studi Konstitusi FH Universitas Cenderawasih, Vol. IV No.1 Juni 2011. Jayapura. pp. 134-135.

²Johszua Robert Mansoben, op.cit. 279.

³*Kankain Karkara Mnu* (referred by other source as *Kankain Karkara Mnu*), a traditional body with the function to oversee the lives within the community called *Mnu* or village.

⁴Hendrik H.J. Krisifu, *To Know Kainkain Karkara Biak: a Adat Court Institution in Biak Adat law Society*, Year 9 No. 1, Januari 2010, Faculty of Law, University of Cendrawasih, pp.1-102. p.2

⁵Ibid.

one of the parties objected to the decision of the adat courts to file a lawsuit to State Court. It may be regarded as less precise and obsolete, as it has blurred out the existence and authority of the adat courts in Papua. Whereas the Article 4 of Perdasus explicitly mentioned the position of the adat judiciary is not as a part of the country's judiciary, but the judiciary applicable customs and domiciled in the environment of indigenous people in Papua alone. Therefore, the adat judiciary is the subordination of state judiciary. This means that the position of the adat judiciary would no longer be independent as settlement institution offense customary indigenous people in Papua province. However, it is a judicial institution custom that is not final (making the adat judiciary ruling being bobbed/floated), which may be requested reexamination by parties objected to the adat court ruling. As result of it, the basic principle of the adat judiciary is the principle of kinship, principle of deliberation and consensus, the principles of simple, fast and low cost. Those principle of the adat judiciary ideally can no longer be realized. The settlement of any customs offense which was initially may provide a sense of justice for the common law would potentially not running optimally. The process for seeking justice is becoming far and grow long. Cosmic balance has been disrupted and can no longer to be restored normally. The atmosphere and relationships in the community will remain undisturbed and can even lead to a sense of disappointment and resentment before any recovery efforts of those who have been victimized by such imbalance.

In order to optimally bolster the functions of the adat judiciary, then, there are few measures that should be considered. *First*, to record any valid offenses against the adat codes among the society. Recording all the customs offenses in Papua should be mandatory as it aims to uncover any existing forms of customs offense along with any traditional sanctions remain applicable to date. *Second*, to strengthen the position of the adat judiciary to become part of impartial process, whereas any judgment shall be final and not taking part within the state judiciary process. This means the adat court decision cannot longer be cancelled by the country's judiciary. The decision also cannot be appealed to any other court because the adat court decision binding on the parties to abide by and comply with a ruling of peace that has been through a process of deliberation. *Third*, to make a clear division of authority in the case to examine and decide a case. The division of authority related to the adat judiciary should only be authorized to examine and decide cases relating to indigenous issues (customs offense) only, whereas for other cases that is not related to indigenous issues into the country's judicial authority. If any breach of the offense adat is set both in adat law and in national criminal law, but the parties have conducted peaceful resolution either by the parties or through judicial custom, it should no longer need to be prosecuted to the country's judiciary because those mistakes are made by perpetrators have been redeemed by the parties.¹ *Fourth*, to strive maintaining the existence of the adat judiciary as an offense to the settlement institution in accordance with the conditions of indigenous culture and traditions of indigenous people in Papua.

The adat law community still requires the existence of the adat judiciary as an institution of settlement of indigenous offense rather than choosing the settlement through the national courts (formal). The adat judiciary as the settlement institution is expected to be in line or in synergy with the general courts in the context of law enforcement leads to a sense of justice. It is hoping to still promote the values of wisdom in society of adat law, and it is not violate human rights, in accordance with the principle of propriety, and does not eliminate the value religious magical. Therefore, it is necessary to empower the indigenous justice so that the output of the completion of customs offenses can provide optimal results especially in giving a sense of fairness to all parties.

2.2 Legal Substance

Essentially, the community has had its own structure and rules in a set pattern of life. The community has to know and practice the rules of the tribunal under the adat law. Therefore, it is not surprising that the adat law known as the law of indigenous peoples in Indonesia. This is in accordance with the opinion of A. Suriyaman Mustari Pide,² that the adat law is an unwritten law that lives and thrives long ago and has been rooted in the community. Although unwritten, the traditional law still possess legal consequences for those who break them. Norms and values that exist in the adat law are very adhered to and upheld by indigenous peoples. The adat law living in the community has a style and diversity of traditional nature, which is derived from a common ancestor and enforced previous generations.

Recognition of the adat judiciary in Papua prior the enactment of Special Autonomy Law could be traced back into history of Indonesian judiciary from time to time that has been passed ever since. In details, this

¹ Police may be authorized by law to do and not do according to their own judgment and the judgment in the circumstances it is necessary to pay attention to the legislation in force and must be accounted for in accordance with the law and norms. Police action is referred to as "discretion", as according to Article 7 letter (j) of Law No. 8 of 1981 on Criminal Procedure, which authorizes an investigator to conduct other actions by law responsible, and Article 18 of Law No. 2 year 2002 on the Indonesian National Police, in the interests of public officials of the Indonesian National Police in carrying out the duties and authority to act according to his own judgment and can only be performed in a state that it is necessary to pay attention to laws and regulations, as well as the code of Professional Ethics of Indonesian Police.

²A. Suriyaman Mustari Pide, *the Adat Law: Past, Present, and Future*, Pelita Pustaka., Makassar, 2009, p.12.

recognition could be divided into (2) periods, namely: (a) Colonization period or prior the Independence of the Republic of Indonesia, and (b) Post-Independence of the Republic of Indonesia.¹

2.2.1 Colonization Period (By Government of East-Indies and Japan)

Historically, when the Indonesia was still separated and composed by the king, the ruling was held by the king and he was absolutely running the justice according to his command. There is no denying that not all cases tried by the king because each entity has its own indigenous and local leader which at the same time may also act on behalf the justice of peace. The cases that fall under judicial king would then be called civil cases and those cases that outside the scope of a king may be referred as *padu* or reconciliation cases.²

The adat judicature in Indonesia become hotly discussed and demonstrated as its crucial role began to be known during the era of the Mataram kingdom led by Sultan Agung (1613-1645). At the time of the Mataram kingdom in 17th century, Java region employed *padu* judicature³ that covered the activities within rural areas, headed by the village as the head of customs and assisted by his traditional leaders, religious leaders of Islam and by the state authorities representing Sultan, or infamously called the prosecutor on that moment. Type of the cases resolved were mainly involve civil cases (e.g. land issues, debts, leases, marriage, inheritance) or minor criminal cases such as minor theft, fraud, humiliation, persecution light, and so on. While serious criminal cases which disrupting of the order of public security or degrading the royal's dignity, such as murder, robbery, arson and insurrection, were immediately taken to the court by the prosecutor to be examined and judged in *Setinggil* court or *Surambi* court at the Kingdom's Headquarter.

At the beginning of Dutch occupation, the legal order of Indonesian whom relying for long the adat law system began disturbed, which sooner was influenced by the foreign legal system. The condition was further perplexed when theologists teaching, such as Islam, Hinduism and Buddhism, began to spread across Indonesia. In response to Hedar Laudjeng and Mohammad Jamin,⁴ Hilman Hadikusuma indicated that during the reign of the Dutch East Indies there are five (5) forms of Court applied,⁵ namely: (a) *Gouvernements-rechtspraak* (Governor Court), (b) *Inheemsche rechtspraak* (Indigineous Court or Adat Court), (c) *zelfbestuur rechtspraak* (*Swapraja* Court), (d) *Godsdienstige rechtspraak* (Religious Court) and (e) *Dorpjustitie* (Village Court).⁶

At the time the government of Dutch East Indies ruled, there has been a dualism of law on Indonesia. Firstly, the western law applied the State Court and the adat law applied the Adat Court. During the Dutch colonial era, the function and authority of the elders both as leaders in community and religious continue to be recognized and preserved. Given the main function of the Elders which merely to reconcile the parties to the dispute. Then their positions have been infamously known as Judges for the Village Peace. This was confirmed by the provisions of the Village Court under Article 3a R.O. (*Reglement of de Rechterlijke Organisatie*), or the Organizational Regulations for the Courts and the Discretion of Judges in the Dutch East Indies, as it was promulgated under *Staatsblad* of 1935 No. 102. Therefore, the village court by nature is the adat court which was carried on by the Village Judges, whether in terms of its territorial structure or its genealogy (patrilineal, matrilineal, and parental). Pursuant to provisions of Article 3a R.O., the stronger competences was given to the Elders in performing their functions as reconciliator for their citizens at dispute.

The position and role of the Elders as Adjudicators of the Village Peace are to be recognized to this date. The settlement of dispute was remaining within the control of disputed parties, if it fails to be resolved by the Elders, it needs to undergo the Elders approval as the reconciliator. In their deliberation, they may only give a hint or advice on how the disputing parties can reach agreement in consensus, as it is very important to maintain the harmony of life within the society.

In particular for the region in West Irian (Papua), the recognition of the adat court was contained in *Ordinance op de Inheemse Rechtspraak in Rechtstreek Bestuurd Gebeid*, the provisions of the Adat Court for the Directly Ruled Region (Ind. Stb. 1932 No. 80) and *Inheemse Rechtspraak Verordening Molukken* concerning the Customary Provisions of Maluku (Jav. Courant 24 September 1935 No. 77 *Extra Bijvoegsel* No. 57). Even in the Provisions of the Adat Courts of Maluku (*Inheemse Rechtspraak Verordening Molukken*) (Jav. Courant 24 September 1935 No. 77 *Extra Bijvoegsel* No. 57) the title does not refer the name of West Irian but such provisions (*Verordening*) were applied to the territory of West Irian. This is simply due to fact that the area of the governorate in Moluccas (*Gouvernement der Molukken*) which was returned again to the area residency

¹Ahmad Mujahidin, op.cit. pp.65-78.

²Ibid, pp. 65-66.

³According to Hilman Hadikusuma, Padu judicature is a judicature system that applies to people of consultation between the disputing parties in their efforts to seek a peaceful solution. The word "cohesive" means "gathering" or "meet", the word solid to be "pepaduan" which means "meeting". So justice coherent or may be fully called "judicial pepaduan" means settling disputes amicably by the two parties to the dispute. The meeting (consultation) would then be witnessed by traditional leaders and religious leaders under the leadership of the head of customs.

⁴Hedar Laudjeng, *To Consider of the Adat Judicature*, HuMa, Jakarta, 2003. pp. 7-8.

⁵Ibid. p. 37.

⁶Ibid.

status in 1934, has subtracted into four areas of governance, namely *Amboina*, *Tual*, *Ternate* and *Noord-en West Guinea* (*Staatsblad Nederlands Indie*, 1934, No. 620), *Tual* government territory which in addition includes the *Kei* Islands, also in charge of areas that previously formed on the district level (*onder* section) which were the *Nieuw Zuid Guinea* and *Boven Digul*.

The Japanese government in carrying out its military rule had enacted a law as issued by the 16th Commander of the Army on March 7, 1942, namely the Troops Law (*Osamu Seirei*) Law No. 1 of 1942, which included the basic rules of statehood at the time of Japanese occupation, Article 3 states: "All government agencies and power, law and the laws of the former government, would still be recognized as valid for the time being, as long as it is not in contrary to the rules of the military".¹ Ever since the Japanese government had exercised its power over Indonesia, the government was forced to carry out the judicial of *Gunpokaigi*, *Gunritukaigi* (Military Court), *Gunsei Hooiin* (Government of hosts Court), the Religious Court, the Adat Court and self-governing Court. Both civil and criminal cases of the Japanese civilians and its military are not to be tried in *Gunpokaigi* and *Gunritukaigi* court. Instead the *Gunsei Hooiin* judged it.²

All justice agencies of the Government of the Dutch East Indies were to be replaced, with exception to the court of first instance (*residentiegerecht*), which was abolished by the Law No. 14 of 1942. These are: *Landraad* which was replaced to *Tihoo Hooiin* (Courts); *Landgerecht* turned to *Keizai Hooiin* (Police Court); *Regentschapsgerecht* replaced to *Ken Hooiin* (County Court); and finally *Districtsgerecht* which changed to *Gun Hooi* (*Kawedanaan* Court). The Law No. 14 of 1942 was then revoked and replaced by the Law No. 34 of 1942, which further regulate the composition of the civil courts. Under this new law, they added 2 (two) courts in addition to the existing courts as referred by the Law No. 14 of 1942, namely: (1) *Kootoo Hooiin* (the High Court), continuation of the former *Raad van Justitie*; and (2) *Saikoo Hooiin* (the Supreme Court), which was the continuous version of the former *Hoogge-rechtshof*.³

The Japanese government seeks to change the existing judicial system at that time. The Law No. 34 of 1942 did not mention the existence of self-governing court and the adat court. However, to Sumatra, these courts were both firmly mentioned by the Article 1 of *Sjihososjikirei* (the Law concerning Judges and Court Rules) as contained within the *Tomi-Seirei-Otsu* No. 40 of December 1, 1943, and entered into force in January 1, 1944.⁴

2.2.2 Post Independence of Indonesia

After Indonesia's independence on August 17, 1945, there is no visible change for Indonesian courts in the earliest phase of the independence. The Dutch's Political law which gave recognition over the adat court in Papuans by the *Ordinance op de Inheemse Rechtspraak in Rechtstreek Bestuurd Gebeid* (Ind. Stb. 1932 No. 80) and *Inheemse Rechtspraak Verordening Molukken* (Jav. Courant 24 September 1935 No. 77 Extra Bijvoegsel No. 57) was continued and eventually showed unclear future since the independence has been proclaimed. Before joining the Unitary State of the Republic of Indonesia, there has been the adat courts in Papua as administered by the Queen of Dutch's Decree (*Besluit Bewindsregeling New Guinea*) as dated in December 29, 1949.⁵ Finally, the new province of West Irian back to the Mother Nation of Indonesia in May 1st, 1963, where it must underpass the process of *Pepera* (similar to referendum) in 1969.⁶

Even after it's post-independence, the Dutch's colonial intervention was remaining at large. Since the enforcement of the Emergency Law No. 1 of 1951 concerning the Unitary of Competence and Procedural Civil Courts (Gazette or *Lembar Negara* 'LN' No. 9 of 1951), which affirmed that the *Inheemsche Rechtspraak* (*Natives Court* or *Adat Court*) and *zelfbestuur Rechtspraak* (*Self-governing Court*) were to be gradually abolished.

In regards to the adat judicature, I ketut sudantra, I Nyoman Nurjaya, A. Mukthie Fadjar, and Isrok,⁷ are jointly stating that the meaning of "the adat judicature" and "the adat court" within the ambit of the Emergency Law No. 1 of 1951 is *inheemsche rechtspraak*, which according to the Dutch East Indies legislation is the proceeding that exclusively given for the indigenous groups (the natives of Indonesia). Besides *inheemsche rechtspraak*, there are genuine proceedings Indonesian society during the colonial era that lives among the indigenous groups called *dorpjustitie* (village courts), a trial conducted by the village judges, which headed by the village chief of the indigenous peoples.

Recognition on the adat criminal codes is characterized by the birth of the Emergency Law No. 1 of 1951 (LN. 1951 No. 9). The enactment of the Emergency Law No. 1 of 1951, the living law (unwritten adat law)

¹Sudikno Mertokusumo, *The History of Judicature and Laws in Indonesia Since 1942 and What is the benefit for Indonesia*, Universitas Atma Jaya, Yogyakarta, 2011, p. 14.

²Ibid. p.18.

³Ibid. p. 22.

⁴Accessed on: <http://www.lenteratimur.com/memartabatkan-kembali-hukum-adat/>. 26 Februari 2015.16.03 EIT.

⁵Hendrik HJ. Krisifu, *the Papua Adat Judicature in Judicature System in Indonesia*, Article addressed on National Seminar on Adat Law, held by Faculty of Law University of Cendrawasih, Jayapura, 20 - 21 November 2014. pp. 3-4.

⁶ See Mohammad Jamin, *the Adat Judicature: Friction of Legal Politic in Perspective of the Law Concerning Special Autonomy of Papua*, Graha Ilmu. Yogyakarta, 2014, p. 7.

⁷Ibid.

is to be recognized again. It may become a written source of criminal law, the *Wetboek van Strafrecht* (WvS) so long it has no comparison or potentially overlap the WvS.

In its development, Indonesia has enacted the Law No. 19 of 1964 (LN. 1964 No. 107) on Basic Provisions on Judicial Power. Article 1 (1) states that "All courts in the entire territory of the Republic of Indonesia are to be regulated by the rule of law." Before this law was enacted, it was the Article II of Transitional Provisions Act of 1945 (prior to the amendment), which has been supporting the legal ground of customary court. It reads that: "All state agencies and the existing rules currently enforced, as long as there is no renewal in accordance to the Constitution".¹

Furthermore, the Law No. 19 of 1964 was repealed and replaced by the Law No. 14 of 1970 (LN. 1970 No. 74), in Article 3, paragraph (1) states that: "All courts in the entire territory of the Republic of Indonesia are to be regulated by the rule of law." Thus since Law No. 14 of 1970 has been enacted, the existence of customary court were no longer recognized in the national judicial system. In other words, the attempt to completely remove the customary courts has been finalized in order to attain the unification of judicial system.² Implicitly, the recognition of living law within a society is stated in the Article 23(1) of Law No. 14 of 1970, it held that: "Everything other than the Court's decision must contain the reasons and grounds of such decision, it shall also contain the certain articles which affirmed the regulations in question or the source of unwritten law that forming the basis for the judgment". Furthermore, also mentioned in Article 27(1) of the Law No. 14 of 1970, that: "The judge, as the law and justice enforcer shall explore and understand the legal values that embody the community."

In its development, the Law No. 14 of 1970 was amended by the Law No. 35 of 1999 concerning the Amendment to Law No. 14 Year 1970 on the Basic Provisions on the Competences of Judiciaries. The Law No. 4 of 2004 on Judicial Authority held that the judicature recognized by the state are only the judicature that are not beyond the recognized national courts (the adat judicature). Recognition of living law (the adat criminal law) as stated in Article 28 paragraph (1) of the Law No. 4 of 2004 on Judicial Power indicates, "judge shall explore and understand the legal values and sense of justice in society ". Finally in 2009, the Law No. 48 Year 2009 concerning Judicial Competence (LN 157 of 2009) replaced the Law No. 4 of 2004 (TLN Number 5076). The provisions of Article 2 paragraph (3) the Law Number 48 Year 2009 regarding Judicial Power has clearly stated that: "All courts throughout the territory of the Republic of Indonesia are the state courts which are regulated by the laws".

Legally speaking, the existence of the adat law (the adat judicature) has been recognized in the following legislations:

1. *Ordonantie op de Inheemse Rechtspraak in Rechtstreeks Bestuurd Gebied* (*Staatsblad* 1932 No. 80), February 18th, 1932, concerning the adat judicature rules.
2. *Inheemse Rechtspraak Verordening Molukken* (*Jav. Courant* 24 September 1935 No. 77 Extra Bijvoegsel No. 57.)
3. Article 3a *R.O. (Reglement of de Rechterlijke Organisatie)*, or the Regulation on the Organization of judicature and the Discretionary of Justice for the Dutch East Indies as promulgated by the *Staatsblad* 1935 No. 102.
4. Article 5(3)(b) of the Emergency Law No. 1 of 1951 concerning Temporary Measures on the Establishment of the Unitary Power and the Procedural Civil Courts (LN. 1951 No. 9).
5. Article 10 and Article 20(1) of the Law No. 19 of 1964 LN 107 of 1964, Basic Provisions on Judicial Authority; Article 27(1) of the Law No. 14 Year 1970 on Basic Provisions of Judicial Power, the Law No. 35 of 1999 concerning Amendment to the Law No. 14 of 1970 concerning Basic Provisions on Judicial Authority; Article 25(1) and 28(1) of the Law No. 4 of 2004 concerning Judicial Power; and Article 5 (1) of the Law No. 48 of 2009.
6. Article 18(B)(2), Pasal 28(I)(3), Pasal 24(3) UUD NRI of 1945, MPR Decree IX/MPR/2001, UU No. 17 of 2007 and President's Decree No. 7 of 2005.
7. The Law No. 21 of 2001 on Special Autonomy for Papua Province as amended by the LawNo. 35 of 2008 concerning Government Regulation in Lieu of Law No. 1 of 2008 on the Amendment of the Law No. 21 of 2001 on Special Autonomy for Papua Province.
8. Papua Special Regional Regulation No. 20 of 2008 concerning the adat judicature in Papua.

2.3 Legal Culture

According to Arma Diansyah,³ legal culture could be defined as follows: "...attitude and values that related to

¹Soerojo Wignyodipoero, *Introduction and Principles of Adat Law*, PT. Toko Gunung Agung, Jakarta, 1983, p. 52.

²Tim Huma, *Glance of Adat Judicature (Notes from some Forums on Adat Judicature Issues)*, Seminar on Adat Judicature in Sanggau-West Kalimantan, 10 Desember 2003, p. 4.

³Arma Diansyah, *The Existence of Damang as Adat Reconciliation Judge in Dayak Tribe Society*, Thesis-unpublished, Postgraduate-Udayana University, Denpasar, 2011, p. 24.

law and legal system, together with those attitudes and values affecting behavior related to law and its institutions, either positively or negatively”.

According to Lawrence M. Friedman, legal culture is divided into 2 (two) forms, namely: (1) an external legal culture and (2) an internal legal culture. According to Fachmi, the legal culture is utmostly important to be observed within a legal system, in addition to the substance of the law and the structure of law.¹ The legal culture refers to the parts that exist in culture generally, - i.e. customs, opinions, ways of act and behave - which directing the social forces closer or away from the law by its own means.

In terms of the legal culture, Soerjono Soekanto as quoted by M. Syamsudin states that the legal culture is a non-material or spiritual culture, which values an abstract conception of what is good (and should be devoted to) and what is bad (and should be avoided to). Related to the concept of the legal culture, there is a close link between indigenous peoples in Papua and their applicable adat laws. Indigenous peoples' attitudes and behavior towards the law is constructed on belief that the traditional order that has set of guidelines, which have to be followed and adhered. Any violator of adat offense would then be held accountable by the the adat judicature (adat deliberation body).

Philosophically, this communal responsibility shall become a shared responsibility when one of the family members is proven to cause harm to other indigenous people. The family or the tribe has the responsibility to endure any of the consequence. This is one form of manifestation of a very close relationship between the tribes and traditional society. The family may mutually working together to help each other in paying the fines or receiving the customary sanctions, and makes every effort in adhering the adat ruling. Fulfillment of the sanction is done solely to restore peace and cosmic balance that previously disrupted prior the offence was commenced.

3. Conclusion

Based on the previously discussed theory of the legal system, it can be concluded that the existence of the adat judicature in Papua can be significantly seen within each of the legal systems mentioned. The appearance of the adat judicature may be discovered from the structure of traditional institutions which borne from the indigenous peoples concerned, for example, in Biak there *Mananwir* whom acting as customary judges, *Ondoafi* or chieftain '*keret*' acting as customary judges in their respective area. All the functions embedded the institutional structure of the society had indicate strong presence of the adat judicature among the communities, where it is acknowledged and live in the midst of indigenous peoples. In practice, it can also be seen from the very substance of the law, where the adat law (adat courts) is still there and emerges as a norm that contains the provisions on deeds of good and bad, along with traditional sanctions for any breach on the adat provisions by the local indigenous community. The real evidence in legal culture can be seen from the attitude and behavior of indigenous peoples individually or in groups / communities are the real and conscious adherences of the people on these customary rules. Society's legal culture has shown tendency to settle any adat offense by consensus and familiarity approaches. This is because people feel certain satisfaction by knowing the result of adat verdict results as the final step to resolve the violations of the adat codes. The main goal is in fact to the restore the imbalance as before it was disrupted, as if it was restituted to its original condition.

The existences of theadat judicature itself within Indonesia have been accounted way past of Indonesia's independence. In this context, the adat judicature have been progressed from time to time, including in the changes of its legal substances. The existence and status of the adat judicature, especially in Papua is placed strongly on its legal structural approach, the substance of the law and legal culture. These approaches have becoming a measuring tool to reposition the existence of customary proceedings in the criminal justice system of Indonesia.

References

- A. Suriyaman Mustari Pide, *the Adat Law: Past, Present, and Future*, Pelita Pustaka., Makassar, 2009.
- Abdul Rahman Upara, *the Existence of Adat Court Decision in Papua Based on Pespective of Principle of Nebis in Idem*, Jurnal Konstitusi Pusat Studi Konstitusi FH Universitas Cenderawasih, Vol. IV No.1 Juni 2011. Jayapura.
- Ade Saptomo, *the Law and Local Wisdom of Revitalization of the Indonesian Adat Law*, PT. Gramedia Widiasarana Indonesia, Jakarta, 2010.
- Ahmad Mujahidin, *One Roof System of Judicature in Indonesia*, PT. Refika Aditama, Bandung, 2007.
- Ahmad Ubbe, *the Adat Law of Malaweng Morality: Its Continuity and Change*, Yarsif Watampone, Jakarta, 2008.
- Arma Diansyah, *the Existence of Damang as Adat Reconciliation Judge in Dayak Tribe Society*, Thesis-unpublished, Postgraduate-Udayana University, Denpasar, 2011.

¹Fachmi, Legal Certainty on Desison Null and Void in Indonesian Criminal Justice Sistem, PT. Ghalia Indonesia Publishing, Jakarta, 2011, pp. 160-161.

- Dyah Irawati and Hinijati Widjaja, *the Existence of Social-Politic of Papua Adat Council in Endeavoring of the Society, (Study case of Sentani Adat Council in Senatani, District Jayapura)*, UKI Press, Jakarta, 2006.
- Fachmi, *Legal Certainty on Desison Null and Void in Indonesian Criminal Justice Sistem*, PT. Ghalia Indonesia Publishing, Jakarta, 2011.
- Hedar Laudjeng, *To Consider of the Adat Judicature*, HuMa, Jakarta, 2003.
- Hendrik HJ. Krisifu, *the Papua Adat Judicature in Judicature System in Indonesia*, Article addressed on National Seminar on Adat Law, held by Faculty of Law University of Cendrawasih, Jayapura, 20 - 21 November 2014.
- , *To Know Kainkain Karkara Biak: a Adat Court Institution in Biak Adat law Society*, Year 9 No. 1, Januari 2010, Faculty of Law, University of Cendrawasih.
- I Made Widnyana, *Paper Collection on the Criminal Adat Law*, PT. Eresco, Bandung, 1993.
- Johszua Robert Mansoben, *Political Traditional System in Irian Jaya*, (Seri LIPI-RUL No.5), Indonesian Institute of Sciences Jakarta-Indonesia and Leiden University-Leiden The Netherlands, 1995.
- Lawrence M. Friedman, *The Legal System: A Social Science Perspective*, Russel Sage Foundation, New York, 1975, translated to Bahasa Indonesia By M. Khozim, *Legal System in Social Science Perspectives*, Nusa Media, Bandung, 2009.
- Mohammad Jamin, *the Adat Judicature: Friction of Legal Politic in Perspective of the Law Concerning Special Autonomy of Papua*, Graha Ilmu. Yogyakarta, 2014..
- Philipus Kopeuw dan Elsa Suebu, *The History of Ondoafi Words*, Tuesday, Januari 3rd, 2012. Accessed on: <https://pealtwo.wordpress.com/asal-usul-kata-ondoafi/> 4 March 2015. 17.39 Eastern Indonesia Time (Hereinafter referred as "EIT").
- Pujiyono, *Paper Collection on Criminal Law Issues*, CV. Mandar Maju, Bandung, 2007.
- Rahman Syamsuddin and Ismail Aris, *To Knit Laws in Indonesia*, Mitra Wacana Media, Jakarta.
- Soerojo Wignyodipoero, *Introduction and Principles of Adat Law*, PT. Toko Gunung Agung, Jakarta, 1983.
- Stefanus Laksanto Utomo, *Legal Culture of Sami Community*, PT. Alumni, Bandung, 2013.
- Sudikno Mertokusumo, *The History of Judicature and Laws in Indonesia Since 1942 and What is the benefit for Indonesia*, Universitas Atma Jaya, Yogyakarta, 2011.
- Tim Huma, *Glance of Adat Judicature (Notes from some Forums on Adat Judicature Issues)*, Seminar on Adat Judicature in Sanggau-West Kalimantan, 10 Desember 2003.
- Yohanis Anton Raharusun, *Special Region on Indonesia Perspective: Legal Analysis to Special Autonomy of Papua Province*, Konstitusi Press, Jakarta, 200.

The IISTE is a pioneer in the Open-Access hosting service and academic event management. The aim of the firm is Accelerating Global Knowledge Sharing.

More information about the firm can be found on the homepage:

<http://www.iiste.org>

CALL FOR JOURNAL PAPERS

There are more than 30 peer-reviewed academic journals hosted under the hosting platform.

Prospective authors of journals can find the submission instruction on the following page: <http://www.iiste.org/journals/> All the journals articles are available online to the readers all over the world without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. Paper version of the journals is also available upon request of readers and authors.

MORE RESOURCES

Book publication information: <http://www.iiste.org/book/>

Academic conference: <http://www.iiste.org/conference/upcoming-conferences-call-for-paper/>

IISTE Knowledge Sharing Partners

EBSCO, Index Copernicus, Ulrich's Periodicals Directory, JournalTOCS, PKP Open Archives Harvester, Bielefeld Academic Search Engine, Elektronische Zeitschriftenbibliothek EZB, Open J-Gate, OCLC WorldCat, Universe Digital Library, NewJour, Google Scholar

