

# Restorative Justice: Positivization of Customary Law in Resolving Land Disputes Based on Local Wisdom of Papuan Citizens

Alfian Budianto<sup>1</sup> Dominikus Rato<sup>2</sup> Bayu Dwi Anggono<sup>2</sup> Fendi Setyawan<sup>3</sup>

1. Doctoral student at Faculty of Law, University of Jember, Indonesia

2. Professors at Faculty of Law, University of Jember, Indonesia

3. Lecturer at Faculty of Law, University of Jember, Indonesia

\* E-mail of the corresponding authors:

b1.alfian93@gmail.com and dominikusrato@gmail.com

## Abstract

The positivization of customary law is the process of turning the source of customary law into various laws and regulations. The unwritten customary laws are obeyed by the people because they originate from social values and agreements to live together. Settlement of land disputes in communities where customary law is still strong, such as Papua, which is known for its local wisdom, is carried out through its own customary institution. To fulfill the element of justice, the dispute resolution approach is carried out by means of deliberations outside the court or non-litigation dispute resolution based on local wisdom. The overall manifestation of this settlement leads to restorative justice. The statutory approach, the conceptual approach, the socio-legal approach, the comparative approach, and the case approach are used in this research, which is a normative judicial and sociological judicial study. In conclusion, it is stated that the existence of Papuan customary law is based on its own legal ethnography, pluralism in social capabilities such as social structure and culture according to its character, types of customary leadership, and social interaction relations in different traditional economies. Recognition of indigenous Papuans is based on the Constitution of the Republic of Indonesia 1945, Article 18 B, Paragraph 2; UUPA Articles 3 and 5; and the Papua Special Autonomy Law in Chapter XI concerning Protection of the Rights of Indigenous Peoples. The Provincial Government of Papua is obliged to recognize, respect, protect, empower, and develop the rights of indigenous peoples based on the provisions of applicable laws and regulations.

**Keywords:** positivism, customary law, restorative justice

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## 1. Introduction

The Indonesian legal system for resolving disputes, especially land disputes, can be carried out through various settlement processes, both through judicial institutions such as the general court and the State Administrative Court as well as outside the judicial institutions, such as through mediation or customary institutions. The large number of institutions with authority in resolving land disputes frequently results in decisions that contribute to a lack of legal certainty. Land disputes are disputes over land between individuals, legal entities, or institutions that do not have a broad socio-political impact. Land disputes can occur in any community, including the Papuan community, namely through the social interaction of the customary law community. If the Papuan people have a problem at that time, it is also resolved, either peacefully by the parties to the dispute or through the mediation of the head of the local customary institution.<sup>1</sup>

The commitment and legal awareness of indigenous peoples to comply with the decisions of traditional leaders is a potential that should be developed in order to provide a basis for creating restorative justice as well as being institutionalized to build legal certainty. Meanwhile, on the other hand, the performance of the judiciary in resolving land disputes has not been optimal compared to the number of cases handled. Permanent legal decisions (*inkracht van Gewijsde*) can't seem to be carried out, so the dispute continues and the land in question is left empty because it's not clear who owns it legally. Some of the problems related to land dispute resolution include: Firstly, philosophically, legal unification and state law-based judicial mechanisms cannot accommodate the principles and values of the indigenous Papuan people, so that decisions issued by courts have the potential to create disharmony and are far from the values of justice. Second, juridical problems, namely national legislative policies that favor juridical positivization, tend not to guarantee the values or principles that are born into and grow in society. so that there is an opportunity for many parties, especially those seeking justice, to issue various complaints and criticisms.<sup>2</sup> Third, the theoretical problem is the need for a new concept that should be a benchmark for the development of national law in resolving land disputes based on local wisdom, which emphasizes restorative justice. Fourth, sociologically, the system of positivizing land law and justice based on

<sup>1</sup> Daniel Fitzpatrick, "Disputes and Pluralism in Modern Indonesian Land Law," Vol. 22, h. 40, h. 15.

<sup>2</sup> Susanti Adi Nugroho, 2009, *Mediasi Sebagai Alternatif Penyelesaian Sengketa*, Telaga Ilmu Indonesia, h. 158.

state law has the potential to be able to build togetherness in the Papuan people towards achieving the values of justice. On the other hand, several important things that must also be considered are related to the environment of indigenous peoples, cultural factors, and facilities in terms of facilities and infrastructure from traditional institutions. Attitudes, views, and beliefs of the community towards customary institutions as a means of dispute resolution are alternatives in an effort to realize the local community's sense of justice.

As an alternative dispute resolution institution, this research means research on dispute resolution outside the state's formal justice institutions because conflicts or disputes can be pursued through alternative channels outside the court. In general, alternative dispute resolution must be based on the principles of good faith, contractual principles, binding principles, freedom principles, and confidentiality principles. The emergence of an alternative dispute resolution model is actually a criticism of the weaknesses of the conventional model, which is slow, expensive, does not reflect justice, and is even manipulative and corrupt. In the context of handling social conflict, there are two important concepts and thoughts, namely the concept of restorative justice and the concept of settlement through local wisdom mechanisms. merging the two concepts or thoughts into a form of positivization of customary law that is expected to be able to resolve any land issues or disputes.

Based on some of the descriptions of the problems mentioned above, this research focuses on the positivization of customary law in the resolution of land disputes based on the local wisdom of the Papuan community to achieve restorative justice, with three legal issues, namely: whether the positivization of customary law is able to create restorative justice in resolving land disputes for indigenous and tribal peoples in Papua; the characteristics of customary land dispute resolution in the Papuan customary law community; and the construction of the positivization of material law and formal law in Indonesian positive.

## **2. Discussion**

### **2.1 The positivization of customary law to create restorative justice in resolving land disputes for the Papuan customary law community**

Land issues concern not only economic and welfare aspects but also social, political, psychological, cultural, and religious issues. Therefore, in solving various problems related to land, the principles of law (juridical), the principle of welfare (proportion), the principle of order and security, and the principle of humanity must be heeded. As previously stated, the relationship between customary law communities and land is spiritual in nature (magical-religious), economic in nature, and social in nature.<sup>1</sup> The acknowledgement of Law Number 5 of 1960 concerning Basic Agrarian Regulations (UUPA) on customary rights can be concluded: the control rights of indigenous peoples may not conflict with the interests of the nation and state, as referred to in Article 1 of the UUPA. It also means not negating the rights of the community or other people. Then, based on the Regulation of the State Minister for Agrarian Affairs and Head of the National Land Agency No. 5 of 1999 concerning Guidelines for the Settlement of Problems with Ulayat Rights of Indigenous Peoples (PMNA/Ka BPN No. 5 of 1999), the right to control indigenous peoples can be applied to the state. These provisions allow communities under customary law to obtain control rights from the state by submitting an application.<sup>2</sup>

Law Number 22 of 1999 concerning regional government, enacted in 1999, was promulgated in the State Gazette of the Republic of Indonesia Number 60 of 1960, Supplement to the State Gazette Number 3839, and then replaced by Law Number 32 of 2004 concerning regional government. The presence of this law is seen as a bright spot and a new hope for the regions to actualize themselves according to their needs. Autonomous granting is the implementation of decentralization in a unanimous and complete manner with a broad form of autonomy, real responsibility, as well as an expansion of the authority to regulate oneself.

The existence of this decentralization requires a rearrangement of land ownership, wherein the land sector is one of the authorities that must be given to district and city governments. The granting of this authority is based on the principle that the land authority granted to an autonomous region may not conflict with the authority within the framework of the Unitary State of the Republic of Indonesia. Based on Law No. 22 of 1999, it is not clear in Article 7 that land affairs are the affairs of the regional government, per the provisions of Article 7 and Article 11 of Law No. 22 of 1999. Based on these provisions, the land sector is under the authority of districts and cities.

A medewind is the delegation of authority to exercise state tenure rights over land. Everything will be organized according to its needs and must not conflict with national interests. In accordance with Article 2 paragraph (2), the implementation of the right to control the state can be delegated to autonomous regions and communities with customary law only when necessary and may not conflict with national interests; this delegation is medebewind, not autonomy. Then, by Article 33 paragraph (3) of the 2002 Assembly of the People's Consultative Assembly, it was decided not to be changed. It is already a national agrarian policy, whose

<sup>1</sup> Djamanat Samosir, *Hukum Adat Indonesia (Eksistensi dalam Dinamika Perkembangan Hukum di Indonesia)*, (Bandung: Nuansa Aulia, 2013), h. 211

<sup>2</sup> Ibid. h. 214

conception is that "all land is the land of the Indonesian nation as a gift from God Almighty, whose control is assigned to the state." Boedi Harsono believes that the authority to form national law will still rest with the central government and that there will still be national law. The autonomy granted within the framework of the Unitary State of the Republic of Indonesia, which is delegated autonomy, is the implementation of the national land law that applies to all regions of the country with guidance and supervision by the government.<sup>1</sup>

Referring to the basic principles and norms contained in Pancasila and the 1945 Constitution to support the implementation of the regional government system, the implementation of regional autonomy remains within the framework of the Unitary State of the Republic of Indonesia. Prioritizing national interests over regional interests is good, but carrying out the public interest does not have to harm regional interests (principle of togetherness). Diversity is a potential for the development of a nation whose existence needs protection and legal certainty. Therefore, in a future perspective, it is necessary to pay attention to pluralism in land management, which still refers to Pancasila, the 1945 Constitution of the Republic of Indonesia, and the motto *Bhinneka Tunggal Ika*. Then, land policies in different parts of the country are different, but the national land law treats them as a single legal entity.

Based on Law Number 21 of 2001 concerning Special Autonomy for the Province of Papua (Otsus Papua Law), there are two mentions of terms that have almost the same meaning, namely indigenous peoples and customary law communities. Article 1 letter p of the Papua Special Autonomy Law states: "Customary people are indigenous Papuans who live in a territory and are bound and subject to certain customs with a high sense of solidarity among its members." Meanwhile, Article 1 letter r of the Papua Special Autonomy Law states: "Customary law communities are indigenous Papuans who, since their birth, have lived in a certain area and are bound and subject to certain customary laws with a high sense of solidarity among their members." Article 1 letter t of the Papua Special Autonomy Law says, "Indigenous Papuans are people who come from the Melanesian racial group, which is made up of indigenous tribes in the Province of Papua, and/or people who are accepted and recognized as indigenous Papuans by the indigenous people of Papua."

The provisions above show that the nature of indigenous peoples in Papua is not only based on descent or racial relations but rather a combination of genealogy (blood relationship) and territoriality (region). This is in line with the Constitutional Court Decision No. 31/PUU-V/2007 concerning the Review of Law Number 31 of 2007 concerning the Formation of the City of Tual in Maluku Province against the 1945 Constitution of the Republic of Indonesia, which states: "Customary law community units are distinguished from those that are: (a) genealogical, which is determined based on the criteria of blood descent; (b) functional, which is based on certain functions related to common interests that unite the customary law community concerned and does not depend on blood relations or territory, such as Subak in Bali; (c) territorial, which is based on certain areas where members of the customary law community unit concerned live for generations and give birth to *ulayat* rights, which include rights to land, water, forests, and so on.

The definition of indigenous and tribal peoples in Article 1 letter r of the Papua New Guinea Special Autonomy Law differs from that of legal communities in several other laws that pertain to customary law communities, for example, Law Number 41 of 1999 concerning forestry, Law Number 18 of 2004 concerning plantations, and Law Number 21 of 2001 concerning environmental protection and management. The explanation of Article 67, paragraph 1, of Law No. 41 of 1999 states that customary law communities are recognized if, in reality, they meet the following elements: The community still exists as an association (*rechtsgemeenschap*); there are institutions in the form of customary rulers; there is a distinct area of customary law; there are legal institutions and instruments, particularly customary justice, that are still followed; and still collecting forest products in the surrounding forest areas for daily needs. Likewise, Law No. 18 of 2004 Article 9 paragraph (2) mentions customary law communities that, in reality, still exist if they meet the following elements: the community is still in the form of an association (*rechtsgemeinschaft*); there are institutions in the form of customary rulers; there is a clear area of customary law; there are legal institutions and instruments, especially customary justice, that are still adhered to; and there is confirmation by local regulations.

UU No. 21 of 2001, Article 5 Point 31, provides the definition of "customary law." Communities are groups of people who have lived for generations in certain geographic areas because of ties to ancestral origins, a strong relationship with the environment, and a value system that determines economic, political, social, and legal institutions. In line with this thought, the Papuan indigenous peoples are actually an organizational unit of the customary law community, as referred to in the 1945 Constitution of the Republic of Indonesia, Article 18B paragraph (2), which is referred to as the "customary law community units." This customary law community unit has received recognition and respect from the state. As a manifestation of legal pluralism in politics, such recognition can be made through laws or regional regulations.

The Papua Special Autonomy Law in Chapter XI of the Protection of the Rights of Indigenous Peoples makes sure that the indigenous people of Papua are recognized.

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<sup>1</sup> Ibid. h.70

1. Based on the laws that are in place, the Provincial Government of Papua is required to recognize, respect, protect, empower, and develop the rights of indigenous people.
2. Paragraph 1 talks about the rights of indigenous peoples, which include both the customary rights of the customary law community and the individual rights of each member of that community.
3. As long as customary rights still exist in the real world, they are carried out by the customary rulers of the relevant customary law community according to local customary law provisions, by respecting the tenure of former customary land rights obtained by other parties legally according to procedures and based on statutory regulations.
4. Provision of ulayat land and individual lands of customary law community members for any purpose is accomplished through discussions with the customary law community and the residents involved in order to reach an agreement on the required land transfer as well as compensation.
5. The Provincial, Regency, and City Governments all try to help settle disagreements over customary land and former individual rights in a fair and wise way so that everyone can be happy with the outcome.

Today, indigenous peoples in Papua have 2 systems of government: the formal government system in the form of village government, which is formed from above by the state (top down), and the non-formal government system, which originally grew from the bottom (bottom up), which is called the customary law community unit. The village government, which the Papua Special Autonomy Law calls "kampong," is the lowest government in the NKRI government system, which is under the sub-district or district government. Customary government, on the other hand, is the original government of local ethnic groups that has existed for generations, so the customary government system is closely related to the social structure and traditional leadership system of each tribe. The Sentani customary law community, the Enggros Tobati indigenous people, and the Jow Warry tribal customary law community are the groups that use customary law now. In addition to being a natural response to the state's inability to meet people's demands for justice, the dominance of customary law and the settlement of cases by customary courts also reflect the characteristics of customary law and customary justice that are considered more suitable to local conditions. In resolving the customary conflicts that are being faced, the head of ondoafian as a customary judge, must use a customary law approach, where an ondoafi, ondofofo, or ontofofo must adhere to two main principles, namely propriety and harmony.<sup>1</sup>

Harmony is a working principle that can be used to help resolve customary conflicts. The application of the principle in customary conflict resolution is intended to restore life to its original state, status, and honor and to create harmonious relationships among village karma. Thus, the principle of harmony does not emphasize winning or losing for one party but rather re-establishing a disturbed balance so that the conflicting parties are reunited in traditional village ties. Assessment of negligence as a human act or condition. The principle of decency contains elements that originate in the moral realm, namely good or bad values, as well as elements of common sense, namely calculations that are legally acceptable. In essence, the main goal of this principle is to prevent the parties from falling into embarrassment.

The principle of harmony contains suggestions to pay attention to the realities and feelings that live in society, which have been ingrained into traditions from generation to generation. Therefore, experience and knowledge about the customs that grow and develop in society are necessary to formulate concrete solutions to resolving customary conflicts. The use of the principle of harmony approach is carried out by paying attention to the place, time, and circumstances (village, kala, patra), so that decisions can be accepted by the parties in society. The principle of harmony is related to how to look at a problem wisely so that the solution given can be accepted by the parties and society as something that relieves feelings.

Another principle used by the customary courts of the indigenous peoples of Papua is the principle of deliberation. Cases in the life of the Papuan customary law community are generally well resolved in the sense that they are resolved as a family. This is because the parties basically know each other, live together, and maybe also have marital and/or hereditary relationships so that problems will be more easily resolved amicably. Conceptually, restorative justice emphasizes dialogue carried out by the parties concerned, such as perpetrators, victims, and society. But keep in mind that this dialogic concept is the awareness of the parties to find appropriate solutions and actions for the impact of the dispute that exists between the two sides. Even in one of the books entitled "Restorative Justice Philosophy for Practicing," it is explained that in a dialogue on the concept of restorative justice, the party by default must show a sense of regret and guilt to the victim so that the victim can see the feeling of regret and know more about the background. So, the concept of restorative justice focuses more on actions than on actors.<sup>2</sup> The restorative approach will at times provide interventions in recovery and consequences that can satisfy people, proving that justice has worked well in restoring balance to society.<sup>3</sup>

<sup>1</sup> Moh. Kosnoe, *Catatan –Catatan Terhadap Hukum Adat Dewasa Ini*, (Surabaya: AirlanggaUniversity Press, 1978), h. 44

<sup>2</sup> Budiyanto Budiyanto, "Penerapan Keadilan Restoratif (Restorative Justice) Dalam Penyelesaian Delik Adat," *Papua Law Journal*, Vol. 1, No. 1, Oktober, 2018, h. 81.

<sup>3</sup> Destri Tsurayya Istiqamah, *Analisis Nilai Keadilan Restoratif Pada Penerapan Hukum Adat Di Indonesia*, *Veritas et Justitia*, Vol. 4, No. 1,

## 2.2 Characteristics of customary land dispute resolution in the Papuan customary law community

In general, customary rights issues are frequently caught in a bind. Ulayat rights that apply in Papua make it more dominantly used in solving land problems compared to using positive law, such as a certified land system. Papuan customary law communities often challenge the certified land system. On the one hand, customary rights are an obstacle to development in Papua; investors feel that customary land ownership often creates an uncondusive and disappointing investment climate. On the other hand, the government, as a stakeholder in the course of development as well as a protector of the existence of the Papuan customary law community, has taken actions that have not taken a proper approach. The government and third parties who are given the authority to utilize customary land in Papua consider that when compensation for land acquisition has been given to customary law communities, the problem has been considered resolved. The government has not fully paid attention to the welfare and future of these indigenous peoples.

The emergence of land disputes that occur in the Papuan customary law community is inseparable from the existence of state authority represented by Basic Agrarian Law Number 5 of 1960 with all its technical regulations, dealing with the existence of indigenous and tribal peoples who grew and developed long before the formation of the Unitary State of the Republic of Indonesia. Even before Europeans arrived in the Land of Papua, the Republic of Indonesia was involved in religious missions (Missionary and Zanding) and colonization missions.

In general, in Papuan customary law circles, there are two systems of control over land ownership: communal ownership and individual ownership. Communal ownership can still be differentiated into small clan-based ownership, namely certain clans, and large clan-based ownership, namely village-based ownership in the sense of which tribe is the original resident of the village. Meanwhile, individual ownership is hereditary rather than individual. Internally, there are rules governing the family (marga) regarding the division of rights in land tenure and management, and the share of each member is recognized according to the clan. However, socially, religious leadership power over land belongs to certain people who come from the oldest lineage. There are two types of tenure rights: community rights and individual rights. Individual rights are secondary, while partnership rights are primary. For the Papuan people, the relationship to land (adat/ulayat) is not merely an economic relationship that can provide food but also an area in the sense of ulayat where events according to folklore have taken place. In other words, this relationship cannot be seen unilaterally in humans as "homo economicus," but also as "homo humanicus" and "homo culturalis," meaning that land has a spiritually sacred relationship with humans.

Long before the enactment of Law Number 21 of 2001 Concerning Special Autonomy for the Province of Papua, the indigenous Papuan people had their own way of managing and resolving any conflicts or disputes that occurred in society. Land rights disputes are a source of contention among indigenous peoples. According to I. Nyoman Nurjaya, when viewed from the perspective of legal anthropology, the phenomenon of conflict generally arises due to a conflict of values, a conflict of norms, or a conflict of interests among ethnic communities. religion, as well as class, including the political community, in society. It is further said that conflicts that occur in society also stem from issues of discrimination in regulation and treatment by the central government towards community communities in the regions, using a term that Bodley refers to as "political ignorance," or treatment that ignores, displaces, and even numbs the values and norms of folk law, including religion and local community traditions, through the dominance of state law with legal centralism. Resolving customary conflicts using customary law means exploring the values that live in society and then applying them in a fair and wise manner. In resolving customary conflicts, no one wins or loses, but efforts are made to restore the disturbed balance so that the disputing parties can relate harmoniously.

According to customary law, customary dispute resolution still pays attention to the rights of the parties to the dispute. Customary Court functionaries must always guarantee the protection of the rights of the parties to the dispute or litigation. The protection of this right is implemented in the dispute resolution mechanism. The mechanism accommodates the thesa, anti-thesa, and synthesis principles, as they are usually used in formal justice, with the steps for their resolution. Broadly speaking, there are three strategic steps in customary dispute resolution, namely holding meetings, deliberations, negotiations, mediation, and customary court settlements. Each land dispute differs from the others in several ways. Basically, in every dispute resolution, whether through litigation or non-litigation/alternative channels, there are things that hinder the deliberations or the implementation of the results of the deliberations. Obstacles in deliberations can be caused by several factors, namely internal factors originating from the parties to the dispute (the subject) and the object in dispute, and external factors originating from other parties.<sup>1</sup>

Communities that still adhere to their customs in the process of resolving disputes usually use a familial

Juni, 2018, h. 201.

<sup>1</sup> Elly Waicang, *Sistem Pemerintahan Adat dan Lokal Di Indonesia: Peluang dan Tantangan*, Aliansi Masyarakat Adat Nusantara (AMAN), Jakarta, 2002, h. 18.

approach or follow the deliberation and consensus model led by the local customary leader. Indigenous peoples use more of the settlement route outside of court, or what is commonly referred to as "non-litigation." This method is considered by indigenous peoples as an effective way to reduce the potential for conflicts that will arise in the future between the disputing parties, even if, for example, there has been a court decision. As we know, there are still many thoughts among indigenous peoples that customary law is above ordinary formal law, so the potential for conflict over a dispute decided by a formal court can still be considered invalid by indigenous peoples.

There are several reasons why indigenous Papuans prefer non-litigation dispute resolution. The first is the problem of implementation time, which is not bound and can be implemented in a short time. The second is low-cost because it is carried out using mutually agreed customary rules, and the third is carried out peacefully using a consensus-based deliberation approach. In the context of customary law in Indonesia and its development, it shows that the complicated formal court process makes the community think that the settlement approach with customary law is better, where consensus on a decision is upheld by all the conflicting parties. The presence of customary law that goes far beyond the presence of formal law makes indigenous peoples never have doubts about its implementation, and this also reflects how cooperative the attitude of Indonesian indigenous peoples is. The neutral position of the traditional head in the midst of the conflicting positions will make the resulting decisions objective and able to restore balance in the Papuan customary alliance. Settlement using customary law media chaired by the customary head is a form of non-litigation settlement carried out by indigenous peoples in order to obtain a way out so that the conflict does not become prolonged between the two disputing parties.

In resolving disputes, the customary head must provide understanding and understanding to the two conflicting parties regarding the issues that are the cause of the two parties' conflict from the customary side, so that the two conflicting parties have a deeper understanding of the issues they are conflicting about. clear and to assess whether it is in accordance with applicable customary law or not. The position of the customary head plays an important role in terms of coordination and motivating the community so that they can act cool-headedly and in accordance with the provisions of applicable customary law. This has a clear connection with the duties of the customary head in society, where everything related to customary law, whether it is a matter of life or death, is the responsibility of the customary head to make decisions. Traditional heads are always expected to be able to carry out their duties properly through ownership of customary knowledge and knowledge of applicable customary law rules so that, in carrying out their duties, they are able to maintain and resolve problems that arise related to Papuan customary land disputes.

Communities will find it difficult to resolve problems that arise between them without the intervention of customary heads, especially those related to decisions involving customary law. The traditional head is the last place for the community to solve problems if they are unable to do so amicably. This is what is experienced by indigenous peoples in Papua, where they experience an impasse in resolving communal land disputes, so they bring them to the customary head to be resolved. The village community has the belief that if it is brought to the customary head, then the problem will be resolved in accordance with the applicable legal regulations. Decisions issued by customary heads are decisions that will be respected by all parties so as to minimize the potential for conflicts that can occur after decisions regarding disputes have been made. The outcomes of decisions reached by indigenous peoples in Papua are harmonious and peaceful, allowing all parties to the conflict to be satisfied. This is what the people really want when they bring customary land disputes to the adat. As a mediator, the customary head plays a role in the process of resolving communal land disputes by being a neutral party or a mediating judge who sees problems from both parties and then finds the best way out for both parties in conflict. The position as a mediator also causes the customary head to act as a peacemaker who will provide the best solution and make the right decision. The position of the customary head as a leader among indigenous peoples is to adhere to the applicable rules and customary law so that in making decisions about two parties in conflict, the resulting decision must be sourced and based on the applicable customary rules so as not to cause harm to both parties to the dispute.

Traditional leaders or traditional heads also have a strategic position in society because it is customary leaders who carry out customary protocols and have rights and authority to decide on cases related to adat, especially those related to the implementation of community development. In the context of the findings of this research, traditional Papuan leaders act as mediators, peacemakers, and judges who are neutral and impartial. Customary heads can be subject to sanctions from the Presidium of the Customary Council if they violate customary laws and traditions, so not everyone can become traditional leaders. In the context of this research, temuyat traditional leaders must have the ability, in terms of customary law and genealogy, to refer to and trace land ownership by descendants who have rights to the disputed land.

As a peacemaker, the customary head must be able to provide a solution that minimizes losses between the two conflicting parties and have good negotiating skills in order to maintain a peaceful atmosphere between the two parties and prevent hostility. In making decisions, customary heads have to consider many things, especially the rules contained in customary law. This is because the decisions issued by customary heads have a great

influence on society, so if not done carefully, they can lead to divisions. Decisions taken in relation to land dispute cases must be based on strong evidence from witnesses and family members who clearly know the genealogy of the customary land and the rules that have been in force.

The customary head's role as a facilitator in resolving land disputes is defined as "providing a way out in facilitating the problem of customary land disputes, which is very good, by performing customary ceremonies in an effort to resolve conflicts over customary land disputes that occur." As a facilitator, the customary head always prioritizes harmony and peace. All parties related to the conflict over land disputes that occurred were resolved and facilitated by the customary head and carried out in harmony and peace.

In the process of conflict resolution, neither party is said to win or lose. Fairness is the goal of resolving land disputes where the customary head becomes the facilitator so that it does not cause disputes and conflicts between the two parties after a decision has been made. Conflicts that occur as a result of unfair decisions can damage family relationships, even though, in the context of indigenous peoples, kinship is a reinforcement between them. The mechanism of local wisdom that is carried out by Papuan indigenous peoples in conflict resolution is always carried out, as in the settlement of land dispute cases. Completion with local wisdom that prioritizes the principles of family aspects. If the local wisdom model in the form of kinship is unable to resolve the disputed issues that occur, then a compromise will be made in which the Village Traditional Head becomes a negotiator to negotiate and offer solutions to resolve problems, such as giving advice on dividing the disputed land equally. The customary approach to providing solutions always begins with holding negotiations first. Those who do not accept the solution offered by the customary head will proceed to the customary court. If you use a customary court, then it can be interpreted that the conflict over land disputes that have occurred cannot be resolved using local wisdom in the form of kinship. In the settlement model through customary courts, the customary head will act as a mediating judge and also as a conciliatory judge.

All decisions made through the customary courts will be taken in the presence of witnesses who clearly know the history of the disputed land issues. The search for truth is carried out in the presence of competent witnesses who clearly know the problems that have occurred. Witnesses who were present were also given a guarantee of protection by ADAT so that they would not feel that they were being intervened upon by the conflicting parties in court. The presence of witnesses will also make it easier for customary heads to make wise decisions in accordance with applicable customary rules, so that in the end, when an agreement is reached, social conditions will return to normal as before land disputes occurred.

### **2.3 Construction of the positivization of customary law in the Papuan customary law community, both material law and formal law in Indonesian positive law**

The legal basis for establishing a special area in Papua Province is regulated in Article 18B of the fourth amendment to the 1945 Constitution of the Republic of Indonesia (1945 Constitution), namely: (1) The state recognizes and respects special or special regional government units that are regulated by UU. (2) The state recognizes and respects customary law community units along with their traditional rights as long as they are still alive and in accordance with community development and the principles of the Unitary State of the Republic of Indonesia, which are regulated in the law. The special autonomy owned by the Province of Papua is regulated in Law Number 21 of 2001 concerning the special autonomy for Papua. The background to the formation of the Papua Special Autonomy Law was to stop the desire of the Papuan people to separate themselves from the Republic of Indonesia. This law was formed to increase the protection of the human rights of the Papuan people.

In accordance with the mandate of the Papua Special Autonomy Law, the Papua Provincial Special Autonomy was formed to give wider authority to the government and people of the Papua Province to regulate and administer its territory. One of them is regulated in Article 4 paragraph 1 of the Papua Special Autonomy Law, which states that: "The authority of the Papua Province includes authority in all areas of government, except for the authority in foreign policy, defense and security, monetary and fiscal policy, religion, and the judiciary, as well as authority in certain other fields determined in accordance with laws and regulations." With the special autonomy owned by the Papua Province, the Papua region has a different bureaucratic system compared to other regions in Indonesia. The Papua Special Autonomy Law explicitly states that the main pillars in the governance of the Papua Province consist of three components, namely the Papuan People's Legislative Council (DPRP), local government (the governor and his apparatus), and the MRP. The construction of the Papua Special Autonomy Law was built on a number of statements that have philosophical meaning, as contained in the considerations, which contain a number of acknowledgments, including:<sup>1</sup>

Recognition of the ideals and goals of the Unitary State of the Republic of Indonesia; an acknowledgment that the people of Papua are human beings created by God and part of civilized humanity; recognition of the existence of special regional government units; an acknowledgment that the indigenous people of the Papua

<sup>1</sup> Rochendi S. & Kausar Ali Saleh, 'Hubungan Pemerintah Pusat dan Daerah dalam Otonomi Khusus di Provinsi Papua Barat' (2017) 13 (1) Politik: Jurnal Kajian Politik dan Masalah Pembangunan 1903, 1909.

Province are members of the Melanesian race and are part of the ethnic groups in Indonesia that have diverse cultures, histories, customs, and languages; An acknowledgement that the implementation of governance and development in the Province of Papua so far has not fully fulfilled a sense of justice, enabled the achievement of people's welfare, supported the establishment of law enforcement, and has not fully demonstrated respect for human rights (HAM); an acknowledgement that the management and utilization of the natural resources of the Province of Papua have not been used optimally to improve the standard of living of indigenous peoples; and Recognition of the gap between Papua Province and other provinces in Indonesia

Special Autonomy for the Papua Province is basically giving wider authority to the province and the people of Papua to regulate and manage themselves within the framework of the Unitary State of the Republic of Indonesia. Wider authority also means greater responsibility for administering government and regulating the utilization of natural resources to the greatest extent possible for the prosperity of the Papuan people as part of the Indonesian people in accordance with statutory regulations. Normatively, the Special Autonomy Law divides regulatory subjects into four subject groups, namely: Indigenous peoples are indigenous Papuans who live in the territory and are bound by and subject to certain customs with a high sense of solidarity among their members. Customary law communities are members of the indigenous Papuan community who, since their birth, have lived in a certain territory and are bound and subject to certain customary laws with a high sense of solidarity among their members; Indigenous Papuans are people who come from the Melanesian race group consisting of indigenous tribes in the Province of Papua and/or people who are accepted and recognized as indigenous Papuans by the indigenous Papuan people; and Residents of the Papua Province, hereinafter referred to as Residents, are all people who, according to the applicable regulations, are registered and reside in Papua.

According to Ter Haar's decision theory (*Beslissingenleer*), "customary law is the entire rule determined in decisions that have authority and is realized in its implementation, except for parts of customary law that are less important, namely village regulations and decisions of the king. "Every member of the community always shows legal awareness, but that has not yet become customary law; only what has been decided by a judge becomes customary law. The emphasis of this theory is more on the decision of the tribal chief (Ondofolo or ondoafi) in resolving disputes between disputing parties; the decision made by the tribal chief (Ondofolo or ondoafi) is customary law. Thus, the customary rules made by the Jouw Warry Tribe are called "customary law" because they are in line with what is stated in the Decision Theory (*Beslissingenleer*). In other words, every member of the community's behavior always shows legal awareness, but that has not become customary law; only what has been decided by the judge (Ondofolo/Ondoafi) becomes customary law.

The jurisprudence of the Supreme Court explains that the Supreme Court, as the Supreme Court of Justice in Indonesia, respects the decision of the Head of Customs against customary law violators who are given customary sanctions, and perpetrators who have been given punishment for their actions cannot be justified in trying a second time for those violators of customary law by imposing prison terms. Customary law, from a juridical, philosophical, and sociological point of view, is essentially recognized and respected for its existence in an effort to create a just legal system in accordance with the values espoused in society and in accordance with the times. Efforts to settle criminal cases are efforts to restore balance to violations or wrongdoing that occur in society. The legal system for resolving criminal cases through customary law becomes a legal system that prioritizes the settlement of disputes or community problems, which is a process outside the court.

In the legal system of Indonesia, the position of customary law has a constitutional position that is the same as the legal position in general applies in the life of the state in Indonesia. However, what should be underlined is that there are also differences between customary law and applicable law in general, namely from the aspects of application and form, where in this case the application of customary law only applies to Indonesians and, from the aspect of form, customary law is generally unwritten. Therefore, of course, as a condition of recognition, it is a joint obligation to always preserve customary law and the customary law community itself so that the nation's noble values can be safe from the brunt of degradation due to globalization. Furthermore, Article 5 of Law Number 5 of 1960 concerning the basic regulations on agrarian principles emphasizes that "agrarian law that applies to earth, water, and space is customary law, as long as it does not conflict with national and state interests, which are based on unity of nation, with Indonesian socialism, with the regulations contained in this law, and with other laws and regulations, everything with due regard to the elements that rely on religious law." The provisions of Article 5 want to emphasize that customary law is the main source for obtaining legal materials in the form of conceptions, principles, and symbols of agrarian law.

### 3. Conclusion

- a. The positivization of customary law is capable of realizing restorative justice in resolving land disputes in the Papuan customary law community because the customary law adhered to has religious-magical, communal, direct, and concrete/visual characteristics, so that each tribe has legal awareness of and adherence to these customary laws. Positivization as an acknowledgment of customary land is contained in regional regulations as well as regulations from the indigenous peoples themselves, both in written

- form and codified. so that it has the value of legal unity, legal certainty, and legal simplification. Restorative Justice is a root value in the settlement of Papuan customary land disputes that contains traditional values of balance, harmony, and peace among the people who live in the Papuan customary law community with full local wisdom.
- b. The characteristics of customary land dispute resolution in the Papuan customary law community can be seen in the way land dispute resolution tends to use a deliberative (non-litigation) model known as "alternative dispute resolution." The process of solving problems through customary institutions is led by the Head of Customs (Ondofolo). The settlement of customary land conflicts by Ondofolo uses a customary law approach, namely the principles of harmony, decency, and harmony based on the principle of problem solving based on good faith by both parties to find a win-win solution. This process is carried out in private, the confidentiality of the parties is guaranteed, and the proceedings are faster and more efficient.
  - c. The special regional regulations regulated by the Papua New Guinea government concerning customary law that applies to each customary territory as determined by the Papua New Guinea Consultative Assembly (MRP) contain the construction of positivization of customary law in the Papuan customary law community in material law and formal law in Indonesian law. The Papua Province Special Regional Regulation provides an understanding of the philosophical nature of the formation and goals of the state. Because the state was established to create order and protect citizens' rights, as well as to realize society's welfare and security, recognition literally means formal ratification, including to the Papuan Customary Law community.

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