

THE EFFECTIVENESS OF SPECIAL ARRANGEMENTS AND BASIC AGREEMENTS IN OVERCOMING STATELESSNESS ISSUES AT THE BORDER BETWEEN INDONESIA AND PAPUA NEW GUINEA¹

Pulung Widhi Hananto*, Rahandy Rizki Prananda, Ratna Herawati, Irawati

Faculty of Law, Universitas Diponegoro
Jl. Imam Bardjo, S.H. No. 1, Semarang
pulungevanov@gmail.com

Abstrak

Perbedaan perspektif terhadap batas wilayah antara masyarakat local pemilik hak ulayat yang didasarkan pada hukum adat dan definisi batas wilayah dalam konteks ketatanegaraan menimbulkan dilematika, salah satunya potensi munculnya statelessness. Keberadaan tanah adat ulayat menjadi factor yang mempengaruhi perlintasan batas secara illegal. Pemerintah Republik Indonesia dan Papua new Guinea merespons hal ini dengan mengadakan basic agreement dan Special arrangements. Artikel ini bertujuan mengkaji penerapan dan efektivitas special arrangement serta basic agreement dalam menangani munculnya permasalahan statelessness. Studi ini menggunakan pendekatan perundang-undangan dan konseptual. Hasil studi menemukan bahwa penerapan aturan yang bersifat positivistik tidak dapat diterapkan secara mutlak pada warga perbatasan Indonesia dan Papua New Guinea. Penggunaan kebijakan kartu merah dan kuning hanya bersifat sementara, sehingga diperlukan kebijakan yang bersifat permanen guna menangani masalah ini.

Kata kunci: *Basic Agreement; Special Arrangement; Perbatasan; Statelessness.*

Abstract

Differences in perspective on territorial boundaries between local communities with customary rights based on customary law and the definition of territorial boundaries in the context of state administration raises a dilemma, one of which is the potential for statelessness. The existence of ulayat customary land is a factor that affects illegal border crossings. The Governments of the Republic of Indonesia and Papua New Guinea responded to this by entering into basic agreements and special arrangements. This article aims to examine the implementation and effectiveness of special arrangements and basic agreements in dealing with the emergence of statelessness problems. This study uses a statutory and conceptual approach. The results of the study found that the application of rules that were positivistic in nature could not be applied absolutely to residents of the border between Indonesia and Papua New Guinea. The use of red and yellow card policies is only temporary, so a permanent policy is needed to address this issue.

Keywords: Basic Agreement; Special Agreement; Cross-Border; Statelessness.

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A. Introduction

The existence of a state as the most complex form of organization in human life is constructed as a separate legal entity which consists of a collection of citizens, each of which is a separate legal subject. A country can be said to be a set of legal subjects and a legal entity between legal subjects which is manifested in citizenship status. Citizenship status for individuals is very important, because it represents the concept of the legal relationship between the individual and the state, the recognition and protection of the rights and obligations that are legally attached (Ekatjahjana, 2010). The legal status of citizenship are stipulated in the constitution and a numbers of regulations which governing the nationality. The regulation of citizenship in the constitution or statutory regulations includes firstly citizenship status as a personal identity attached to the individual. Secondly, a description of the legal relationship between subject and State. Third, the responsibility of the State towards nationality or statelessness and the application the national legal instruments or international law.

The granting of the right to citizenship is belong to expression of respect for human dignity. In this case there should be no individual in this world in any country who is not granted citizenship. The Status of Citizenship as part human rights, it is recognized by Indonesia Constitution in Article 28D paragraph (4) of the 1945 Constitution that defined as everyone's right (Isharyanto, 2015). This article explains that every subject has the right to citizenship status. However, due to the nature of the Constitution 1945 itself is a basic law, the right to status citizenship itself is not regulated in detail in the constitution, then The status of citizenship is further regulated in the legislation below (Faizal, 2020). In the International level, Universal Declaration of Human Rights (1948) as an instrument of international law clearly regulates the citizenship status of each person. It is stated in Article 15 paragraph (1) that, "a person has the right to a citizenship status". Paragraph (2) states that "not entitled" a person is stripped of his citizenship status and denies the right to change nationality. Regarding to the stipulation above, it can be stated that Citizenship rights are very basic human rights, so that everyone has citizenship and no one can arbitrarily deprived of citizenship or denied the right to change nationality.

But in fact, due to certain conditions, several individuals or communities in a certain area are not recognized as citizens. They are referred to as stateless persons. Stateless persons are individuals who are not recognized as citizens by one country based on the legal rules of the country where the individual lives. According to the 1954 Convention relating to the Status of Stateless Persons in Article 1 defines a "*stateless person*" as "a person who is not considered a citizen by any State in the implementation of the law of that country". The convention recognizes stateless persons and recognizes their international legal status. Individuals or persons who do not have the status of a citizen are not regulated by the national law of the country concerned, but are subject to the provisions of international law. Regarding to the perspective of international law, statelessness is a condition in which a person is not recognized as a citizen by any country based on its law.

The United Nations High Commissioner for Refugees (hereinafter referred to as UNHCR) estimates that it is currently estimated that there are more than 12 million people in the world who experience statelessness and become one of the major humanitarian problems in the 21st century besides refugees. In 2017 UNHCR has collected data on 3.9 million stateless persons (United Nation High Commissioner for Refugees, 2018). The stateless status of a person can be carried when he is an adult or has been attached since he was born without citizenship. A child born to stateless parents will have the potential to receive stateless status as well, causing an intergenerational cycle. of Stateless Persons and The 1961 Convention on the Reduction of Statelessness.

In addition, the consequences of statelessness are now increasingly conceived of in human rights terms, given that statelessness frequently results in discrimination in terms of accessing basic rights, such as the right to work, to health care, and to education in one's own country, and that it

can lead to vulnerability to other human rights violations, such as trafficked (Batchelor, 1995). Some stateless persons find that their predicament in their country of origin or habitual residence is so untenable that migration is the only option. In this regard, increased international concern on the urgency to persons in a migratory context is an important, although still nascent, legal development.

The issue of statelessness is also faced by Indonesia, although there is no official data that identifies and determines the exact number by the Directorate General of Population and Civil Registration. In the UNHCR submission at the 27th session of the Universal Periodic Review in 2017, it was stated that there are indications of a large potential population of stateless people in Indonesia. One of the areas in Indonesia that tends to give rise to the phenomenon of statelessness is the border area between Papua Province and Papua New Guinea.

The uniqueness of the border area of the Republic of Indonesia with the neighboring country of Papua New Guinea causes many citizens of the crossing from both countries to cross into the border area. Types of crossers who pass through the border areas of the Republic of Indonesia and Papua New Guinea are qualified into two types, including: Traditional Border Crossers and International Border Crossers. The activities of border crossers around the Indonesia-Papua New Guinea border area are in the form of traditional border crossings such as those carried out by close relatives or relatives from Papua to Papua New Guinea and vice versa, while economic activities such as commodity trade between the two countries pass through the border gate (Numberi, 2021). Traditional Border Crossers have activities to meet the needs of daily life, ranging from gardening, gathering sago, catching fish, and visiting relatives. These activities are carried out traditionally. Meanwhile, international border crossers are people who are not border citizens but are Indonesian citizens or Papua New Guinea citizens.

Refer to the information obtained on the interview with the Head of the Intelligence and Supervision Division of the Immigration Office of Jayapura City, there are hundreds of residents from 7 villages in Boven Digoel district, Papua, precisely in the Indonesia-Papua New Guinea border area, do not have clear citizenship status. Some of them are Papua New Guineans, but live in Indonesia. This condition can potentially place these people as stateless persons (Darwanto, 2021). Boundaries according to their customs are marked in the form of large trees, large stones, river flows and so on which have mythological and ecological meanings. State boundaries are considered to indirectly separate a series of kinship relationships along with rights and obligations in managing ulayat land (Hapsari, 2020). Differences in perspectives regarding the concept of territorial boundaries between local communities who own customary rights based on customary law and the definition of territorial boundaries in the constitutional context sometimes lead to misunderstandings and provoke actions that are considered to violate state law. As of results, this phenomenon has the potential to lead and enhance illegal border crossers between the two countries' territories.

The crossing regulation that focuses on the ownership of administrative documents encourages traditional border crossers to take illegal routes by passing the 'rat road' that connects Papua New Guinea with Indonesia. As a result, illegal border crossers are those who carry out activities across the borders of Indonesia and Papua New Guinea without being equipped with documents and can stay for months to years in the territory of the two countries. One of the customary law communities that exist in Indonesia is the customary law community located on the border of Indonesia and Papua. Our observation found that the boundaries of the territory of the customary law community were based on natural signs and were not limited to the territorial boundaries of the State.

Emile Durkheim's view that the customary law community is a society with mechanical solidarity, namely an integrated society or a cohesive and stable society. This community perspectives that the law is an agreement so that even in the context of territorial boundaries what is understood by the community concerned are natural signs that are understood by the community

that have been going on for generations (Durkheim, 2008). The existence of ulayat lands of the customary law community of Papua New Guinea in Indonesia and vice versa shows that the territorial boundaries of the state cannot hinder the cultural ties between the two communities. The cultural ties between these two societies indicate that there is a close interaction between these two things. The interactions that occur between the two communities take place very intensely and do not pay too much attention to state territorial boundaries. It is in line with the communalistic nature of customary law communities.

The existence of the kinship interaction opens up opportunities for marriage, education and trade relations between the two countries. This circumstances is certainly an interesting discourse in the context of citizenship, including identifying the potential for stateless in Papua. The stateless person is an important problem because it relates to the fulfillment of the rights of these people and mainly occurs in border areas including the borders of Indonesia and Papua New Guinea. So that a special instrument is needed outside of the applicable normative law, in order to regulate the risk of statelessness in the border areas of Indonesia and Papua New Guinea.

This study emphasizes the importance of the role of special arrangements and basic arrangements in preventing the potential for statelessness for residents living in the border areas of the Republic of Indonesia Papua New Guinea, due to kinship relations and customary rights to customary lands. The topic has never been discussed and studied specifically in the field of legal research in Indonesia. the final results of this study are address to provide a feedback and improve the quality of handling the issue of statelessness in the border zone between Indonesia and Papua New Guinea.

B. Research Method

This article use a doctrinal legal research by applying a qualitative method, which is a form of subjective research that relies on controlled observation analysis from researchers who focus on field research activities (McConville, 2017). This research is a legal research conducted methodologically, systematically, and consistently (Soekanto & Mamudji, 2001). This research uses two approaches, among others, the statutory approach is carried out by examining the relevant laws and regulations and the conceptual approach is applying views in legal science which are expected to be able to find ideas that give birth to new legal understandings and concepts that are relevant to the issues at hand (Marzuki, 2015). In brief, legal research is defined as an effort to seek and find true knowledge according to law, which begins with a gap between what should be (*das sollen*) and what is actually (*das sein*); between the ideals (ideas) of law with reality; between theory and implementation (legal gap) (Amiruddin & Asikin, 2004).

C. Result and Discussion

1. The Impact and Implication of Special Arrangement: in Explain by Chronological: Indonesia Constitution 1945 – Special Arrangement (Lex Specialis)

At the outset, it is worth pointing out that no real difference exist in public International Law between nationality and citizenship, with the former traditionally only having salience in the International context (Gibney, 2013). Nationality has no positive immutable meaning. On the contrary, its meaning and import have change with changing character of states. It may acquire anew meaning in the future as the result of further change in the character of human society and development in International organization. Nationality always connotes, however membership of some kind in the society of state or nation (Myers, 1929).

The preamble to the 1945 Constitution of the Republic of Indonesia states that the State protects the entire Indonesian nation and the entire Indonesian homeland. The elaboration of the contents of the preamble is followed up with the provisions in the articles of the 1945 Constitution of the Republic of Indonesia. The form of this protection is through the statement that Indonesia

is a Unitary State in the form of a Republic. As a unitary state, the central government has sovereignty. However, in order to achieve even distribution of welfare, regional autonomy is enforced in Indonesia. In addition to the regional autonomy regulation which gives the authority that each region can regulate and manage its own government affairs based on the principle of regional autonomy as stated in Article 18 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, the state also provides protection through Article 18 B paragraph (1) of the 1945 Constitution. NRI 1945.

The article states that the State recognizes and respects special or special regional government units which are regulated by law. Based on Article 18 B paragraph (1) of the 1945 Constitution of the Republic of Indonesia, Law No.2 of 2021 concerning the Second Amendment to Law No. 21 of 2001 concerning Special Autonomy for the Papua Province was established. The meaning of special autonomy granted to the Papua Province has been regulated in Article 1 paragraph (2) of Law No.2 of 2021. Special autonomy is a special authority that is recognized and granted to the Papua Province to regulate and manage the interests of the local community according to its own initiative based on the aspirations and basic rights of the Papuan people. Based on this authority, it provides protection and increases the dignity of the native Papuan people.

The authority granted by the Regional Government of the Papua Province, one of which can establish mutually beneficial relationships with various institutions or agencies abroad in accordance with statutory regulations. This is in accordance with Article 4 paragraph (5) of Law No. 2 of 2021. When viewed from the explanation of the article, the mutually beneficial relationship is aimed at advancing education, increasing investment, and developing tourism in Papua Province. The authority of the Papua Province has been regulated in Article 4 paragraph (1) of Law No. 2 of 2021. Likewise, the authority of the Papua Province in the border areas. Papua Province in Indonesia is directly adjacent to Papua New Guinea. Relations between Papua Province and Papua New Guinea are regulated through basic and special arrangements. Basis agreements between the Government of Indonesia and the Government of Papua New Guinea on border arrangements were signed by both parties on 17 June 2013.

Basic agreements basically regulate cooperation in the administration and development of border areas for the common interest of the people of the two countries. This arrangement still takes into account the rights and customs of the people living in the border areas. Basic agreements indicate that by establishing a mutually beneficial relationship as stated in Law Number 2 of 2021, the purpose of the relationship will be achieved. This is indicated in Article 9 regarding trade relations between the two countries.

Inside the Basic agreements in Article 9 paragraph (2) letter a, it is stated that the parties in trade pay attention to arrangements that only apply to traditional residents and border residents who live in border areas. This implies that cross-border for traditional and customary purposes is recognized and permitted by the state, as regulated in Article 4 Basic Agreements. Recognition of the state shows that there is no statelessness in a state. This is clarified by the special agreements between the Government of Indonesia and the Government of Papua New Guinea. Special agreements were signed on November 15, 1993.

2. The Role of Adat Law to Society and Asset in Papua – Papua New Guinea Border

According to the Indonesian Dictionary, customs are rules (actions) that are commonly followed or carried out since time immemorial; Custom is a way of habit which is a manifestation of culture which consists of cultural values, legal norms, and rules that are related to one another into a system and are obeyed as a habit or tradition. Montesquieu (1689 – 1755) in his theory of cultural relativism said; "An element or custom in a culture cannot be judged with views that come from other cultures, but from a value system that must exist within itself". Customs are personal, meaning that a certain community custom can only be understood by getting closer to the cultural values that exist in the community that owns the custom.

Many legal experts in Indonesia do not recognize the existence of customary courts. Regarding to article 18 The Law No. 48 of 2009 concerning Judicial Powers (Law on Judicial Powers) it stipulates that judicial power is exercised by a Supreme Court and judicial bodies under it consisting of general courts, religious courts, military courts, state administrative courts and a Constitutional Court. In Article 2 paragraph 3, it is emphasized that all courts in the entire territory of the Republic of Indonesia are state courts regulated by law. Article 5 paragraph 1 stipulates that judges and constitutional judges are obliged to explore, follow, and understand the legal values and sense of justice that live in society. The above provisions show that customary justice is not recognized, but in fact it still exists in the community, especially in rural areas, and in provinces outside Java.

The concept of Villages or in the Papua region known as Kampung, according to The Law no. 6 of 2014 concerning Villages can be defined that traditional villages or what are referred to by other names hereinafter referred to as Villages are legal community units that have territorial boundaries that are authorized to regulate and manage government affairs, the interests of the local community based on community initiatives, origin rights, and/or traditional rights that are recognized and respected in the government system of the Unitary State of the Republic of Indonesia. Basically, the customary law used is the law of innocent people, but in the decision-making process the customary judge always considers all the facts revealed in the customary court and is guided by the principles of customary law in society. The purpose of problem solving in customary law is to reconcile and balance the situation.

The results of the field research found that the leadership system in the border area of Papua Province with Papua New Guinea which still adheres to a lot of traditional systems which tend to have the role of tribal chiefs. The tribal chief is considered a leader who can accommodate the representation of the traditional tribes in the area concerned. This is influenced by the geographical location of Papua New Guinea which is directly adjacent to Papua, where Papua is one of the areas that still recognizes the existence of indigenous peoples in its territory. In each - each village in Papua even has a different customary system and the mention of the term village or tribal head. So that many things - things that happen in Papua in general are mostly resolved by customary law.

Papua region is socio-culturally within the framework of the Indonesian nation's culture as a national unity with the Papua province. These two provinces are known regionally as Indonesian Papua in contrast to Papua New Guinea (PNG). Philosophically, in the recognition of the local community, these two provinces are collectively referred to as Tanah Papua through pledges and commitments such as; "two for one and one for two". Two for one - one for two, meaning one Papuan Special Autonomy Law for two provinces, namely Papua and West Papua, two provinces for one development, namely Tanah Papua. Historically, the culture and civilization of the indigenous Papuans who inhabit the territory of West Papua and Papua have the same past experience in the Unitary State of the Republic of Indonesia (Deda & Mofu, 2014).

The basic philosophy that must be understood when we talk about land as customary rights for Papuans as a whole is that we talk about the relationship between the population (community) and their land. This is very closely correlated with kinship relations, power, leadership, sources of livelihood, rites and the spirit realm. So it can be stated that the role of ulayat rights in the Papuan indigenous peoples is religious magister. This relationship makes land interpreted as an integral part of people's personalities. This creates a very strong inner bond with the land, in the sense that there is an inner connection between the sacred land.

Article 18 B of the Constitution of the Republic of Indonesia is high-hierarchy legal basis for the protection of the rights of indigenous peoples in Indonesia. The customary law community consists of three elements, namely the community, has a lebensraum or territory and also has a customary law structure. One of the important aspects of the customary law community is the customary land or customary rights of the customary law community. In Article 1 number 13

Government Regulation No. 18 of 2021 concerning Management Rights, Land Rights, Flat Units and Land Registration, ulayat land is defined as land located in the territory of customary law community control which in reality still exists and is not attached to any land rights.

According to the perspectives on indigenous peoples, land is something related to the property of its predecessors, the role of customary land has important meaning and privileges for indigenous peoples, especially with regard to livelihoods, thus providing an assessment and appreciation of land in such a way and requires special arrangements (Laturette, 2017). In the land tenure system based on the civil context in national law, what is meant as the owner and heir of land are subjects who have land rights in certain areas. In relation to customary land tenure, there are two forms of land tenure/ownership systems, namely communal ownership and individual ownership (individual ownership is hereditary) (Erari, 1999). In general, all tribes have customary rules that regulate into families (*marga*) regarding the distribution of rights from control and management of land where the power lies with the eldest child who comes from the oldest lineage.

Regarding to Papuans perspective, the relationship over land (*adat/ulayat*) is not only seen as an economic commodity that functions as a source of food, but is also an area in the sense of *ulayat* which contains a partial human position as *homo economist* but also as *homo humanicus* and *homo culturalis*, meaning that the land has spiritually sacred relationship with humans. The tenure system of land ownership in the area of customary law circles is divided into two types of land tenure/ownership, namely communal ownership and individual ownership (Deda & Mofu, 2014). Communal ownership is classified into small clan-based ownership, namely certain clans or clans, and large clan-based ownership, namely village-based ownership in the sense of which tribe is the original resident of the village. While individual ownership is not based on individuals but descendants. Paying attention to this matter, the *ulayat* rights of the customary law community in the Papua border region have very important meaning for the community concerned both in terms of economic, social, spiritual and cultural aspects. In this case, the customary land of the customary law community has imaginary boundaries, namely boundaries that are based on natural signs and cannot be determined with certainty. The *ulayat* rights socially show that there is unity between the customary law communities. In this case, the existence of social integration arises because of the sentiment of fate and dependence on nature.

Efforts to protect the community's law customary law in Papua, in the reform era starting with the establishment of Law Number 21 of 2001 concerning Special Autonomy in Papua (Suharyo, 2019). In principal, special autonomy has set about various aspects of community protection customary law. the various laws and regulations that have been issued, ranging from from Law Number 21 of 2001 on Special Autonomy in Papua, Regional Regulations Papua Province Number 18 of 2008 concerning People-Based Economy, *Perdasus* Papua Province Number 20 of 2008 on Customary Courts in Papua, Special Regional Regulations Papua Province Number 22 of 2008 concerning Resource Protection and Management The Nature of the Papuan Customary Law Community and Papua Province Regional Regulation Number 23 of 2008 on the *Ulayat* Rights of Indigenous Peoples and Individual Rights of Legal Community Citizens The Customs on Land, which have been affirmed in their articles, have implicitly and explicitly regulate land law protection *adat* in Papua, in the context of the state well-being.

However, obstacles in the implementation of these laws and regulations cannot be denied. Aspects such as limited resources and human resources of indigenous people in Papua as well as facilities and infrastructure that are still very shortage in Papua is a common phenomenon which is still difficult to deal with. Besides that, socialization of laws and regulations and the seriousness of the government regions and the House of Representatives Papua (DPRP) is also constrained. Which too hinder from implementing regulations the legislation is not yet. It needs a harmonization of perceptions among related parties, as well as the use of customary land for exploitation activities mines and plantations (Suharyo, 2019).

The determination of the customary rights of indigenous peoples has been mandated through various levels of legislation, but the implementation is different, in fact there is no recognition of the customary rights of indigenous peoples in Papua. Besides being influenced by the role of the government, it is also influenced by the customary law community. The practice in Papua is in line with the explanation of the existence of ulayat lands and their customary law communities is solely a claim by the customary law community accompanied by the weakening of their various customary institutions including traditions, customary law and customary territories (Rahmadi, 2022).

3. The Function of Special Arrangement to Tackle the Issues – Based on Article in Special Arrangement and Basic Agreement in Relate With Issues

Based on the description of the legal phenomenon that has been described in the previous chapter, the territorial boundary between Papua New Guinea and the Papua province is very risky to give rise to illegal trespassers without administrative documents crossing the territory of the two countries. Each country has limits to the extent to which a country is sovereign and has sovereign rights over its territory. The important role of a country's border area has an important meaning in the sovereignty of a country such as a government's policy for both national interests and international relations. In determining the status of a State border, an international legal basis is needed.

The Determination of territorial borders between two countries usually must be based on an agreement made among both parties (Samekto, 2009). In order to deal with this problem, the Governments of the Republic of Indonesia and Papua New Guinea made a basic agreement on the border agreement between the two countries (Basic Agreement on Border Arrangements Between the Republic of Indonesia and The Republic of Papua New Guinea in 1973), but its nature is still limited. This agreement were signed by the Minister of Foreign Affairs Adam Malik and Australia (acting on its own behalf and on behalf of Papua New Guinea as a protectorate area) represented by Mr. Michael T. Samore. This agreement was signed in Jakarta on February 12, 1973 which was ratified by Indonesia in Law No. 6 of 1973 concerning the Agreement between Indonesia and Australia concerning Certain Boundary Lines between Indonesia and Papua New Guinea.

Furthermore, this agreement was replaced with a basic agreement between the Indonesian government and the Government of Papua New Guinea on border arrangements which was signed in Jakarta on 17 December 1979 with the ratification of Presidential Decree No. 6 of 1980, then renewed in Port Moresby on 29 October 1984 and ratified by Presidential Decree No. 66 of 1984. The last amendment was again made in Port Moresby on April 11, 1990 and ratified by Presidential Decree No. 39 of 1990 (Prawerthi & Atmaja, 2019).

Refer to the information from Head of Boundary and Cross-Territory Division, Border and Cooperation Agency for Papua Province Indonesia's boundary line with Papua New Guinea by placing 52 pillars from the placement of the first pillars MM1-MM14A which is the main boundary of the Meridian Monument. In addition to the 14 MM pillars, in 1983-1991, in accordance with the mandate in Article 9 of the 1973 agreement, 38 MM pillars have been established so that it can be calculated that 52 MM pillars have stood along the border line (Karet, 2021). It was followed up by the Government of the Republic of Indonesia by issuing Presidential Decree of the Republic of Indonesia Number 2 of 1982 concerning the Establishment of the Committee for the Settlement of Problems in the Border Areas of the Republic of Indonesia and Papua New Guinea. Then in 2008, the Government of the Republic of Indonesia re-issued Law No. 43 of 2008 concerning State boundaries. This regulation is intended to provide legal certainty regarding the scope of the territory of the State, the authority to manage the territory of the State, as well as sovereign rights.

One of the strategies used by the governments of the two countries to deal with these border zone crossers is the use of cross-border cards. The red crossing card is intended for Indonesian citizens who must have a red card, while the yellow card is for Papua New Guinea citizens. Based

on information obtained from the Head of the Immigration Office I of Jayapura City, Mr. Darwanto (Darwanto, 2021), it is the obligation for every cross-border crosser between countries to have a Cross-Border Card as a state document that functions as a permit. The Immigration Office of the Republic of Indonesia in the Papua Region is red, while the Cross-Border Pass issued by the Papua New Guinea Department of Affairs is yellow. Limitations on the rights of Cross-Border Pass Holders are only allowed to carry out traditional and customary activities or border trade including social relations and ceremonies such as marriage, farming, other gardening, fishing and other uses of waters, traditional border trade, sports and other activities. local cultural activities in the border area agreed by both parties.

The validity period of the cross-border card is for one year and when it expires, the holders must apply for an extension to the nearest Immigration office. The red and yellow KLB are generally used at the Border Post in the Muara Tami District, Jayapura City, which has Customs Immigration Quarantine and Security facilities, and a fence has been installed as a boundary sign. Mechanisms The procedure for cross-border crossings between the two countries has been regulated in the main points of cross-border arrangements between the Republic of Indonesia and Papua New Guinea. These rules are stated in Circular No. IMI-PR.08.01-163 of 2010 concerning procedures for issuing cross-border passes for Indonesian citizens in border areas (Darwanto, 2021).

However, the fact is not as expected. Regarding to further information from Mr. Karet (Head of Boundary and Cross-Regional Division, Border and Cooperation Agency for Papua Province) that along this border zone, local people in both cases do not recognize any formal boundaries such as national boundaries (Karet, 2021). This situation is illustrated indirectly a phenomenon of overlapping customary land ownership where the Indonesian population owns and manages customary land in the Papua zone and New Guineans own and work on customary land in the border area which is part of the territory of the Republic of Indonesia. He also emphasized that the cross-border relationship between the people of the Republic of Indonesia and Papua New Guinea in principle has been going on for a long time and stems from cultural relations such as common language, marriage, subsistence economy, and mythology, thus forming a network of population mobility in the border areas of the two countries.

The dynamics of this border area arrangement continue to be pursued in parallel with the national interests of the two countries so that entering this decade, the two countries agreed to make the cross-border issue of people and goods to and from the border area regulated together in a special agreement (Special Arrangements for Traditional and Customary Border Crossing Between Republic of Indonesia). Indonesia and Papua New Guinea). On June 17, 2013, Indonesia and Papua New Guinea have agreed on a Basic Agreement on Border Arrangements Between the Republic of Indonesia and The Republic of Papua New Guinea which came into force in 2014. This agreement regulates in its entirety the border issues between Indonesia and Papua New Guinea.

The land boundary among Papua province and Papua New Guinea runs from North to South for approximately 780 Km located from the boundary line/meridien monument (MM1) in the Skouw and Wutung areas, Jayapura City to MM10 in the Anggamarut/Wairin area, Boven Digoel Regency from MM11 in the Domonggi area, Merauke Regency up to MM14 in the mouth of the Bensbach river or the Torasi river. In addition to the 14 MM pillars, between 1983-1991, according to the mandate of Article 9 of the 1973 Agreement between Indonesia and Papua New Guinea, 38 MM Pillars were established. So that up to now there have been 52 MM pillars along the border line. The addition of the 38 new MM pillars is currently still contained in the Joint Declaration signed by the survey and mapping authorities of the two governments.

The boundaries set by the agreement between the two countries differ from the views of indigenous peoples. The customary law community believes that the boundaries used are natural signs in the form of rivers. The Skouw people think that the Tami river is part of the Wutung

customary territory (Papua New Guinea) but according to the boundaries agreed by the two countries, the Tami River is included in the territory of the Republic of Indonesia. This also happened to the Wembi people who believed that the border line with PNG was the Bewani River, while the Bewani River was part of the territory of the Republic of Indonesia.

The existence of ulayat lands of the indigenous peoples of Papua New Guinea residing in Indonesia and vice versa shows that the territorial boundaries of the state cannot hinder the cultural ties between the two communities. The cultural ties between these two societies indicate that there is a close interaction between these two things. The interactions that occur between the two communities take place very intensely and do not pay too much attention to state territorial boundaries. This is in line with the communalistic nature of customary law communities. In Emile Durkheim's view, the customary law community is a society with mechanical solidarity, namely an integrated society or a cohesive and stable society. This community views that the law is an agreement so that even in the context of territorial boundaries what is understood by the community concerned are natural signs that are understood by the community that have been going on for generations.

Manley Hudson in his report, stated that the greatest number of cases of statelessness had been created by collective denationalization on political, racial or religious grounds." This, clearly, is not merely a conflict of laws problem and the State, upon which the individual is most dependent for help, is unlikely to give assistance. There are nevertheless aspects of nationality law which are subject to scrutiny under international law. While these are the exception, they may have an impact on people in a variety of situations, and person lacking an effective nationality in law or in fact is not well- positioned to represent him- or herself before the State. (Foster, 2018).

In this term, cross-border interactions by indigenous peoples located on the border of Papua and Papua New Guinea cannot be addressed in a positive way. This means that the nature of universalism and reductionism in legal positivism cannot be applied in this border area. Universalism means that the law is applied throughout the territory of Indonesia regardless of the characteristics of a society or the area of its application. Regarding this matter, it is precisely what Tamanaha said in his book *A General Jurisprudence of Law and Society* that law is embedded in a peculiar form of social life.

Based on the view of the uniqueness of the socio-cultural conditions of the people living on the border of Papua and Papua New Guinea, an Agreement Between The Government Of Australia (Acting in represent And On Behalf Of The Government Of Papua New Guinea) And The Government Of Indonesia Concerning Administrative was made. Border Arrangements As To The Border Between Papua New Guinea And Indonesia. In Article 3 of this Agreement it is stated that

- (1) The traditional and customary practices of the peoples, who reside in a border area and are citizens of the country concerned, of crossing the border for traditional activities such as social contacts and ceremonies including marriage, gardening and other land usage, collecting, hunting, fishing and other usage of waters, and traditional barter trade are recognised and shall continue to be inspected.
- (2) Such border crossings based on tradition and custom shall be subject to special arrangements, and normal immigration and other requirements shall not apply.
- (3) The special arrangements shall be formulated on the principle that such crossings shall be only temporary in character and not for the purpose of settlement.

Article 3 of the agreement between the two countries is very good because it is based on an understanding of the socio-cultural conditions of the border communities. Paragraph 1 emphasizes that the activities of indigenous peoples living in the border areas of Indonesia and Papua New Guinea to carry out traditional ceremonies, social contacts, gardening and various other forms of land use, for hunting, fishing and also traditional trade are recognized and will continue to be monitored.

Regarding to the information from Head of the Integrated Cross-border Post in Skouw, Eri Numberi (Numberi, 2021), the border between Papua and Papua New Guinea is very unique because it includes the customary land of the Papua New Guinean customary law community in Papua and the customary land of the Papuan customary law community living in Papua. is in Papua New Guinea. Therefore, many indigenous peoples from Papua New Guinea come to Indonesian territory every day to carry out agricultural activities. The unique phenomena which occurred that time is land acquisition for the public interest in the border area, there are lands of indigenous peoples from Papua New Guinea whose land is the object of this activity and cannot be compensated due to the principle of nationality, namely only Indonesians who are recognized as land owner. Therefore, the people of Papua New Guinea applied to become Indonesian citizens in order to get compensation for their land. These people also carry out other activities to Indonesia such as to buy certain needs. The people of Papua New Guinea who live on the border prefer to shop in the Papua region (Skouw) because the available merchandise is more diverse (complete) and the prices for necessities are cheaper. For indigenous peoples from Papua New Guinea who carry out trading activities in Indonesia, the nominal amount of expenditure that can be carried out is determined and is not subject to excise.

Inside paragraph 2 of agreement stipulates that border crossings carried out by traditional communities are not based on immigration regulations. This means that indigenous peoples who wish to cross the territorial boundaries of the two countries do not have to use passports and cross borders. In such conditions, a more responsive mechanism is needed to facilitate cross-border activities of indigenous and tribal peoples between the two countries but still pay attention to aspects of state security. The steps taken by the two countries were to make an agreement that people living in border areas would be given a yellow card and a red card. Yellow cards are given to indigenous peoples from Papua New Guinea, while red cards are given to indigenous peoples from Indonesia.

However, there are issue that should also be noted in the arrangement of cross-border agreements between indigenous and tribal peoples in the two countries, namely the people who cross traditional borders only for temporary activities and not for permanent activities. The intensive interaction between indigenous peoples in Papua New Guinea and indigenous peoples in Indonesia in border areas also raises various issues regarding citizenship, namely:

a. Trans-National Marriage

Intensive interaction between indigenous peoples in the territory of Indonesia and Papua New Guinea has the potential to cause interactions between the two indigenous peoples. In this case, if there is a marriage between these communities, the citizenship of the child born will follow the customs of his father in accordance with the customs prevailing in that society.

b. Double Nationality

The existence of customary land ownership in Indonesia, families living and becoming Indonesian citizens and intensive activities and interactions in Indonesia have led to the existence of Papua New Guineans who also have Indonesian citizenship. This also happened to Ondoafi or the traditional leader in Moso Village who has dual citizenship.

4. Conclusion

Observing the case of customary law communities living in the border areas of the provinces of Papua and Papua New Guinea, legal positivism cannot be applied in absolute way. The uniqueness of the people who live on the border of Papua and Papua New Guinea shows that the approach in dealing with border problems in the region must be based on an emic perspective or the perspective of the community concerned, no longer using an ethical perspective or a government perspective. Therefore, policy making must be based on comprehensive considerations, namely economic, social and cultural considerations of the community concerned.

The application of red cards and yellow cards as regulated in a special arrangement is the right step to make it easier for indigenous and tribal peoples to interact and carry out their activities in different areas. On the other hand, it also serves to impose restrictions or restrictions on people who are the subject of traditional cross-border because only indigenous and tribal people living in these border areas will be given a red card or yellow card, while people who do not fall into that category will not be given a red card or yellow card. This means that this action can facilitate the identification of indigenous and tribal peoples between the two countries.

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