

# THE POSITION OF CUSTOMARY VILLAGE IN THE CUSTOMARY LAW COMMUNITY IN PAPUA PROVINCE: A REFLECTION OF THE LAW NUMBER 6 OF 2014 CONCERNING VILLAGES

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## Abstract

This paper aims to examine the existence of Customary Village (Adat) as a mirror of the Unity of the Customary Law Community. The Customary Village has been known in several community law communities in Indonesia, such as in West Java, Bali, South Kalimantan, East Nusa Tenggara (NTT), West Nusa Tenggara (NTB), Maluku and Jayapura District of Papua. It has been stipulated in Article 18B of the 1945 Constitution of the Republic of Indonesia, Article 399 of the Law No. 23 Year 2014 concerning Regional Government, the Law No. 6 of 2014 concerning Villages, and the Government Decree No. 43 2014 – has been amended to the Government Decree No. 47 2015, Article 1 letter l of the Law No. 21 Year 2001 on Special Autonomy for Papua Province, and the Regional Government Regulation No. 8 of 2016 concerning Indigenous Village of Jayapura District. Socio-juridically, the Village (Desa) and the Customary Village (Desa Adat) have become part of the community institution and/or the customary institution. It is known as “*Obe*”(Kampong) in the Jayapura District of Papua. The word “*Obe*”(Kampong) is in line with the legal characteristics of local wisdom. The existence of the customary village basically is a reflection of the Customary Village in the context of recognition and restoration of the customary community authority under the identity of indigenous and tribal peoples of Jayapura District to have the autonomous Customary Village. The village democracy can be seen in the 1945 Indonesian Constitution, Article 94, Article 95 paragraph (3), and Article 111 of the Law of Village, and the Regional Government Regulation No. 8 of 2014 on the village supporting the implementation of the Law No. 8 of 2016 concerning the Village Community in Jayapura District. The efforts towards the existence of Villages Community as partners of the Village Government need commitment from the Regional Government and the Regional House of Representative (DPRD) of the Jayapura District to synergize and synchronize some policies with the Papua Provincial Government, the Papuan People's Representative Council (DPRP), and the Papuan People's Assembly (MRP) through policy or regulation.

**Keywords :** *Customary Village, Customary Community, Village Kampong.*

## 1. Introduction

Indonesia as a sovereign state based on the independence proclamation of August 17 of 1945 is known as a state with patterned diversity of cultural, religious, racial, multi-class, legal pluralism, and the mirror of one of the principles supporting the Indonesian nation, namely the principle of unity in diversity either de jure or de facto in the context of the Unitary State of the Republic of Indonesia (NKRI). This means that diversity is the capital of culture and cultural strength to drive the dynamics of the life of the nation and state in a sustainable manner. On the other hand, the diversity of cultures, races, religions, groups, legal pluralism are a potential conflict or dispute that can threaten the integration of Indonesian sovereignty. Therefore, if the conflict / dispute is not managed, interpreted, and resolved procedurally, peacefully and wisely by the government along with all components of the nation's, it will threaten the Indonesian sovereignty. As it is known, there are 4 (four) basic principles of national support, namely: 1) Pancasila, 2) the 1945 Indonesia Constitution, 3) the Unity in Diversity, and 4) the Unitary State of the Republic of Indonesia (NKRI).

One of Indonesia's cultural riches normatively and empirically is traditional villages and villages as community institutions according to the Law Number 6 of 2014 concerning Villages along with its derivation in form of the Government Decree (PP) No. 43 of 2014 amended by the Government Decree No. 47 of 2015. Social grouping system with their customary law (written / unwritten) is an instrument of social, political and legal in the lives of indigenous peoples. In terms of the term customary village in some region, it is known various names such as *villages / hamlets* in Java, *villages / Banjar* Pakraman in Bali, *Nagari* in West Sumatra, *Gampong* in Aceh, *clans* in South Sumatra, *Lembang* in Toraja, *Banua/Wanua* in West Kalimantan, *Negeri* in Maluku, *Tiuh/Pekon* in Lampung, *Kadamangan* in Central Kalimantan, *Huta/Nagori* in North Sumatra, *Obe* in Sentani Jayapura District, and *Nu* in Waropen Papua District. For the term of written customary law in the communal life of the customary law communities is known various names such as *Awig-awig* in Bali and

Lombok, *Pepakem* in Cirebon, and the *book of light symbols* (Kitab Simbur Cahaya) in Lampung, and the term of unwritten customary law is recognized as the living law.

Van Vollenhaven theoretically was able to identify nineteen (19) customary law circles in Indonesia and 14th in the Irian (Papua) customary law community. With this identification, it simply shows that the indigenous Papuans have cultural differences and customary law based on the distribution of the indigenous peoples according to cultural ecology (geological ecology), even though the area is close together. However, van Vollehoven did not show differences in detail as an ethnographic form of culture especially in legal ethnography. The existence of the Papuan customary community normatively and empirically is purposed for the development of customary communities in the field of customary law in supporting the development of national laws.

There is 7 (seven) indigenous territories in the Papuan indigenous peoples, namely: 1) La Pago, 2) Mee Pago, 3) Tabi / Mamta, 4) Ha Annim, 5) Saireri, within the territory of the Papua Province, 6) Bomberai and 7) Domberai, within the territory of West Papua Province. According to JR Mansoben,<sup>1</sup> the customary law community in Papua (Papua and West Papua) recognizes 4 (four) traditional leadership system typologies, namely 1) Big Man System, 2) Clans System, 3) King System 4) Mixed System. Therefore, it can be said that the heterogeneous indigenous peoples of Papua in terms of the zone of cultural ecology and plural social structures is reflected in the customary law as a positive law and *the living law*. It is further explained that understanding the customary law and the Papuan community groups is to understand values and ideal norms of the Papuans customary law. This is an important part of the effort to understand the identity of the Papuan people who are plural based on the distribution of cultural ecology, both in the highlands, pre-highlands, lowlands (rivers, lakes, swamps) of the coast and islands holistically and comprehensively.

Identifying of the Papuan indigenous peoples and the Papuan indigenous institutions spread across the 7 (seven) customary territories as mentioned above, it has to be seen as an integrated unit according to the culture and customary law of each customary community group from various specific needs and objectives to help or implement social institutions especially customary law institutions. It is also as a guideline in an effort to maintain the ideal lives of indigenous peoples and customary institutions in various dimensions of the social life of the indigenous Papuans. The customary law institutions and the institutional customary are original systems and / or rules that have long been guided by the Papuan customary community, especially the Jayapura customary law community as a social control. In the institutions of customary law, the status of the rights and obligations of indigenous peoples and customary institutions traditionally has a hereditary arrangement and is inherited based on structure and social organization. The Jayapura customary law community is categorized as a customary law community that adheres to the principle of genealogical territories or genealogical territoriality. It means that the customary law communities have a division based on the territorial and genealogical structure of social organizations in line with to the customary territories and blood relations among members of the customary law communities. For example, the customary government system and kinship system as traditional institutions are still maintained to show rights and obligations as well as the norms of enforcement against natural resources and inheritance and marriage to manage autonomous indigenous peoples.

Institutionally, the Jayapura customary law community also has a customary institution whose position is the same as the customary government and / or adat village as an identity institution that identifies the customary village according to the Law Number 6 of 2014 concerning Villages with its implementing regulation in PP No. 47 of 2015. Article 1 letter l of the Papua Special Autonomy Law also mentions further "Village". Kampung (Village) is a customary law community unit that is recognized its existence in the 1945 Indonesian Constitution and has the authority to organize its members independently based on the original authority possessed in order to realize just and equitable welfare. While Indigenous Village is a concrete manifestation of the customary law community unit along with their traditional rights which are still maintained, upheld, respected and carried out by all members.

In the history of legal politics and a culture of legal unification, the uniformity of Kampung models in Jayapura District has been implemented since the enactment of the Law No. 5 of 1979 and the enactment of the Government Regulation No. 72 of 2005 concerning Villages. It has resulted the collapse of indigenous peoples

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<sup>1</sup> See J.R. Mansoben, 1995, *Traditional Political System in Irian Jaya Province* (Sistem Politik Tradisional di Provinsi Irian Jaya), LIPI and RUL, Jakarta.

that covers the norms, values, structures, and principles that are adhered to and upheld by the customary law community in their joint lives and participation in the administration of government and regional development and the development of the village itself. Granting the authority to the regions through the Regional Autonomy and Special Autonomy therefore is an opportunity to make the arrangement to villages and indigenous villages in particular the arrangement of the indigenous and tribal peoples so that the administration and regional development can be beneficial for the development of the welfare of indigenous people in 4 (four) regions development of Jayapura District in a sustainable manner.

For the Jayapura customary law community who resides in Indigenous Villages and Villages, they have not been given protection and provided adequate opportunities to strengthen their existence and encourage participation in governance and development in Jayapura District. So that in the provisions of Article 101 of the Law No. 6 of 2014 concerning Villages, it gives authority to the District / municipality to conduct arrangements for Indigenous Villages through Regional Regulations. In the District / municipality. In Jayapura District, the Regional Regulations (Perda) No. 8 of 2016 concerning Indigenous Villages is becoming a step in progress for the indigenous Papuans in general. Therefore, it is necessary to follow-up the socialization of the position of the traditional village as a customary law community unit and traditional village for the customary law as a form of joint commitment to build a village to the city.

## 2. Research Methods

The research method was normative and empirical methods. The normative method prioritized its sources of legal literature in the form of: 1) primary legal materials (all laws and regulations as positive law in contact with research objects); 2) secondary legal materials (reviewing legal books, journals / legal articles, reports legal research, and legal magazines to support references; and 3) tertiary legal materials (more on the use of legal dictionaries, English-Indonesia dictionaries to translate the terms of words are deemed necessary). The empirical juridical (sociological) method focused on its source in the community in the form of primary legal material in the field where the law is obtained directly from 3 (three) legal subjects, namely: 1) informants, 2) respondents, and 3) resource persons through observation and interview techniques. The three legal subjects were considered to have knowledge of the object of research. The data were then analysed qualitatively.

## 3. Results and Discussion

### A. Village as a Reflection of Original Autonomy (Customary Government) in Legislation

There are provisions normatively in the 1945 Indonesia Constitution (prior to the amendment) that provide a strong place for the form of customary government, as stipulated in Article 18: "The division of Indonesian territory over large and small regions, with the form of the government stipulated by law with looking at and remembering the basic principles of consultation in the system of state governance and the rights of the origin of special regions." Article 18 contains several principles including "the principle to require that the contents of Article 18 must reflect the basis of consultation and the rights of origin in special areas."<sup>1</sup> In relation to customary government, it is clearly expressed and implied in the formulation by looking at and remembering the rights of origin in special areas. This formula is clarified by the constitution through the explanation of Article 18 point 11, as follows: "In the territory of Indonesia, there are approximately 250 *Zelfbesturende landschappen* and *Volksgemeenschaappen*, such as villages in Java and Bali, *Negeri* in Minangkabau, hamlets and clans in Palembang and others. These regions have original structures and are therefore considered to be special areas. Indonesia respects the position of these special regions and all state regulations concerning these regions will remember the rights of origin of the area."<sup>2</sup>

Explanation of Article 18 identifies areas that have an original structures of *Zelfbesturende landschappen* and *Volksgemeenschaappen* particularly for the *Volksgemeenschappen* or *Inlandschegemeenten* are autonomous regions which are allowed to regulate and manage their own households.<sup>3</sup> The same opinion is expressed by Kusnardy and Ibrahim. They state that "in contrast to the

<sup>1</sup> See the Article 18, 18A, and 18B of the 1945 Indonesia Constitution. See also Syaukani HR. det.al., 2003, *Regional Autonomy in the Unitary State of Indonesia* (Otonomi Daerah Dalam Negara Kesatuan), Pustaka Pelajar, Jogjakarta.

<sup>2</sup> See Widjaja Haw, 2001, *Regional Autonomy and Autonomy Regional* (Otonomi Daerah dan Daerah Otonomi), Rajawali Press, Jakarta.

<sup>3</sup> See Bambang Yudoyono, 2003, *Regional Autonomy* (Otonomi Daerah), Pustaka Sinar Harapan, Jakarta.

autonomous region which has now been abolished (according to Koesoemahatmadja *Zelfbesturende landschappen* was abolished with the. Law No. 19/1965 on the Praja Village), the Volksgemeenschappen is a village which is the lowest community unit self-government based on original Indonesian law.<sup>1</sup> Hilman Hadikusuma then uses the sentence governing and breaking down the household itself as the right to implement local customary law that is contrary to the public interest.<sup>2</sup> Similar opinion is also expressed by Manan, he states that "in general explanations of the Law on the Village Government (point 6) mentions that "village has the right to hold the household.<sup>3</sup> The right to hold a household is not an autonomy right as intended by the Law No. 5 of 1974 that only came from the surrender of affairs by the central government (and village autonomy is not the sort of autonomy according to the law). It means that village autonomy is the village autonomy that grew and is rooted in customary law."<sup>4</sup>

Hazairin<sup>5</sup> indicates that the constitutional format referred to as the unity of the people of the community with which their customary law applies. Hazairin further emphasized that "in the Republic of Indonesia under its sovereignty, the customary power can continue in legal societies customs as stated in article 1 (b) of the 1945 Indonesia Constitution<sup>6</sup> regarding on the rights of its origins in the areas that are special. In its explanation, it mentions in societies that customary law has the original order considering a special area. Indonesia has respect on the position of special regions."<sup>7</sup> Widjaja<sup>8</sup> refers to the village as an original autonomous region based on customary law developing from the people themselves according to historical developments. Kusnardi and Ibrahim<sup>9</sup> argue that "The village is a fact that still lives as a subordinate level based on original Indonesian law. Formerly the name of the village was known as *Inlandsche Gemeete*. The village government is carried out on the basis of democracy which stems from village agreements carried out on the basis of democracy which stems from consensus in deliberations led by wisdom."<sup>10</sup> Meanwhile, Sujamto states that "many people have forgotten that the village is actually seen as one form of special territory in the 1945 Indonesian Constitution. However, the Law No. 5/1979 concerning the Village Government does not mention at all about this matter, even though in its consideration mentions Article 18 of the 1945 Indonesian Constitution."<sup>11</sup>

Article 18 basically has been amended and the idea of to recognize the existence of the customary can be seen in Article 18 B paragraph 2, as follows: "The State shall recognise and respect their traditional communities along with their traditional customary rights as long as these remain in existence and are in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, and shall be further regulated by law." In terms of it, there are customary law community units such as in Papua and specifically in

<sup>1</sup> See Muhammad, Bushar, 1991, *The Basic of Customary Law* (Pokok-Pokok Hukum Adat). 5<sup>th</sup> ed. PT. Pradnya Paramita, Jakarta. See also B. Ten Haar, 1980, *the Chapters on the Customary Law* (Bab-bab Tentang Hukum Adat), 10th Ed., PT. Pradnya Paramita, Jakarta.

<sup>2</sup> Hilman hadikusuma, 1992, *An Introduction of the Science of the Indonesia Customary Law* (Pengantar Ilmu Hukum Adat Indonesia), Mandar Maju, Bandung.

<sup>3</sup> Bagir Manan, *Welcoming the Dawn of Regional Autonomy* (Menyongsong Fajar Otonomi Daerah), 2<sup>nd</sup> ed., PSH FH UII, Yogyakarta, 2002, pp. 7-17.

<sup>4</sup> Ibid. p. 17.

<sup>5</sup> See Arief, S, 1986, *the Principles of the Customary Law and the Customary Law Lecturer Collection* (Asas-Asas Hukum Adat dan Kumpulan Kuliah Hukum Adat). Pustaka Tinta Mas, Surabaya.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Supra Note 3.

<sup>9</sup> Kusnardi and Ibrahim, 1983, *Indonesia Constitutional Law* (Hukum Tata Negara Indonesia), the Study Center of the Constitutional Law – Faculty of Law University of Indonesia, Jakarta.

<sup>10</sup> Supra Note 5.

<sup>11</sup> Supra Note 13.

Amungme, the customary law in fact still retains traditional rights in a special law, excluding the Law No. 22 of 1999, then revised by the Law No. 32 of 2004 concerning the Regional Government, amended by the Law No. 23 of 2014 concerning Regional Government as currently accommodated in Law No. 21 of 2001.<sup>1</sup>

The community units of the customary law as intended by the Constitution are actually discourses about a group of people who take a common residence for an area that has a government organization with a set of regulations that they set themselves and are under the leadership of the village, which they lift and set themselves. The ways they regulate and determine village leaders are important elements in determining village style which throughout history contain differences between one region and another. Moreover, as a local community alliance, the village is a legal community organization that is old, ahead of the legal community now called the state.

Based on the regulations governing various lives in the village alliance, it can generally be referred to as customary law. It is categorised as a complex of customs and is generally not opened, not codified, but has the power to force citizens (to submit and obey the rules), as well as sanction those who violate these rules. Due to this village community is also referred to as a customary law community, which according to Zakaria is "what in the literature of Customary Law is referred to as *rechsgemeenschap*, *adatrech gemeenschap*, and *vollsgemeenschap*, it is often translated as a customary law community or customary law alliance."<sup>2</sup> In line with that, Hazairin interprets indigenous peoples or customary law communities as "Community units have its agencies to be able to stand alone and have legal unity, unity of rulers, and environmental unity, based on common rights or land and water for all its members."<sup>3</sup> The form of family law affects the system of government and its social system." Hilman Hadikusuma agrees and states that "In the customary law alliance, there is a governing body that carries out the government, which has the duty and authority to administer and regulate all fellowship activities for the benefit of its members. The governing body or government of the alliance consists of the chairman or head of the alliance and its assistants and the fellowship of the community according to their respective levels. The highest authority (sovereignty) in the fellowship is in the hands of the deliberation body and its members. So, there is consensus among members and the harmony of members plays an important role in the fellowship."<sup>4</sup> These customary units are referred to as constitutions as having an original structure and having origins and traditional rights. It is the reason why they are called special areas. The constitution mentions such areas as *elfesturende landschappen* and *volksgemeenschappen*. The two forms of government are therefore both forms of government are juridically obliged to obtain guaranteed protection for their existence and sustainability according to the constitutional legal system adopted by this country. The Decree of the MPR-Republic of Indonesia No. IV / MPR / 1999 as the results of the MPR-Republic of Indonesia General Session on 20 October 1999 expressly stipulated the special autonomy status for the Papua Province. It was a wise answer to the real conditions of Papua which had distinctive ethnic and cultural diversity.<sup>5</sup>

#### *B. Jayapura Customary Law Society in the Legislation*

Normative and empirical approaches to the customary law community unit are recognized by the state in accordance with Article 18B paragraph (2) of the 1945 Indonesian Constitution if 4 (four) conditions stipulated based on legislation can be fulfilled, namely: 1) as long as the legal community exist; 2) In accordance with community development; 3) In accordance with the principle of the Republic of Indonesia; and 4) Regulated by law. These 4 (four) juridical requirements are clear and show the government recognition to the existence of customary law communities in order to keep the interests of the state as a central position. This is reinforced by

<sup>1</sup> See Frans Reumi, 2004, "Situation of Legal Pluralism and Dispute Settlement (*Legal Anthropology Study*) Situasi Pluralisme Hukum dan Penyelesaian Sengketa (Suatu Kajian Antropologi Hukum)", *Jurnal Antropologi Papua*. Vol. II 6 April 2004.

<sup>2</sup> B. Ten Haar, op,cit.

<sup>3</sup> Ibid.

<sup>4</sup> Supra Note 5.

<sup>5</sup> See Yulfita Raharjo, et.al, 1995, *Human Resources and Development of Irian Jaya* (Sumber Daya Manusia dan Pembangunan Irian Jaya), Paper in Seminar on Development of Irian Jaya, 6-9 December 1995, LIPI, PEMDA and UNCEN, Jayapura.



policies that refer to Article 33 paragraph (3) 1945 Indonesia Constitution – states that " Earth, water, and wealth are contained in the state's control." Therefore, it is very unlikely that indigenous peoples will be autonomous.

Related to the understanding of the customary law community, there are 2 (two) formulations of it coming from customary law scholars, namely B Ter Haar Bzn and Hazairin. According to B Ter Haar Bzn,<sup>1</sup> customary law alliances are " regular groups that are fixed by unifying their own power, either visible or not visible objects." Hazairin<sup>2</sup> further states that the customary law community is: "... social units that have the completeness to stand alone. It means that they have legal unity, unity of the ruler and environmental unity based on joint rights to the homeland for all its members ..."

From the two formulations as mentioned above, it implies that the customary law community is an important element that describes the existence of things as conditions that are identical to one country, namely:

1. A human unity that behaves and interacts in social interaction in such a way. This shows the existence of an element of "the *people*";
2. They can act out or inside as a group. This indicates the existence of an element of " *Sovereignty*";
3. They have their own rulers. This indicates an element of " *Government*"; and
4. They have joint rights to the homeland and property. This shows the existence of an element of " *territory* "

To understand the Jayapura Papua customary law community can be seen from the basis of the structure and form. From the basis of the structure, the Jayapura customary law community can be divided variously over: 1) Genealogical customary law communities; 2) Communities of territorial customary law; and 3) Genealogical territorial customary law communities.<sup>3</sup> Genealogical customary law community is a customary law community whose members are bound to each other based on the same blood relations factor. Community for genealogical custom laws can be divided into 3 (three) types, as followings:<sup>4</sup>

1. Members of the community who are bound by blood relations according to the descendants of the mother, for example in Manangkabau and Kamoro<sup>5</sup> (Timika Papua);
2. Members of the community who are bound by blood relations according to their ancestors (father blood), for example in the Batak, Nias, Bali, Ambon, and Papua; and
3. Community members who are bound to regional parties according to the lineage of mothers and fathers, for example in Java, Aceh and parts of Kalimantan.

The territory of the customary law community in Jayapura is a customary law community whose members are bound to each other based on the factors of the area of residence in the fellowship of territorial area of customary law communities. It can be divided into 3 (three) types, as followings:<sup>6</sup>

1. a customary law community that is bound to their residence including remote hamlets, while its government officials live together in the central residence, for example in Javanese and Balinese villages.

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<sup>1</sup> Supra Note 5.

<sup>2</sup> Ibid. see also Soepomo, 1980, *the Chapter of the Customary Law* (Bab-bab Tentang Hukum Adat), 10<sup>th</sup> ed., PT. Pradnya Paramita, Jakarta.

<sup>3</sup> See Kareth Ferry, 1994, *The Ownership of the Customary Land and Development in Irian Jaya* (Pemilikan Tanah Adat dan Pembangunan di Irian Jaya), Paper, Faculty of Law UNCEN, Jayapura.

<sup>4</sup> Ibid. see also Elkin, A.P, 1950, *Review of Research in Social Anthropology: Papua/Melanesia Section, South Pasif Commission*, Report on Project S.5 (B), University of Sydney, Australia.

<sup>5</sup> See Widjojo Muridan S, 1997, *People of Kamoro and its Environmental Changes of the Culture-Social in Timika, Irian Jaya* (Orang Kamoro dan Perubahan Lingkungan Sosial Budaya di Timika Irian Jaya), PMB – LIPI, Jakarta.

<sup>6</sup> SADP-IRJA, 1998, *Potential Identification, Challenges and Prospects of the Plant System in Irian Jaya* (Identifikasi Potensi, Kendala dan Peluang Sistem Tani Berbasis Perkebunan di Irian Jaya, Research's Report, Jayapura.

2. an area in which there are several villages. Each of which stands alone, but all are subordinate parts of a certain area. For example, in South Sumatra.
3. a combination of several village fellowships which are located adjacent to one another which maintain common interests, such as holding irrigation and / or settlement of village boundaries.

The Jayapura genealogical territorial customary community is a customary law community whose members are bound to each other based on shelter factors and blood relations amongst community members. According to Soepomo,<sup>1</sup> the conditions must be fulfilled that he/she must be included in a genealogical unit and he/she must reside in a legal meeting area. The customary law community itself is classified by Soerjono Soekanto and Soleman B Taneko in 4 (four) types, namely:<sup>2</sup>

1. The single customary law community. It is a stand-alone customary law community in which there is no laying down of customary law communities and superiors. For example, village communities in Java.
2. The multilevel customary law community. It is a customary law community in which there are superior customary law communities and subordinate customary law communities, where the subordinate customary law communities submit to the superior society. For example, in Manangkabau the superior customary law community is called Negari, while the subordinate customary law community is called Suku.
3. The sequential customary law community. It has a number of groups, which are several customary law communities that have the same degree to establish cooperation in certain cases which will form a new ruler, until a customary law community emerges.
4. The sequential customary law community consists of a confederation of indigenous customary law communities, for example reaching a federation of 5 villages and five *manca* (9 village federations) in Central Java, formed to combat crime or regulate water.

The customary law community is generally viewed from the basis of the structure and form as described above - namely the single, multilevel, and sequential genealogical customary law community - is possible to be combined in accordance with to the development of the Jayapura Papuan customary law community concerned. This is strengthened by the juridical recognition of indigenous peoples in the laws according to Article 18B of the 1945 Indonesia Constitution. It states that the original autonomy system and customary law communities living in a social bond are *genealogically territorial* in social units with the power of natural resources, region, its citizens in their management for generations. Article 3 and Article 5 of the Law No. 5 of 1960 concerning the National Basic Agrarian Law, however, only gives recognition as limited to the control rights of customary law communities and communal land rather than regulation and gives authority to the state. So that the existence of indigenous peoples is still half-heartedly recognized by the state.

Recognition of the existence of customary law communities can be seen in the Law No. 41 of 1999 concerning Forestry. It is regulated in article 67 paragraph (1), as follows: Customary law communities insofar as they are in reality still exist and are recognized as being, are entitled :

1. Conducting forest products to fulfill the daily needs of the indigenous peoples concerned;
2. Conducting forest management activities based on applicable customary law and do not conflict with the law; and
3. Getting empowerment in order to improve their welfare.

Article 67 paragraph (2) states that inauguration of the existence and deletion of customary law communities, as referred to in paragraph (1), shall be stipulated by Regional Regulation. Furthermore, in the explanatory of article 67 of the Forestry Law, it is stated the conditions for recognizing customary law communities. Explanatory of article 167 paragraph (1) states that the customary law community is recognized if in reality it fulfills the element, as followings:

1. The community is still in the form of "*peguyuban*" (*rechtsgemeenschap*);
2. There are institutions in the form of the ruler's adat (customary) instruments;
3. There are clear areas of customary law;
4. There are institutions and legal instruments, adat (customary), which are still adhered to; and
5. They are still collecting forest products in the surrounding forest area to fulfill daily needs.

<sup>1</sup> Soepomo, 1980, *the Chapter of the Customary Law* (Bab-bab Tentang Hukum Adat), 10<sup>th</sup> ed., PT. Pradnya Paramita, Jakarta.

<sup>2</sup> Supra Note 5.

The explanatory of article 67 paragraph (2) states that regional regulations are prepared taking into account the results of research by experts in customary law, the aspirations of the local community, and indigenous community leaders in the area concerned, as well as related institutions or parties. Therefore, it cannot be justified if the customary rights of a local customary law community are used to hinder the implementation of the Government's general plan. For example, refusing large-scale forest clearing for large projects or for transmigration purposes and so on.<sup>1</sup> Similarly, it cannot be justified if *ulayat* (customary) rights are used as a pretext for local customary law communities to open forests arbitrarily. If it is allowed, there will be a country within the country.<sup>2</sup>

The OTSUS Law also stipulates the basic rights of Papuans, especially regarding "*protection of the rights of indigenous peoples*".<sup>3</sup> Article 43 of the Otsus law stipulates as follows: (1) The Government of the Papua Province must recognize, respect, protect, empower and develop the rights of indigenous peoples by referring to the provisions of applicable law; (2) the rights of indigenous peoples in paragraph (1) include the customary rights of customary law communities and individual rights of the residents of the customary law community; (3) implementation customary rights, as long as according to reality still exists, carried out by the customary authorities of the customary law community in accordance with the provisions of local customary law, by respecting the ruler of former communal land rights obtained by other parties in accordance with regulations and based on regulations; (4) Providing customary land and individual land customary community members for any purpose, carried out through deliberations with the customary law community and the concerned citizens to obtain agreement on the surrender of the necessary and compensation; and (5) the Papua Province, District / municipalities Government provides active mediation in efforts to resolve communal land disputes and the former individual rights fairly and wisely, so that a satisfying agreement can be reached for the parties concerned.

### *C. The Existence of the Customary Village of Jayapura District, Papua*

Normatively, there is a little difference between the villages according to the Regional Regulation (Perda) No. 8 of 2014 and Customary Villages with Perda No. 8 of 2016 in Jayapura District concerning Customary Villages. As it is mentioned before, There is 7 (seven) indigenous territories in the Papuan indigenous peoples, namely: 1) La Pago, 2) Mee Pago, 3) Tabi / Mamta, 4) Ha Annim, 5) Saireri, within the territory of the Papua Province, 6) Bomberai and 7) Domberai, within the territory of West Papua Province. According to JR Mansoben,<sup>4</sup> the customary law community in Papua (Papua and West Papua) recognizes 4 (four) traditional leadership system typologies, namely 1) Big Man System, 2) Clans System, 3) King System 4) Mixed System. The existence of the Jayapura Papua customary community and its customary rights are still recognized and respected in the implementation of regional government. Villages that have been established and existed in the customary territory of Jayapura District need to be classified and given clear legal status by naming as villages and customary villages in order to avoid confusion in understanding and achievement targets for regional development in implementing Papua's Special Autonomy Law along with Perda that favor to the customary peoples.

The policy in the Perda of Jayapura District also regulates the mechanism for the formation of Customary Villages which will be regulated by the Regents' Regulations. In Customary Villages, there is no structure as in the Village - namely the Village Consultative Body (**Bamuskam**) or called by another name in terms of legally local wisdom such as: a) *Ondofolo* for the Sentani region; b) *Ondewafi* (Yarise) for the Tepra and Yokari region; c) *Tubwe* for the Ormu region; d) *Done* for Moi territory; e) *Mrar Matawun*, *Matawun Pan* and *Mran Tamsu* for Jouw wari and Tarpi areas; f) *Dugeno* or *Kikeno* or also called *Dugu* for the Gresi and Kemtuk regions; g) *Iram* for the Namblong region; and h) *Oktim* for the regions of Orya, Elseng, Sause, Kaureh, Nakasai, Kapaouri and Kosare.<sup>5</sup>

<sup>1</sup> See General Explanation II point 3 of BAL (UUPA).

<sup>2</sup> See General Explanation II point 3 of BAL (UUPA).

<sup>3</sup> See Article 43 of the Special Autonomy Law.

<sup>4</sup> *Supra* Note 1.

<sup>5</sup> Frans Reumi, 1999, *the Customary Law in Irian Jaya* (Hukum Adat Tanah di Irian Jaya), Co-operat Amongst State University all over East Indonesia in Palu, DIKTI, Jakarta.



This is because the Customary Village adheres to the customary leadership system, namely Ondoafia or other designations adopted by each customary law community (tribe / clan) in the administrative region of the Jayapura district. So that it is necessary to revitalize an institutional model that will exercise social, political and legal control over the Administrators of the customary Village called the Customary Council of the Tribal Village / Tribal Council whose membership comes from tribal heads / clans of each customary community with an adat leadership system adopted in the Indigenous Village Government. In the Customary Villages, the election of the Head of a customary village is carried out through consensus meetings by members of the traditional village community consisting of tribes and clans and / or confederation forms. Thus, the procedure for choosing the Head of the Customary Village is different from the Head of the Village chosen by voting.

In political affirmation for the customary people of Jayapura - Papua Province, the Special Autonomy Law of Papua has been implemented as a form of wider authority for the Papua Province and Indigenous Peoples to regulate and take care of themselves within the framework of the Republic of Indonesia (NKRI). On the basis of the implementation of Papua's Special Autonomy, the arrangement of the existence of customary law communities and governance as well as traditional village government needs to be done to provide legal certainty and clarity in the implementation of regional government in Jayapura Regency. So that the sensitivity of the indigenous people in the traditional village of Jayapura Regency can be protected, empowered and there is a policy of partiality carried out by the Papua Regional Government towards the indigenous and tribal peoples in Jayapura Regency.

The existence of customary law communities and customary villages respected and protected by their customary rights as mandated in Article 43 of the Papua Special Autonomy Law. It is increasingly strengthened by the enactment of the Law No. 6 of 2014 concerning Villages with its implementing regulations PP No. 47 of 2015. The Village Law recognizes the existence of customary villages and villages / traditional villages which are manifestations of the existence of indigenous peoples or customary law communities. The policy on Perda No. 8 of 2016 concerning Customary Villages is formed to rearrange the existence of Customary Villages and Villages whose existence was judged to be increasingly weak due to the enactment of legal politics of legal unification through the Law No. 5 of 2005 concerning Villages with implementing the Governmental Regulations No. 72 Year 2005. They are homogenizing the concept of the Village in all indigenous peoples / customary law communities throughout Indonesia during the New Order era.

Normatively and empirically, the Jayapura regent's policy through the Perda on Village and Customary Village is an icon of "the rise of the identity of customary peoples / Jayapura customary law community" in line with the mandate of the Constitution. The existence of Customary Villages in detail can be accommodated in the subject matter which is systematically arranged as follows: (1). characteristics, status of the father and members of the traditional village community; (2). determination of status and establishment of traditional villages; (3). customary village administration; (4). authority of traditional villages; (5). rights and obligations of traditional villages; (6). customary justice; (7). construction of traditional villages; (8). cooperation with; (9). duties and responsibilities of regional government; (10). obligations of regional governments; (11). supervision; (12). financing; and (13) prohibitions. It has become the norm and are implemented by the Jayapura Regency Government together with the customary law community in the four development areas in accordance with the village medium-term development plan (RPJMK) with reference to the Papua RPJMD.

The characteristics and territories of customary law communities and customary villages of the Jayapura District include 1) members of customary peoples from areas inhabited in accordance with the history of the proposal; 2) having a genealogical unit and / or have territorial units and / or territorial genealogical units. 3) some or all members of indigenous peoples still use the local language; 4) still imposing customary rules for its members; 5) having a leadership pattern according to the leadership system adopted in the structure of indigenous peoples with traditional leaders / customary government; 6) possessing customary rights over traditional land and forests; 7) owning customary justice; 8) possessing customary assets in the form of natural, mineral / oil and gas resources; 9) recognition came from other indigenous communities around it.

For the Customary Village Government consists of 1 (one) Customary Village or more that is imprinted by 1 (one) Head of Customary Village Government. The area of 1 Customary Village Government is led by an Ondoafi or another designation who is located as the Head of Customary Village Government. In the area of Customary Village, customary community rights apply to land territory and all its contents and territorial sea along with all its contents as long as there is no transfer of rights to other parties. Customary villages have administrative boundaries as stipulated in the Regional Regulations. Determination of the territory of Customary Village Governance by the Regional Government must be based on: 1) the structure of customary peoples; 2) their traditional rights; and 3) customary regulations that apply. The Customary Village has a community

membership that originates from indigenous tribes who inhabit the Jayapura Regency area and other indigenous Papuans who have lived together. In addition to, the customary tribes as referred to in paragraph (1), Papuan Natives from outside the Jayapura District region can become members of traditional village communities. Membership of the traditional village community as referred to in paragraph (2) must be recognized by the local customary village community and endorsed by the Head of the Indigenous Village Government based on the proposal of the Head of the Customary Village. Non-indigenous Papuans do not have ownership rights to land in traditional village areas.

#### 4. Conclusion

It can be concluded that

- a. Constitutionally, in Article 18 and Article 18B paragraph (1) and paragraph (2) as well as Article 28 paragraph (3) of the 1945 Indonesian Constitution recognizes provincial regions in regencies / municipalities with regional government and the unity of customary law communities along with customary rights. The synchronization between the concept of village and customary village including the position of customary institutions as customary villages and the concept of community institutions is recognized in Article 94 and Article 95 of the Law No. 6 of 2014 concerning Villages, the PP No. 43 In 2014, as amended the PP No. 47 of 2015 as a form of implementation of the village law. Article I letter I and Article 43 and Article 50 of the Law No. 21 of 2001 concerning Special Autonomy for the Papua Province affirm its recognition to the customary peoples and customary Papuan institutions, in relation to article 399 of the Law No. 23 of 2014 concerning Regional Government. the Regional Regulation No. 8 of 2016 concerning Customary Villages places the Customary Village Authority with its characteristics as a social institution that lives with the customary law community unit of Jayapura district in Papua Province.
- b. The customary law community in Jayapura District of Papua Province is classified in 9 (nine) ethnic groups and clans, not kingdoms and sultanates. They have appropriate ecological characteristics to culture, including: 1) customary peoples from the region inhabited according to the original history; 2) a genealogical unit and / or territorial units and / or territorial genealogical units. 3) some or all members of the customary community still use the local language; 4) customary rules for its members; 5) a leadership pattern according to the leadership system adopted in the structure of indigenous peoples with traditional leaders / customary government; 6) customary rights over traditional land and forests; 7) owning customary justice, 8) customary assets in the form of natural, mineral / oil and gas resources, 9) the recognition of coming from other indigenous communities around it, still maintained until now.

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