

Reconstruction of Intersection the Customary Court and State Criminal Court for Indigenous Communities in Papua

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Abstract

The Law on Special Autonomy for Papua Province gives the Customary Court the authority to settle criminal cases between indigenous Papuans. If there is an objection to the decision of the Customary Court, the parties can submit their case to be tried by the State Court. The problem is, sometimes the criminal justice system precedes the case settlement process rather than the Customary Court, causing a clash. How to place the intersection into an accommodative and not a resistance? The methods used are document studies and field studies through interviews with law enforcers, judges, academics and traditional leaders in Jayapura and Manokwari. The results of the study conclude that the

intersection between the Customary Court and the State Court is a necessity because, from the aspect of the subject object and criminal responsibility of the two judicial institutions, there is a wedge. To minimize the occurrence of resistance, it is necessary to reconstruct the intersection between the Customary Courts and the State Courts in the process of resolving criminal cases from members of the customary law community. Efforts are also needed to equalize perceptions and synergies between apparatus Customary Court and the State Court. In addition, it is important to develop a guideline for adjudicating cases of customary crimes or related to the Customary Court for judges serving in the Papuan jurisdiction.

KEYWORDS *Customary Courts, State Courts, Papua*

Introduction

Papua is an area of the Unitary State of the Republic of Indonesia (NKRI) which has special regional government autonomy. As regulated by Law No. 21 of 2001 Jo. Law No. 35 of 2008 Jo. Law Number 2 of 2021 concerning Special Autonomy for the Province of Papua (UU Otsus Papua). In the preamble to the Special Autonomy Law for Papua, it is stated that one of the reasons for the granting of special autonomy is that "*the administration of government and the implementation of development in the Papua Province have not fully fulfilled the sense of justice, have not fully enabled the achievement of people's welfare, have not fully supported the establishment of law enforcement, and have not fully shown respect for the people.*" against Human Rights in the Papua Province, especially the Papuan people".¹

The makers of the Papua Special Autonomy Law in the foregoing preamble stated that there is a correlation between government and development in Papua which is still not fair with efforts to welfare of the people and law enforcement and respect for human rights which are also lacking. If viewed from the perspective of *law enforcement policy*, it is also closely related to social policy.² Law enforcement in the context of crime prevention is part of an effort to realize social protection policy, while social defense *policy* is part of a policy to overcome social problems and humanitarian problems in order to

¹ Consideration letter f of Law Number 21 of 2001

² Barda Nawawi Arief. *Masalah Penegakan Hukum dan Kebijakan Hukum Pidana dalam Penanggulangan Kejahatan*. (Jakarta: Kencana, 2008)

support national goals in the form of social welfare (social welfare policy).³ The makers of the Special Autonomy Law for Papua are aware that the issue of law enforcement and respect for human rights is closely related to efforts to bring about reforms in the implementation of equitable development and the welfare of the people in Papua.

The problem has not been fully realized that the law enforcement that is just and correlated with respect for human rights⁴ for the Papuan people has been made as a part of special autonomy. The failure to fulfill this has prompted reform of the law enforcement system in Papua, one of which is by giving recognition to the Customary Court.⁵ This customary court applies within the customary law community which is given the authority to examine and adjudicate customary civil disputes and criminal cases between indigenous peoples.⁶ The law used to adjudicate by the Customary Court is based on the customary law of the indigenous peoples concerned.⁷ It is hoped that with the recognition and empowerment of the Customary Courts by the Papua Special Autonomy Law, there will be many civil disputes and criminal cases among

³ Barda Nawawi Arief. *Pembaharuan Hukum Pidana dalam Perspektif Kajian Perbandingan*. (Bandung: Citra Aditya Bakti, 2005)

⁴ Recognition of traditional court institutions in Papua is correlated with the state's recognition of human rights in the form of respect for cultural identity and the rights of traditional communities (vide Article 28I (3) of the 1945 Constitution of the Republic of Indonesia). The government, through legal means, also has an obligation to pay attention to and protect the needs of customary law communities, including in this case the need for customary courts to resolve disputes or conflicts based on their customary law (vide Article 6 (1) of Law Number 39 1999 concerning Human Rights). In this case, constitutional law and human rights law recognize the existence of traditional rights of customary law communities in the case of customary courts. Maryano Maryano, Lilik Mulyadi, and Muhammad Ogan, 'Adat Penal Decision in The Indonesia Legal Practice' (European Alliance for Innovation, 2021).

⁵ Before the Indonesian state was formed, members of the Papuan customary law community existed and existed with their customary legal system in the case of customary courts. Until the implementation of the national legal system and the state justice system after Indonesian independence, in fact members of the customary law community in Papua still adhered to their customary law system, including in terms of resolving disputes and conflicts between those who were relied on to resolve them, namely through customary court institutions. Therefore, it is very important for the state to provide guarantees and protection for the continuity of traditional rights of indigenous peoples in accessing customary courts in the constitution and human rights laws. Sartika Intaning Pradhani, 'Traditional Rights of Indigenous People in Indonesia: Legal Recognition and Court Interpretation', *Jambe Law Journal*, 1, no. 2 (2019), 177–205.

⁶ Article 51 paragraph (1) of the Papua Special Autonomy Law

⁷ Article 51 paragraph (3) of the Papua Special Autonomy Law

members of the customary law community which can be completely resolved by the citizens concerned without involving the Courts within the State Courts.⁸

The Papua Special Autonomy Law stipulates that the Customary Court is not a state judicial body, but a judicial institution for the customary law community⁹ that is peaceful in nature.¹⁰ As long as the parties who submit their case to the Customary Court voluntarily and do not object to the settlement decision, the decision will be final and have permanent legal force.¹¹ It is different if there is one party who objects to the result of the decision of the settlement of the case from the Customary Court, then the space (right) is opened to file an examination and retrial of the dispute or case to the District Court within the general (state) judicial body.¹² In the case of a criminal case, the objection is submitted in the form of a report to the Police for an investigation process and followed by a claim by the Public Prosecutor to the Court for the trial of the criminal case concerned.

Specifically for the decision of the Customary Court regarding the release of the perpetrators of criminal acts from legal prosecution according to the provisions of the applicable criminal law, the Papua Special Autonomy Law requires a statement of approval from the Head of the District Court obtained from the Head of the District Attorney in the jurisdiction of the place where the crime occurred.¹³ The statement of approval from the Head of the District Court in the form of an acquittal from the Customary Court will be a guarantee that the criminal case will not be prosecuted by law enforcement in the future. If the request for approval for the implementation of the decision of the Customary Court that acquits the acquittal is in fact rejected by the Head of the District Court, the decision of the Customary Court shall become the subject of legal consideration for the District Court to decide the relevant criminal case.¹⁴

The construction of the settlement of criminal cases by the Customary Courts and their correlation with the District Courts above is based on the

⁸ Elucidation of Article 51 paragraph (2) the second paragraph of the Papua Special Autonomy Law

⁹ Elucidation of Article 51 paragraph (2) of the first paragraph of the Papua Special Autonomy Law

¹⁰ Article 51 paragraph (1) of the Papua Special Autonomy Law

¹¹ Article 51 paragraph (6) of the Papua Special Autonomy Law

¹² Article 51 paragraph (4) of the Papua Special Autonomy Law

¹³ Article 51 paragraph (7) of the Papua Special Autonomy Law

¹⁴ Article 51 paragraph (8) of the Papua Special Autonomy Law

context in which the criminal cases were tried first by the Customary Courts. The problem is, the Papua Special Autonomy Law does not provide for the settlement of criminal cases among members of the customary law community when the Criminal Justice System operates before the Customary Court. There is no regulation regarding when it is being processed by law enforcement, the Customary Court can be authorized to take over the criminal case so that the handling of criminal cases is stopped by investigation, prosecution or examination in court. There is also no regulation if it has been resolved through criminal justice and has permanent legal force, the Customary Court is no longer authorized to hear the criminal case. Likewise, it is not regulated on how the binding power of the decision on the settlement of criminal cases by the Customary Court which runs outside the court process to the decisions of criminal justice judges is not regulated.

In practice, there are examples of cases where in the middle of the process of investigating a murder case by the Police, the Customary Court took over the case settlement process.¹⁵ Interestingly, in the trial process by the Customary Court, it turned out that the person who was proven to have committed the crime of murder was not the person who had been designated as a suspect by the Police previously, so that the person who was made a suspect by the Police was released from customary charges by the Customary Court.¹⁶ Another case example is that the Customary Court cannot take over the handling of criminal cases that have been processed in the criminal justice system, but the decisions of customary settlements are taken into consideration by the judge in deciding the criminal case.

The problem is, the non-optimal accommodation of customary court decisions by the district courts often leads to dissatisfaction with the sense of justice of indigenous peoples to the potential for resistance to the products of criminal justice decisions (the state).¹⁷ Therefore, even though the perpetrator has been sentenced to imprisonment based on the decision of the District Court, the fact is that when the perpetrator returns to his community, there are still demands to be tried in a customary way through the Customary Court with the consideration that the justice of the indigenous peoples has not been restored.

¹⁵ Interview with Hans Mandacan, one of the tribal chiefs in Manokwari, on Wednesday 20 July 2022

¹⁶ Interview with Hans Mandacan.

¹⁷ Interview with George Awi, Chairman of the Port Numbay Traditional Council in Jayapura on Thursday 14 July 2022

Based on the absence of regulations and problems in law enforcement practices mentioned above, in fact there have been differences in legal interpretations and it is inevitable that there will be a clash between the authorities to adjudicate the Customary Courts and the Criminal Courts (the state) so that there is resistance from the members of the indigenous peoples. As stated in the preamble to letter d of the Papua Special Regional Regulation Number 20 of 2008 concerning Customary Courts in Papua, it states that "*in law enforcement practices in Papua, criminal cases are handled by state courts whose decisions have permanent legal force, but the victim usually sues the perpetrator through customary court with severe sanctions so that it has an impact on disturbance of security and order/community in Papua*".

Previously there had been research articles related to the above issues, including: first, an article written by Budi Novianto and Ade Saptomo entitled "application of customary criminal law in deciding crimes in the Marind Tribe of Merauke" who put forward the finding that "*If violence occurs against the Marind Tribe of Merauke, it will generally be resolved through local community customary courts, but it does not rule out the possibility of directly handing over the matter to the local judicial level. For example, in Decision Number 58/Pid.B/2000/PN.Mrk., Decision Number 39/Pid.B/2004/PN.Mrk. and Decision Number 29/Pid.B/2004/PN.Mrk.*".¹⁸ Among the court decisions related to criminal cases which were submitted for resolution to the state court, there were those that accommodated customary fines based on local customary criminal law in addition to imposing prison sentences in accordance with the Criminal Code.¹⁹

Second, the article written by Erni Dwita Silambi, Marlyn Jane Alputila and Syahrudin entitled "Customary Justice Model in Resolving Indigenous Conflicts in Merauke Regency Papua". The results of this research suggest that in Merauke, although the customary court has received legitimacy from the Papua Special Autonomy Law, in reality there are (some) members of the indigenous community who bring criminal cases that have been resolved by the customary court to the state judiciary to be decided according to national law.²⁰ Among the existing problems is the lack of uniformity in the judicial process

¹⁸ Budi Novianto, and Ade Saptomo. "Application Of Customary Criminal Law in Deciding Crimes in The Marind Tribe of Merauke." *Birokrasi: Jurnal Ilmu Hukum Dan Tata Negara* 2, no. 1 (2024): 231-237. <<https://doi.org/10.55606/birokrasi.v2i1.905>>.

¹⁹ Novianto and Saptomo.

²⁰ Erni Dwita Silambi and Marlyn Jane Alputila, 'Customary Justice Model in Resolving Indigenous Conflicts in Merauke Regency', *Musamus Law Review*, 1, no.1 (2018), 63–72.

and punishment decisions by customary courts, therefore it is proposed that there is a need for the formation of Merauke regional regulations which regulate the uniformity of customary justice processes and the types and criteria for imposing customary fines so that they can serve as guidelines for judges in state courts to accommodate settlements customary court.²¹

This paper contains a study on mapping the basic differences and points of contact between the Customary Courts and the Criminal Courts in the context of realizing justice for indigenous peoples in Papua. From the mapping of the intersection, this paper then explores the urgency of reconstructing the ideal intersection between the State Courts and the Customary Courts in the process of resolving criminal cases from indigenous peoples in Papua. In addition, it is also studied about the urgency of holding an equalization of perceptions between the State Court apparatus and the Heads of Tribe or Customary Court apparatus regarding the purpose of justice which will be carried out or processed together in a synergistic manner in the settlement of criminal cases within the Papuan customary law community.

The method used in this study is a document study by taking inventory and analyzing and evaluating the laws and regulations related to the existence of the Customary Court in Papua. In addition, the collection and analysis of court decisions related to criminal cases which incidentally considers customary settlements (Customary Courts). To strengthen the results of the analysis of the regulations and court decisions, field research activities were carried out in the form of in-depth interviews with law enforcers, namely the prosecutors at the Papua High Prosecutor's Office, the Jayapura District Attorney, and the Manokwari District Attorney, as well as the judges at the Jayapura High Court, Jayapura District Court, and the Manokwari District Court. Interviews were also conducted with academics at the Faculty of Law, Cenderawasih University and the Chairman of the Customary Council in the cities of Jayapura and Manokwari. The results of the literature and field research were then analyzed in a qualitative descriptive manner and an ideal prescription was put forward regarding the accommodation pattern for the decisions of the Customary Courts by the District Courts in the settlement of criminal cases related to indigenous peoples.

²¹ Silambi and Alputila.

Overview of the Customary Court in Papua

Papua is one of the regions in Indonesia that has a rich diversity of tribes, languages and cultures. It is estimated that there are 312 (three hundred and twelve) tribes in Papua.²² Each of these tribes has a system of leadership or customary government. There are at least four models of customary leadership from the Papuan tribes, namely *ondoafi*, king, big man and mixed.²³ In the *ondoafi* system, leadership is obtained from generation to generation or inherited leadership. While the king system is in the form of a government such as a kingdom and its devices. As for the big man system, it is based on the appointment of the most powerful person in the tribe. Meanwhile, the mixed system is an elaboration of the three systems, namely *Ondoafi*, Bigman and Raja. Generally, the four traditional leadership models exercise their customary governance powers in the executive, judicial and legislative fields centrally to their tribal chiefs.

For the exercise of the judicial power of the tribal chief mentioned above, it is held in the form of a Customary Court. The organizational structure and membership of the Customary Courts is determined based on the customary law of each customary law community.²⁴ Some of them have their tribal chiefs act as customary judges who resolve all disputes and criminal cases from members of their customary law communities. In others, there is a model for appointing judges from members of the customary law community. Customary trials are led by customary judges by prioritizing deliberation for consensus²⁵ and based on peace.²⁶ The procedure for making decisions on case settlement and implementation of decisions is carried out according to the customary law of the customary law community concerned in accordance with the leadership system of their respective tribes, whether it is *ondoafi*, king leadership, big man system or mixed system.²⁷

²² Census data from the Central Bureau of Statistics in 2000. Dyah Irawati and Hiniwati Widjaja. *Eksistensi Sosial-Politik Dewan Adat Papua Dalam Pemberdayaan Masyarakat*. (Jakarta: UKI Press, 2006)

²³ George et al. *Sistem Peradilan Adat dan Lokal di Indonesia: Peluang dan Tantangan*. (Jakarta: Alliance of Indigenous Peoples of the Archipelago, 2003)

²⁴ Article 9 paragraph (2) of Perdasus Papua Number 20 of 2008

²⁵ Article 11 paragraph (1) Perdasus Papua Number 20 of 2008

²⁶ Mohammad Jamin. *Eksistensi Peradilan (Desa) Adat Berdasarkan Undang-Undang Desa*. (Surakarta: UNS Press, 2016)

²⁷ Article 11 paragraph (3) Perdasus Papua Number 20 of 2008

Typically, indigenous peoples in Papua have great respect for their tribal leaders, especially in terms of resolving disputes and conflicts that occur in their environment through the Customary Court. In the implementation of the function of administering the Customary Court, the Chieftain who acts as a customary judge is symbolized sacredly as:²⁸

- a. the sun, which is the source of life that gives light to its people, where all difficulties and pleasures are a place to complain;
- b. land, namely land that is in the *ulayat* area of the local customary community is protected by it representing all the people who live in it;
- c. the yellow bird (Cenderawasih), which is a pride that has always been worshiped from time to time, from generation to generation;
- d. fire, which describes the resolution of all problems under the command and decision of the leader;
- e. water, which is a peaceful person who can give a splash of calm, tranquility and peace;
- f. banyan, which is a figure who can protect all his people, both rich and poor;
- g. ocean, which has broad insight and a source of enlightenment.

In addition to the charisma or authority factor of the Tribal Chief who is a customary judge symbolized above, the compliance of the members of the customary law community is also influenced by social pressure in order to realize the restoration of community harmony. However, disputes or conflicts among members of indigenous and tribal peoples injure social balance and harmony. In this context, the Customary Court plays a role in representing the community to provide “*adat reactions*”²⁹ to crimes or conflicts in the community.³⁰ Therefore, the settlement decision from the Customary Court in the form of the imposition of customary fines is intended to provide a customary reaction to the perpetrators of customary crimes in order to carry out their obligations to repair or compensate the victims, and restore the situation

²⁸ Papua Regional Police Team-Faculty of Law, University of Cenderawasih-Kemitraan Partnership for Governance Reform Indonesia. *Peradilan Adat di Papua*. (Jayapura: Papuan Regional Police-Faculty of Law, University of Cenderawasih-Kemitraan Partnership for Governance Reform Indonesia, 2005)

²⁹ Ter Haar. *Asas-Asas dan Susunan Hukum Adat*. (Jakarta: Pradnya Paramita, 1985)

³⁰ The types of customary sanctions will be different for each indigenous community. Each indigenous community will have different sanctions according to the customs in that area. See Ikhdha Fitria, "Recognizing adat law: Problems and challenges in modern law system in Indonesia." *The Indonesian Journal of International Clinical Legal Education* 2, no. 4 (2020): 503-516.

or social relations in the customary law community as before.³¹ Thus, the purpose of justice produced by the Customary Court is restorative justice.³²

Basic Differences Between Papua Customary Court and Criminal Courts (State)

Before examining the intersection between the Papuan Customary Courts and the (State) Criminal Courts, it is necessary to first state the basic differences between the two judicial institutions, including: *first*, from the aspect of legal legitimacy. The criminal justice system gains legitimacy based on legislation including Law Number 48 of 2009 concerning Judicial Power, Law Number 2 of 1986 Jo. Law No. 8 of 2004 Jo. Law Number 49 of 2009 concerning General Courts, Law Number 16 of 2004 Jo. Law Number 11 of 2021 concerning the Prosecutor's Office of the Republic of Indonesia, and Law Number 2 of 2002 concerning the State Police of the Republic of Indonesia. Meanwhile, the Papuan Customary Court has legitimacy based on the Papua Special Autonomy Law.

Constitutionally, the regulation of customary courts originates from constitutional provisions which regulate the state's recognition of customary law community units and their traditional rights³³ as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia (see Article 18B paragraph (2) The 1945 Constitution of the Republic of Indonesia). In this case, the state has an obligation to protect and preserve indigenous communities³⁴ and their

³¹ Marlyn Jane Alputila, Mulyadi Alrianto Tajuddin, and Nurul Widhanita Y. Badilla. "Identification of Customary Delict of South Papua and Its Customary Sanctions as a Form of Preservation of Customary Law." *Devotion: Journal of Research and Community Service* 4, no. 12 (2023): 2271-2285.

³² Andreas Lagimpu and Yusak Jore Pamei. *Peradilan Adat Sulawesi Tengah*. In Widjanarko Sudjono et al (Ed.). *Eksistensi Peradilan Adat: Pengalaman Aceh, Kalimantan tengah dan Sulawesi Tengah*. (Jakarta: Ministry PPN/Bappenas-Norwegian Embassy-UNDP, 2016)

³³ Ni Ketut Sari Andayani, Gede Marhaendra Wija Atmaja, and I. Ketut Sudantra, "Four Conditions for Recognition of Traditional Society in the Constitution and State Revenue Income", *Journal of Indonesian Legal Studies*, 6, no. 2 (2021), 307–32 <<https://doi.org/10.15294/jils.v6i2.48044>>.

³⁴ Zaka Firma Aditya and Sholahuddin Al-Fatih, "Legal Protection of Indigenous People's Rights Through Strengthening the Licensing Principles Based on Social Sensitivity", *Journal of Indonesian Legal Studies*, 6, no. 1 (2021), 1–34 <<https://doi.org/10.15294/jils.v6i1.44671>>.

institutions, which include customary law³⁵ and customary courts. Furthermore, from the context of the legal regime that oversees the Customary Courts, it actually boils down to the legal regime of local government and not the regime of judicial power. Although Article 50 paragraph (2) of the Papua Special Autonomy Law states that "*in addition to the judicial power as referred to in paragraph (1), it is recognized that there is a customary court within certain customary law communities*", but the position of the Customary Court is not within or as part of judicial power. Therefore, under certain conditions, such as the release of the perpetrator of a crime decided by the Customary Court, the approval of the Head of the local District Court must be obtained. So that in the future there will be no criminal prosecution before the criminal court, the acquittal from the Customary Court must obtain legitimacy from the General Court as Actors of Judicial Power.

Second, from the aspect of institutional structure. The institutional structure of criminal justice is stratified starting from the District Court as the first level judiciary domiciled in the district or city, the High Court as an appellate court domiciled in the provincial capital, and the Supreme Court as a judiciary at the Cassation and Judicial Review level located in the Capital City. Country. The enactment of this level of criminal justice is to provide space for filing legal remedies from the parties for the court decisions that have been handed down. In contrast to the Papuan Customary Court, which does not have a multilevel judicial structure³⁶ based on its area or territory, as in the general judiciary. The Papuan Customary Court also does not recognize any legal remedies for appeal, cassation or judicial review as a means of correctional justice. Therefore, the institutional structure of the Papuan Customary Court is relatively simple and pivots on the Customary Chief or customary law community leaders who have the authority as customary judges within their respective customary law communities, where the decision to settle the case is final, has permanent legal force and is binding on the parties litigants.

Third, from the aspect of the judicial apparatus. In the criminal justice system, there are three apparatuses that work in each subsystem, namely the Police in investigation and investigation activities, the Prosecutor's Office in prosecuting and executing decisions, and the Court in examining, adjudicating and deciding criminal cases. Although these three criminal justice subsystems

³⁵ Ade Adhari et.al "Customary Delict of *Penglipuran* Bali in the Perspective of the Principle of Legality: A Dilemma and Arrangements for the Future", *Journal of Indonesian Legal Studies*, 6, no. 2 (2021), 411–38 <<https://doi.org/10.15294/jils.v6i2.50555>>.

³⁶ Budiyo. *Revitalisasi Peradilan Adat sebagai Alternatif Penyelesaian Delik Adat Pada Masyarakat Hukum Adat Papua*. (Malang: Intelegensia Media, 2017)

have their respective authorities, they are interconnected and coordinated in a series of integrated criminal justice systems. For example, if a Police Investigator starts an investigation, he will send a Notice of Commencement of Investigation (SPDP) to the Prosecutor. Furthermore, if a confiscation activity is carried out in the context of a criminal investigation, the investigator will request a decision from the court. During the trial there was a contest in the effort to prove between the Public Prosecutor on the one hand and the lawyer who defended the defendant³⁷ on the other to convince the judge in making court decisions in accordance with the principle of due process of law.³⁸

In contrast to the Customary Court system in Papua, where there is no known subsystem of the Police or the Prosecutor's Office, it relies on the Customary Chief or customary law community leaders as customary judges in customary courts. If in the Criminal Court there is a separation between the authority to sue and to judge, then in the Customary Court it becomes a single unit within the customary judge. The judicial power exercised by the customary judges has a dimension of trust (spiritual) so that it is obeyed by the members of the customary law community. Even in the evidentiary activities during the trial of the Customary Court, there are times when a magical procession is carried out if there is a denial from the accused.

Fourth, from the aspect of the position and role of victims in the justice system. The position of the victim in the criminal justice system does not get a proportional place. The victim is placed as a witness to the occurrence of a crime starting from the stage of investigation, prosecution to trial. Victimization of victims is inevitable in the course of the criminal justice process. In the case of prosecuting the perpetrator, the victim is represented by the Public Prosecutor at the trial. The victim does not have a *bargaining position* in court proceedings to file a claim for compensation for the losses she suffered as a result of the criminal act. The criminal justice system which tends to be *retributive justice* emphasizes the punishment or deterrence of the perpetrators rather than replacing the losses suffered by the victims. Even the fines imposed as court decisions are intended for the state and not in the context of recovering the losses of victims of criminal acts.

Unlike the Customary Courts in Papua, the position of the victim is very important in the trial process and in determining the appropriate punishment

³⁷ Herbert L. Packer, *The Limits of the Criminal Sanction*, (California: Stanford University Press, 1968)

³⁸ Keith A. Findley, "Toward a New Paradigm of Criminal Justice: How the Innocence Movement Merges Crime Control and Due Process." *Texas Tech Law Review* 41, no. 1 (2009): 1-41.

for the perpetrator. At the customary trial, the victim is given the space and opportunity to convey his loss and apply for compensation in the form of imposing a customary fine to the judge of the Customary Court. The Papuan customary justice system is based on the philosophy of *restorative justice*, namely the restoration of conditions and relationships as before. This means that compensation, wound healing and restoration of social relations³⁹ between perpetrators, victims and the families and ethnic groups of the perpetrators and victims are also the main concerns of the Customary Court judges in deciding the settlement of criminal cases. In this context, the customary fines imposed by the judges of the Customary Courts are likened to “custom medicine” or a cure for the consequences of criminal acts, both physically, psychologically and socially.

Fifth, from the aspect of the position and role of the community in the justice system. The criminal justice system is relatively less involved in the community in the process of resolving criminal cases. Before entering the investigation stage, there is usually room for the public to report to the police about potential or ongoing criminal events, however, after the investigation process until the completion of the trial the court is never again involved. Unlike the customary justice system in Papua, the community is also involved in the process of resolving criminal cases between perpetrators and victims who are both members of the customary law community.

The views of community members regarding the occurrence of criminal acts and the impact and appropriate solutions for resolving criminal cases will be explored and taken into consideration by customary judges in the Customary Court trial. However, the community as a community unit has an interest so that the settlement of criminal cases in the Customary Courts can function to restore relationships or social conditions⁴⁰ that have been injured due to the occurrence of criminal acts from the perpetrators of criminal acts. Even in certain criminal acts that are disturbing public order, there is a choice of punishment provided by the judges of the Customary Courts in the form of social work or the implementation of customary obligations of a social nature.

³⁹ Rena Yulia, Aliyth Prakarsa, and Mohammad Reevany Bustami, “Harmonizing Adat Obligations and State Law: A Case Study of Murder and Rape Cases in Baduy’s Indonesia”, *Journal of Indonesian Legal Studies*, 8, no. 2 (2023), 803–54 <<https://doi.org/10.15294/jils.v8i2.72283>>.

⁴⁰ Taufik Siregar, Anwar Sadat Harap, and Ikhsan Lubis, “Mediation in Customary Law as an Alternative Method of Dispute Resolution”, *Kanun Jurnal Ilmu Hukum*, 24, no. 2 (2022), 196–214 <<https://doi.org/10.24815/kanun.v24i2.26532>>.

Sixth, from the aspect of execution of court decisions. In the criminal justice system, the prosecutor who acts as the executor or implementer of court decisions with permanent legal force is the prosecutor. As determined by Article 54 paragraph (1) of the Law on Judicial Power which reads "*the implementation of court decisions in criminal cases is carried out by prosecutors*", and Article 30 paragraph (1) letter b of the Law on the Prosecutor's Office of the Republic of Indonesia which reads "*in the criminal field, The prosecutor's office has the duty and authority to carry out judges' decisions and court decisions that have permanent legal force*". Whereas in the customary court, the executor of the decision is the customary judge who hears the case itself. There is no special institution in charge of implementing the decisions of the Customary Courts.

Although there is no coercive apparatus,⁴¹ generally the perpetrators and their families obey and implement the decisions of the Customary Courts voluntarily because the process of determining the amount of the customary fine has been communicated properly and proportionately measured according to their abilities at trial (before the decision was made). Technically, for the implementation of the payment of customary fines, the perpetrator is handed over to the victim or his family in the presence of a customary judge. Meanwhile, for the execution of decisions from the Customary Courts in the form of customary fines as long as they are related to the interests of the customary law community, they are paid directly to the customary judges.

Intersection Point of the Customary Court and State Court in Criminal Settlement of Criminal Cases of Communities of Indigenous Law Communities in Papua

Apart from having the six basic differences above, the Customary Courts and the State Courts have intersections in the process of resolving criminal cases from members of the Papuan customary law community. The intersection in question is that there are some things that intersect with one another so that they have a similar dimension between the two courts so that in practice it creates friction between the courts. According to Dani Elpah that "*the point of contact with the authority to adjudicate is the relationship between the authorities of two judicial institutions in a dispute in a certain object that is currently running*

⁴¹ I Ketut Sudantra. *Pengakuan Peradilan Adat dalam Politik Hukum Kekuasaan Kehakiman..* (Denpasar: Swasta Nulus, 2016)

in one judicial institution or which is running simultaneously".⁴² If the intersection is mapped, there are four points of contact between the Customary Court and the State Court in the process of resolving criminal cases for members of the Papuan indigenous peoples, namely the subject of the crime, the object of the crime, and the imposition of criminal responsibility.

The first point of contact is about the subject of the crime. It is determined by the Papua Special Autonomy Law that the authority of the Customary Court to handle civil disputes and criminal cases between members of the customary law community. That is, outside the customary law community, they cannot become legal subjects who have litigation in the Customary Courts, both as perpetrators and victims. If the perpetrator or victim is not a member of the customary law community concerned, then the Customary Court cannot have the authority to try him. The problem is, every member of the Papuan customary law community is an Indonesian citizen who has an obligation to comply with the provisions of criminal legislation so that there is no prohibition for law enforcement to carry out the criminal process for criminal cases that occur in the environment or related to the members of the customary law community.

If the criminal law enforcement process precedes the case settlement process through the Customary Court, it can be predicted that two models of law enforcement paradigms will respond to it. For law enforcement officials who have a positivist paradigm and view that every Indonesian citizen has the same position before the criminal law law, then the criminal case is carried out according to the provisions of the applicable criminal law without regard to the settlement process through the Customary Court which also runs simultaneously.⁴³ In contrast to law enforcement officials who have an understanding of legal pluralism, in handling criminal cases they will heed the

⁴² Dani Elpah. *Titik Singgung Kewenangan Antara Peradilan Tata Usaha Negara Dengan Peradilan Umum Dalam Sengketa Pertanahan*. Research Report. (Jakarta: Research and Development Center for Law and Justice of the Supreme Court, 2014)

⁴³ Judges who have a formalistic legalistic view of adjudicating criminal cases related to customary crimes (mixed offenses) will not heed the value of justice for indigenous peoples which is represented through customary court decisions. Criminal sanctions imposed by such judges are limited to implementing state punishment against citizens who violate criminal law, regardless of whether the form of sanctions will accommodate the restoration of balance in society which has been shaken by customary criminal acts (which are mixed with general criminal acts). See Bagus Hermanto, "Discover future prospect of Indonesia criminal law reform: Questioning adat criminal law existence, Material and Formal Legislation, and Constitutional Court Decision Frameworks." *Paper was presented at International Seminar Udayana University and University of Melbourne*. Vol. 17. 2021.

settlement decisions of the Customary Courts to be considered based on considerations of upholding restorative justice. With the same legal subject slices between customary law community members and Indonesian citizens in one position, a law enforcement process based on the provisions of criminal law can be carried out on the one hand and on the other hand the process is also carried out simultaneously through the Customary Court.⁴⁴ In the context of customary courts deciding and resolving criminal cases before the ongoing judicial process, sometimes there is an expectation that the court decision will later state *nebis in idem*.⁴⁵

The second point of contact regarding the object of the crime. The criminal justice system has the objects of criminal acts that it handles in general and special types. These general types of crimes are regulated in the Criminal Code (KUHP) such as theft, fraud, persecution, murder, and others, while special types of crimes are those regulated in legislation such as terrorism, money laundering, corruption, taxation and others. On the other hand, the Customary Court has the competence to adjudicate cases of customary criminal acts which can be classified into two groups, namely pure customary crimes and those which are equivalent to general crimes in the Criminal Code. A pure customary crime means that there is no equivalent to a general crime regulated by the state criminal law legislation,⁴⁶ such as consensual adultery which between the two of

⁴⁴ Frans Reumi said that juridical implications of the weakness of institutional recognition, authority and decision of customary court over the resolution of cases or customary disputes with the principle of *ne bis in idem*, although customary court as a peace court institution has implemented the function of judicial power, thus causing conflict of norms in law enforcement for customary peoples of Papua is multicultural. Frans Reumi, "Recognition of Customary Court: Perspective of Judicial Power and Special Autonomy of Papua." *Papua Law Journal* 1, no. 2 (2017): 162-186.

⁴⁵ Furthermore, it is argued from the explanation above, it can be concluded that the *nebis in idem* principle as referred on the Article 76 of Code Penal is in line with the Article 51 Paragraph (6) of the Special Autonomy for Papua Law, so there should be no repeated charged on the incident/legal act that is already decided by the customary judge. See Nazanin Pourjabali, and Najjad Ali Almasi, "A Comparative Study of Post-Marriage Nationality of Women in Legal Systems of Different Countries". *International Journal of Multicultural and Multireligious Understanding* 2, no. 2 (2015): 14-21. <<http://dx.doi.org/10.18415/ijmmu.v2i2.3>>

⁴⁶ In general, these customary crimes are not regulated in written law (in the form of statutory regulations), but originate from customary community habits that have been passed down from generation to generation and are obeyed and carried out voluntarily. As is the unique characteristic of customary law because it depends on the customary community's observance of applicable customs. See Nilna Aliyan Hamida, "Adat Law and

them does not have a husband or wife bond with another person known as *cohabitation*, does not follow or fulfill rituals or customary obligations that should be carried out, etc., while customary crimes have the equivalent of general crimes such as theft, fraud, persecution, murder and others. The type of customary crime which has its equivalent to the general crime is the object of a case that intersects between the State Courts and the Customary Courts.

The simulation is that if a murder crime occurs in which the victim is a member of a certain indigenous community, then an investigation is carried out and it is determined that the suspect is the same indigenous community as the victim, then it becomes a question whether the criminal case will proceed to the prosecution stage until it is transferred to the prosecutor's office. court, or will penal mediation efforts be carried out by diverting it to the case settlement process through the Customary Court so that if it succeeds in fulfilling the peace, the investigation process will be terminated based on restorative justice. Normatively, cases of general criminal offenses with serious qualifications in the form of murder are exempted from being able to stop the process based on restorative justice as regulated by Article 5 letter f of the Regulation of the State Police of the Republic of Indonesia Number 8 of 2021 concerning Handling of Crimes Based on Restorative Justice. In this context, it is unavoidable that there will be an intersection where simultaneously the same criminal case is carried out in two ways of settlement, namely through the State Court and the Customary Court. If the conflict in resolving the case is not harmonized, it could give rise to polemics, controversy or resistance⁴⁷ within the Papuan customary law community.

The third point of contact is regarding the burden of criminal responsibility. In the customary justice system, there are two models of accountability, namely individuality and communality. The purpose of the customary criminal responsibility model individually is that the perpetrator is responsible for his own actions and therefore the imposition of customary sanctions is intended only for himself. Meanwhile, the purpose of the communal criminal liability model is that in addition to the perpetrators of the crime concerned, the family, relatives or tribes of the perpetrators are also prosecuted or bear the burden of responsibility.⁴⁸ For example, in the Biak

Legal Pluralism in Indonesia: Toward A New Perspective?", *Indonesian Journal of Law and Society* 3, no. 1 (2022).

⁴⁷ Sukardi Sukardi and Hadi Rahmat Purnama, "Restorative Justice Principles in Law Enforcement and Democracy in Indonesia", *Journal of Indonesian Legal Studies*, 7, no. 1 (2022), 155–90 <<https://doi.org/10.15294/jils.v7i1.53057>>.

⁴⁸ Soepomo. *Bab-bab Tentang Hukum Adat*. (Jakarta: Pradnya Paramita, 1986)

Numfor tribe, when a murder crime occurs, the perpetrator will be given a customary sanction in the form of *bin babiak* where a girl from her family will be married to a man from the family of the victim who was killed.⁴⁹ In other words, girls who are innocent in the occurrence of the crime of murder also bear the burden of criminal responsibility in the form of *bin babiak*.

With the progress of education and understanding of human rights and gender equality, the actual model of accountability and the imposition of customary sanctions is no longer relevant.⁵⁰ In the event of an objection from the girl and then submits a report to law enforcement officials so that a criminal law enforcement process is held through the criminal justice system, those who will receive the burden of criminal responsibility are only for the perpetrators of the crime of murder (the individuality model) and not regarding the girl. Therefore, it is possible to submit cases from the Customary Courts to the criminal justice system on the grounds of avoiding the communal accountability model which is considered burdensome for certain parties who are not related to criminal acts but also receive customary sanctions. Thus, it is inevitable that there will be a clash between the Criminal Court and the Customary Court.

Comparative Review with Other Countries

As a comparison with other countries, there is South Africa which recognizes the existence of customary courts and regulates the intersection of their adjudicatory authority with state courts. Similar to Indonesia, the constitution and laws in South Africa recognize and regulate the rights of indigenous peoples to resolve civil disputes and criminal cases in customary courts based on the customary legal system applicable to these indigenous communities. The law in South Africa which specifically regulates the judicial authority and institutions of traditional courts and their relationship with state courts is The Traditional Court Act No. 09 of 2022.

The Traditional Courts Act Republic of South Africa No. 09 of 2022 regulates the types of cases that can be handled by customary courts, including theft with a value of goods not exceeding R15 000-00, damage to property whose value does not exceed R15 000-00, assault that does not cause serious

⁴⁹ Justus Pondayar, “*Cara Penyelesaian Delik Adat Biak Numfor*”, Thesis, Master of Law Study Program Postgraduate Program at Udayana University, Denpasar. 2007

⁵⁰ Muhammad Ishar Helmi, Pujiyono Pujiyono, and Khamami Zada, ‘Existence of Customary Law in Indonesian Criminal Law’, *Jurnal Cita Hukum*, 10, no. 3 (2022) <<https://doi.org/10.15408/jch.v10i3.29829>>.

injury, quarrels between members of the community and all matters arising due to customary law with the value of claims or goods not exceeding the amount determined by the Minister.⁵¹ So, apart from the types of criminal cases determined by the law, such as theft of an item whose price is above R15 000-00, the customary court has no authority to try it. If there is a complaint regarding theft involving the value of goods above R15 000-00, the customary court will issue an order for the case to be handed over to the public prosecutor⁵² or tried by a state court. On the other hand, if the prosecutor or judge at the court discovers a criminal case that is the domain of the customary court, it can also facilitate the transfer of handling the case to the customary court.⁵³ In this case, the law regulates the relationship between the types of criminal cases that can be tried by customary courts and state courts.

To address the intersection in the case handling process between traditional courts and the criminal justice system, The Traditional Courts Act Republic of South Africa No. 09 of 2022 regulates several things, including: first, traditional courts are prohibited from hearing and deciding on cases that are currently being investigated by the South African Police;⁵⁴ secondly, customary courts are not permitted to try a criminal case that is currently being tried or is awaiting a decision from a state court;⁵⁵ third, customary courts are also not permitted to try criminal cases that have been decided by state courts.⁵⁶ Such provisions provide clarity regarding the interaction arrangements between customary courts and state courts in resolving criminal cases in customary communities. This model of contact regulation can be used as a reference for efforts to reconstruct the authority of traditional courts and state courts in Papua.

⁵¹ Section 2 (Article 4 (2)(a)) The Traditional Courts Act Republic of South Africa No. 09 of 2022

⁵² Article 8 (1)(j) The Traditional Courts Act Republic of South Africa No. 09 of 2022

⁵³ Article 14 (2)(b) The Traditional Courts Act Republic of South Africa No. 09 of 2022

⁵⁴ Article 4 (2)(b)(i) The Traditional Courts Act Republic of South Africa No. 09 of 2022

⁵⁵ Article 4 (2)(b)(ii) The Traditional Courts Act Republic of South Africa No. 09 of 2022

⁵⁶ Article 4 (2)(b)(iii) The Traditional Courts Act Republic of South Africa No. 09 of 2022

Reconstruction of the Ideal Intersection Between the Customary Court and State Court in Providing Access to Justice for Indigenous People of Papua

Basically, as long as the three points of contact above are still present, in practice it is inevitable that there will be a clash of powers to adjudicate between the Customary Courts and the State Courts in the process of resolving criminal cases. from members of the customary law community in Papua. If this intersection is not managed properly, it will create resistance between law enforcement officials in the criminal justice system and members of the customary law community in Papua. On the other hand, if the intersection is managed properly through efforts to reconstruct the intersection, and equalize perceptions, as well as the synergy between the State Courts and the Customary Courts, access to justice will be realized for members of the customary law community in Papua. Furthermore, if access to justice through synergies in the settlement of criminal cases between the State Courts and the Customary Courts can be realized, it will be positively correlated with security stability and increasing community welfare as the objectives of the implementation of special autonomy in Papua.

Reconstruction of the intersection is the first step in an effort to create synergy between the Customary Courts and the State Courts. As previously explained, the Papua Special Autonomy Law only regulates the correlation between the Customary Court and the State Court in the context where the Customary Court precedes the examination and adjudication of criminal cases that occur between members of the customary law community. Whereas in the case that the State Court precedes the process of handling the case, and the Customary Court then follows it or adjudicates the case simultaneously, it is not regulated by the Autonomy Law. Including whether the Customary Court can take over in the middle of the process of handling cases carried out by law enforcement officials from the criminal justice system is also not regulated by the Special Autonomy Law. So it raises the assumption that when it has been entered into the process of handling cases by the State Courts, then the settlement through the Customary Courts cannot stop the handling of the criminal case and is only used as material for judges' consideration in making sentencing decisions. From this assumption, it will lead to a further assumption

that the position of the Customary Court is actually subordinate⁵⁷ to the State Court.

The subordinate position of the Customary Courts from the State Courts mentioned above can be seen from several things, including: *first*, if the Customary Courts decides to release the perpetrators of a criminal act, approval must still be sought from the Head of the District Court through the Head of the local District Attorney so that in the future there will be no criminal charges against them. concerned; *second*, the decision to settle a criminal case from the Customary Court is not final and has permanent legal force if there is an objection from one of the litigants, either the perpetrator or the victim, to the decision and submits the case to law enforcement officials to be processed through the State Court; *third*, the decision of the Customary Court which is carried out simultaneously with the criminal justice process by the State Court does not automatically stop the handling of the case but is used as a legal consideration by the judge in passing a sentencing decision; and *fourth*, fines or customary obligations decided by the Customary Court cannot be taken over as a sentencing decision by the judge at the State Court.

If we refer to the philosophy of state recognition of the existence of the Customary Court in the Papua Special Autonomy Law, it is idealized that the position of the Customary Court is equal to that of the State Court.⁵⁸ As stipulated by Article 50 paragraph (2) of the Papua Special Autonomy Law that "*in addition to the judicial power as referred to in paragraph (1), it is recognized that the existence of customary courts exists within certain customary law communities*". The word "beside" in this provision confirms that the position of the Customary Courts in Papua is actually not sub-ordinary to the State Courts. In other words, the Customary Courts and State Courts do not negate each other. If examined more deeply, the Customary Court and the State Court should be like two lines of the criminal case settlement process (double track justice system) that can be chosen by members of the Papuan customary law community. The two pathways should not overlap each other, causing distortion of the judicial authority of one of the judicial institutions rather than the other.⁵⁹

⁵⁷ Mohammad Jamin. *Peradilan Adat: Pergeseran Politik Hukum, Perspektif Undang-Undang Otonomi Khusus Papua*. (Yogyakarta: Graha Ilmu, 2014)

⁵⁸ Lilik Mulyadi and Ronald Hasudungan Sianturi, "Indonesian Customary Court Concept in the Future", *Asian Social Science*, 11, no. 12 (2015): 1–10 <<https://doi.org/10.5539/ass.v11n12p1>>.

⁵⁹ Herlambang P. Wiratraman reminded that regulating the authority of customary courts by the state should not be just an effort to institutionalize customary courts into the state

The availability of access to justice in two ways of resolving criminal cases through the Customary Court and the State Court needs to be opened as wide as possible includes the non-discrimination of the types of general criminal cases that can be resolved by the Customary Court and converted by stopping the handling of criminal cases by the criminal justice system. That is, the Papua Special Autonomy Law does not provide criteria for the types of criminal cases that can be resolved by the Customary Court so that all cases, whether qualified for minor or serious crimes, fall under its authority. In contrast to what is regulated by the Republic of Indonesia Police Regulation Number 8 of 2021 and the Republic of Indonesia Prosecutor's Regulation Number 15 of 2020 concerning Termination of Prosecution Based on Restorative Justice, where for serious crimes such as homicide, the termination of the case cannot be carried out even though efforts have been made to penal mediation or settlement through Simultaneous Customary Courts. Papua Special Autonomy Law should be enforced consistently and make it a *lex specialist* so that the two regulations of law enforcement institutions can be set aside. This means that the types of cases of serious crimes such as murder that have been resolved through the Customary Court which are carried out simultaneously with investigation or prosecution activities can be used as the basis for enforcing restorative justice so that the handling of the case can be stopped (resolved).⁶⁰

The diversion model as in the juvenile criminal justice system can be adopted in an effort to reconstruct the intersection of the Customary Court and the State Court in the process of resolving criminal cases from members of the customary law community. Diversion in question is the transfer of settlement of criminal cases from the criminal justice process to processes outside the criminal justice system through the Customary Courts for cases where the perpetrators and victims are fellow members of the indigenous peoples. This diversion model is applied when the criminal justice system precedes the Customary Court in carrying out the criminal case settlement process. Technically, during the initial examination of the investigation and prosecution, it is offered for settlement through the Customary Court. If both parties, namely the perpetrator and the victim or their families, are willing to

justice system. The state must be able to provide possible avenues for seeking informal justice systems rather than forcing formal mechanisms or bureaucratizing customary justice. See Herlambang P. Wiratraman, "Adat court in Indonesia's judiciary system: A socio-legal inquiry." *Journal of Asian Social Science Research* 4, no. 1 (2022): 43-62.

⁶⁰ Anna Maria Salamor and others, 'Application of Restorative Justice in The Settlement of Customary Criminal Cases', *SASI*, 29, no. 2 (2023), 227 <<https://doi.org/10.47268/sasi.v29i2.1259>>.

settle it through the Customary Court, the Police or the Prosecutor shall provide space and time facilitation for efforts to resolve the matter through customary law. If there has been a decision of the Customary Court and the customary sanctions imposed on the perpetrator and the victim or his family have been forgiven, then it is stated in the form of a peace agreement which is submitted to law enforcement. Furthermore, the peace agreement resulting from the implementation of the decision of the Customary Court is submitted by law enforcement to the Court to obtain a diversion determination to be used as the basis for stopping the investigation or prosecution. Against criminal cases that are terminated through the Diversion, criminal charges can no longer be carried out at a later date. This means that the settlement of the handling of criminal cases through the Customary Court in the form of Diversion has binding legal force because it is strengthened by court decisions.

If the above-mentioned diversion is not successful due to the inability of the perpetrators to pay the customary fine or carry out the customary obligations decided by the Customary Court, then the process of handling the case by law enforcement continues to be transferred to the stage of examination in court. The panel of judges in deciding the settlement of criminal cases through criminal impositions must consider the previous decisions of the Customary Courts to explore and understand the values and sense of restorative justice that will be enforced in their decisions. Including the implementation of customary fines that have only been partially fulfilled, they must also be taken into account and converted into a sentencing decision to be handed down by the panel of judges at the district court. Therefore, in the context of the reconstruction of the intersection between the Customary Courts and the State Courts, accommodation for the type of crime is required in the form of payment of customary fines or customary obligations that the defendant needs to undergo. In this context, the position of the State Courts affirms the decision of customary fines from the Customary Courts. Thus, at the completion of the process of handling criminal cases by the State Courts which pay attention to and heed the decisions of the Customary Courts, the defendants are no longer burdened by customary criminal responsibility when they return to their communities.

The reconstruction of the ideal intersection between the Customary Courts and the State Courts as described above must be formulated in legislation, especially in the revision of the Papua Special Autonomy Law.⁶¹ This

⁶¹ See also and compare with Cahya Wulandari, et al. "Penal mediation: Criminal case settlement process based on the local customary wisdom of Dayak Ngaju." *Lex Scientia Law Review* 6, no. 1 (2022): 69-92; Hazar Kusmayanti, et al. "The Character of Peace in

is because the proposed Diversion model is related to procedural law so it must be stated in the form of law. After the reformulation of the Papua Special Autonomy Law as referred to in this concept, it is also necessary to make efforts to socialize and equalize perceptions through legal training between apparatus and judges in state court⁶² or customary judges at the Customary Courts⁶³ to strengthen the synergy in the process of resolving criminal cases against indigenous people in Papua. In addition, it is also necessary to prepare guidelines for adjudicating customary criminal cases for judges serving in the Papuan jurisdiction. It is important that these guidelines are established considering that Indonesian judges apply an assignment rotation (rotation) system, so those who are new to duty in Papua must have a guide in the form of guidelines for adjudicating cases of customary criminal acts in order to realize consistency in the application of law and the enforcement of justice for members of indigenous peoples.

Conclusion

The Papua Special Autonomy Law provides recognition and authority to the Customary Courts in adjudicating civil disputes and criminal cases among members of the customary law community. In practice, there is an intersection of authority to adjudicate between the Customary Court and the State Court, both from the aspect of the subject of the crime, the object of the crime and the imposition of criminal responsibility. If this intersection is not managed properly, it will create resistance between law enforcement officials in the criminal justice system and members of the customary law community in

Judges' Customary Criminal Receptions as Restorative Justice." *Journal of Law and Legal Reform* 5, no. 1 (2024): 409-432; Dhini Hindria Restuti, "Renewal of Criminal Law in the Customary Law." *Indonesian Journal of Criminal Law Studies* 3, no. 1 (2018): 61-70.

⁶² In accordance with the proposal Alexander P Danne in terms of strengthening existing customary laws and institutions in South Sudanese through legal training. He stated that "provision of infrastructure and legal training resources to local level courts which process the bulk of customary cases. Training should include topics such as the difference between 'official' and 'living' customary laws and their treatment in courts, as mentioned above. Failure to distinguish between these types of laws can result in legal outcomes which actually exert negative effects on marginalised groups." See Alexander P. Danne, "Customary and Indigenous law in transitional post-conflict states: A South Sudanese case study." *Monash University Law Review* 30, no. 2 (2004): 199-228.

⁶³ T. Kehinde Adekunle, "Nigerian indigenous courts and their dispute resolving mechanisms in global perspective." *Online* at <https://aija.org.au/wp-content/uploads/2017/08/Adekunle1.pdf>

Papua. On the other hand, if the intersection is managed properly through efforts to reconstruct the intersection, and equalize perceptions, as well as the synergy between the State Courts and the Customary Courts, access to justice will be realized for members of the customary law community in Papua.

Among the intersection reconstruction efforts, namely: *first*, making efforts to balance the position between the Customary Court and the State Court. This means that the position of the Customary Court is not subordinate to the State Court; *second*, complete the relation formulation when the State Court precedes the process and the Customary Court is carried out simultaneously. In this case, it is necessary to strengthen two ways of resolving cases (*double track justice system*), namely the criminal justice system and the customary justice system which can be chosen by indigenous peoples in accordance with their sense of justice; *third*, applying the Diversion model, namely the transfer of the settlement of criminal cases from the criminal justice process to the process outside the criminal justice system through the Customary Court. This diversion model is applied when the criminal justice system precedes the Customary Court in carrying out the criminal case settlement process.

If both parties, namely the perpetrator and the victim or their families, are willing to settle it through the Customary Court, the Police or the Prosecutor shall provide space and time facilitation for efforts to resolve the matter through customary law. If there has been a decision of the Customary Court and the customary sanctions imposed on the perpetrator and the victim or his family have been forgiven, then it is stated in the form of a peace agreement which is submitted to law enforcement. Furthermore, the peace agreement resulting from the implementation of the decision of the Customary Court is submitted by law enforcement to the Court to obtain a diversion determination to be used as the basis for stopping the investigation or prosecution. The reconstruction of the ideal intersection between the Customary Courts and the State Courts as described above must be formulated in legislation, especially in the revision of the Papua Special Autonomy Law.

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