Research Article

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Ideal Concept of Traditional Justice in Solving Criminal Case

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Abstract

Customary law is an unwritten rule that lives in the customary community of an area and will continue to live as long as the community still fulfils the customary law that was passed on to them from their ancestors before them. Settlement in criminal cases through customary law that produces results is a form of legal certainty. This study aims to determine the ideal concept in resolving criminal cases through customary courts in Merauke Papua. The method used in this study is a combination of normative legal research and empirical legal research with the reason that the author wants to examine the norms related to the problem of resolving customary criminal cases and seek direct information on the implementation of customary justice in Merauke Regency which is presented descriptively. recognition of customary courts must be stated in writing in the law on judicial power so that this institution has a clear legal basis and its decisions can be recognized so that it does not need to be tried again through national courts, criminal threats under five years must be resolved through customary courts and are final decisions

Keywords: *concept, ideal, Justice, custom*

1. Introduction

During the colonial era, the customary justice mechanism was recognized by the issuance of Stb 1932 No. 80 of 1932. This recognition provides a lesson for the Indonesian people that the Dutch nation, which is a developed country in the field of law, still provides space for customary courts to settle customary cases.

However, the recognition of customary justice began to suffer a tragic fate since the

promulgation of Law No. 23 of 1947 concerning the abolition of the King's Court in Java and Sumatra which was then followed by the enactment of Emergency Law No. 1 of 1961 concerning the stipulation of all emergency laws and all laws. The Government Regulation in place of Law that existed before January 1, 1961, became a law on temporary measures to organize a unitary structure of power which also ordered the abolition of customary courts.

In accordance with Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, the State of Indonesia is a state of law and the consequence of a state of law is the existence of legal certainty.

Amendments to the 1945 Constitution of the Republic of Indonesia that occurred in 2000 recognize and respect the unity of indigenous peoples and their traditional rights as stated in Article 18 B paragraph (2) and Article 28 I paragraph (3).

Article 18 B paragraph 2 states "The state recognizes and respects customary law community units along with their traditional rights as long as they are still alive and by following community development and the principles of the Unitary State of the Republic of Indonesia as regulated in law"(Bakhtiar, Abbas, & Nur, 2021) While Article 28I paragraph 3 states "Cultural identity and rights of traditional communities are respected in line with the development of times and civilizations".

The Indonesian people should be sad and concerned about the abolition of the existence of customary courts in Indonesia because this institution is an institution that was born from the womb of indigenous peoples who have their customary law which has been turned off and replaced with a new judicial institution which is claimed to be more modern and formal but not necessarily acceptable. by Indonesian people.

With the amendments to the 2000 Constitution of the Republic of Indonesia, Community-based dispute resolution, which is often referred to as customary courts, has begun to gain attention again, at least in various scientific forums and community organizations involved in discussions on reinforcing customary courts. (Jiwa Utama & Febri Aristya, 2015)

Although formally the existence of this customary justice institution is not recognized, in reality, the mechanism for resolving cases through this institution is another alternative that is taken by justice seekers, especially for people who still have traditional patterns of life with very strong norms, they consider settlement through customary courts. fairer than settlement through formal institutions according to I Ketut Suardana (Zulfa, 2010) said that “customary justice is a fact because it is still alive and practised in the reality of people's lives, but this reality has not gained proper recognition in state law, especially in the laws governing judicial matters”.

Customary law is an unwritten rule that lives in the customary community of an area and will continue to live as long as the community still fulfils the customary law that was passed on to them from their ancestors before them. Settlement in criminal cases through customary law that produces results is a form of legal certainty because the law in its function restores the balance lost amid society and the results obtained in the settlement process are a form of legal certainty itself.(Basrawi, 2020)

The failure to implement the concept of the rule of law in the legal system in this country is very much felt as evidenced by the facts of the occurrence of overcapacity in correctional institutions since the fact that the community considers that positive justice is the only place to seek justice and has legal certainty which is legitimized by the judicial system.

Thus, the implementation of unwritten law becomes unclear, even a few people do not want to take the customary route due to doubts about the legal force. Even though legally the settlement of customary criminal law is strengthened by several decisions or jurisprudence that recognizes the settlement of customary law, one of which is the decision of the Supreme Court. RI Number 1644 K/Pid/1988 Dated May 15, 1991, which decided to respect the decision of the head of an adat which gave Customary Sanctions to violators of customary law norms and did not justify the general judiciary to try a second time using a positive legal system approach. (Wulansari, 2012)

The jurisprudence of the Supreme Court explains that the Supreme Court as the Supreme Judicial Body in Indonesia respects the decision of the Customary Chief against violators of

customary law and customary sanctions given and perpetrators who have been given punishment for their actions cannot be tried for a second time by giving criminal penalties (Syarifuddin, 2019)

The only law that recognizes customary justice in Indonesia is Law No. 21 of 2001 concerning Special Autonomy for the Papua Province and for the Papuan people the existence of this special autonomy law provides a breath of fresh air because the recognition of customary courts has been accommodated in the law. However, when viewed in its implementation in the community, the customary courts seem to be in a position of being and not being (Elwi Danil, 2012). Some criminal cases that have been resolved in customary courts but those cases were also resolved under national law as in decision No. 119/PID.B/2012/PN.MRK. (Erni Dwita Silambi, Alputila, & Syahruddin, 2018)

Although the people of Merauke (Erni Dwita Silambi, 2019) have begun to experience a change in their thinking patterns from traditional to modern, which are supported by increasingly sophisticated and modern equipment and also because the internet has reached remote areas until now the settlement of criminal cases still exists among indigenous Malind Anim in Merauke. This may be perceived from the number of cases that were resolved through the customary justice institution in Merauke as indicated in the table below:

Table 1: Types of cases that are settled by custom in Merauke (2012-2021)

Number	Type of crime	Amount	Information
1.	Ordinary molestation	12 case	Final
2.	Mild molestation	5 case	Final
3.	Domestic violence	22 case	Final
4.	Theft	5 case	3 Final 2 proceed to the state legal process
5.	Rape	1 case	proceed to the state legal process
6.	Retrieve results forests in areas that are considered sacred	3 case	Final
7.	Kangaroo Theft	11 case	Final
8.	Inter-tribal fighting	2 case	Final
9.	Sexual relationship between 2 adults who are not yet bonded	4 case	Final
10	Family abandonment	7 case	Final
11	Murder by means of suanggi	1 case	proceed to the state legal process

Data: Indigenous Peoples Institutions

So far, all committed criminal cases that can be resolved through the Malind Anim customary court in accord with the Special Autonomy Law, namely in article 51 paragraph (1) Customary courts are peace courts within customary law communities that have the authority to examine and adjudicate customary civil disputes and criminal cases among the members of the customary law community concerned. This statement is also explained by paragraph (3) "The customary court examines and hears customary civil disputes and criminal cases as referred to in paragraph (1) based on the customary law of the community concerned". *(lihat lagi kutipannya dlm bahasa Indonesia*). This article does not explain of what criminal offence is meant, whether all criminal cases include as criminal cases that have a comparison in the Criminal Code or are purely customary cases that have no comparison in the Criminal Law Code.

The Malind Anim people prefer to settle their cases because they consider that the settlement through customary justice is sacred, fair and the sanctions that have been given are considered lighter. Because the preceeding was handled by the best and trustworthy people that involved also parties, the process became more open, simple and timely.

The researcher strongly agrees with what was stated by Sinclair Dinen (Zulfa, 2010) about the community elective mean to settle cases through customary law considerate of natural conditions of remotness of several Merauke districts. During the rainy season, sea waves raised and the road

condition deteriorated, speed boat is the only transportation used to reach many remote areas. In that circumstances, the role of customary courts is as the only place to seek justice is considered effective and also fast to resolve all existing problems. Given such a circumstance, the author formulates the problem, namely "What is the Ideal Concept of Customary Courts in Resolving Criminal Cases in Merauke?

2. Method

The type of research conducted in this study is a combination of normative legal research and empirical legal research with the reason that the author wants to examine norms related to the problem-solving customary criminal cases and seek information directly on the implementation of customary justice in Merauke Regency.

The data analysis method used in this research is qualitative method through reasoning and legal arguments against the material obtained. The data is processed and presented descriptively. The data analysis referred in this research purposely presented to describe, and explain the existing data so as to answer the problems that exist in this study

3. Results and Discussion

The Ideal Concept of Customary Courts in Realizing the Settlement of Criminal Cases in the National Legal System Synchronization and harmonization of laws and regulations.

Provide a brief understanding that harmonization is an effort to harmonize, adjust, strengthen and round off the conception of a draft legislation with other laws and regulations, either higher, equal, or lower, and other matters other than laws and regulations. These are organized systematically to prevent from contradictive and overlapping data and analysis. This is a consequence of the existence of a hierarchy of laws and regulations in Indonesia.

By way of doing harmonization, it will be clearly illustrated that a statutory regulation is an integral part of the whole system of laws and regulations

In practice, it is not uncommon to find cases that have not been regulated by law or legislation or have been regulated but are incomplete and unclear. Therefore, the unclear legal rules must be reformulated and the incomplete ones must be completed so that these rules can be applied to the event in order to achieve the goals of the aspired law.

The obstacles faced in the implementation of customary justice in Merauke can be described as follows:

A. There are conflicting articles

There is overlapping recognition of existing customary courts, both in one statutory regulation and between existing laws and regulations in Indonesia. Recognition is stated in Article 18B paragraph (2) of the 1945 Republic of Indonesia Law, namely recognizing and respecting the unity of indigenous peoples and their traditional rights. However, this acknowledgment is not followed by the judicial law so that dispute resolution through customary courts cannot be carried out. Because Law No. 48 of 2009 confirms that "all courts throughout the territory of the Republic of Indonesia are state courts regulated by law, Vide: article 2 paragraph (3). This statement is contained in Article 18 stating that "judicial power is exercised by a Supreme Court and judicial bodies under it in the general court environment, the religious court environment, the military court environment, the State administrative court environment, and by a Constitutional Court." The article 2 do not recognize the existence of courts outside the state courts, including customary courts which is clarified in article 18 that "judicial power is exercised by a Supreme Court and judicial bodies under it in the general court environment, religious court environment, military court environment, State administrative court environment, and by a Constitutional Court."

The acknowledgment in Article 18B paragraph (2) seems to be a conditional acknowledgment but this implies the acknowledgment of the entire order of indigenous peoples, including customary

courts conducted by indigenous peoples because the presence of customary courts is very important as expressed by I Nyoman Nurjaya that "customary courts is one of the six criteria for the existence of a legal society.(Mohammad Jamin, Sri Lestari Rahayu, 2011)·

The Special Autonomy Law does not clearly elaborate customary justice which recognise the existence of customary institutions. Hierarchically, if there is a conflict between a lower law and a higher law, the higher law will be applied in accordance with the principle of *Lex superiori derogat legi inferiori*. The Emergency Law only provides limits on customary crimes that have no equivalent in the Criminal Code, while in the Special Autonomy Law the authority to adjudicate criminal and civil cases is clearly regulated but does not limit the types of criminal cases that may and may be committed cannot be resolved through customary courts.

In the Draft Criminal Code (version 28 August 2019) there are several articles that recognize customary offenses as stated by the Drafting Team of the Criminal Code Bill that there are three possible ways to re-enforce customary criminal law or determine the existence of customary offenses.(Djojodigoeno, 2020)

1. Customary Courts are revived;
2. the enactment of regional regulations containing customary criminal acts that are still valid in the local area; and
3. Preparation of customary law.

In the Papua Special Autonomy Law, there is an acknowledgment of the customary court in Article 50 which states that:

1. Judicial power in Papua Province is exercised by the judiciary in accordance with the laws and regulations
2. In addition to the judicial power as referred to in paragraph (1), the existence of customary courts in customary law communities is also recognized.

Then in Article 51 paragraph (3) on the phrase ".... examine and adjudicate civil disputes and criminal cases". This paragraph will create a less distinct norms because it is not clear what criminal cases are meant, whether all criminal cases include those that have a comparison in the Criminal Code or only those that have no similarities in the Criminal Code in accordance with Emergency Law No. 1 of 1951 which was promulgated by Law Number 1 of 1961 concerning the Stipulation of All Emergency Laws and All Government Regulations in stead of Laws that existed before January 1, 1961 became Laws, in particular Article 5 paragraph (3).

B. There are articles that are not clear

In the Special Autonomy Law, there are several paragraphs that contain Conflicts of Norms internally. The articles are:

a. Article 51 paragraph (1) customary court is a court of peace within the customary law community which has the authority to examine and adjudicate customary civil disputes and criminal cases between members of the customary law community concerned. This verse provides an opportunity for the customary courts in Papua to settle all criminal and civil cases that occur within the customary law community. This paragraph is also slightly different from the Papua Special Regulation Number 20 of 2008 concerning Customary Courts which in Article 8 paragraph (2) of the Customary Courts as referred to in paragraph (1) can accept and manage cases that occur between indigenous Papuans and non-Papuans.
b. Article 51 paragraph (4) In the event that one of the disputing parties or the plaintiffs object to the decision that has been taken by the customary court that has examined it as referred to in paragraph (3), the litigating party has the right to request the district court within the agency the court which is authorized to examine and retrial the dispute or case in question. According to the researcher, this paragraph is not clear because it does not explain the reasons for asking the court to try again. This seems to be an appeal made by parties who are not satisfied with the decision of the customary court. However, article 17 paragraph (4) on customary justice in the Papuan Perdasus stipulate that customary sanctions do not abolish the punishment if the parties do not accept it. Thus, the perpetrators may be punished twice

according to this writer is unfair.

c. Article 51 paragraph (6) The decision of the customary court regarding a criminal act whose case is not requested for re-examination as referred to in paragraph (4) becomes a final decision and has permanent legal force. This paragraph is clearly not final because if it is continued in the next two paragraphs then paragraph (6) still gives two options, namely final if it is accepted by the District Court or processed if it is rejected and only becomes the judge's consideration in deciding the case in question.

According to the author, as a judicial institution that is separate from the state judicial system, customary courts must have independence and autonomy so that customary court decisions are no longer conditional decisions whose decisions can be overturned by a district court conducting a re-examination as stated in Article 51 of the Special Autonomy Law. The author needs to make changes to Article 51 so that this article does not create a multiple interpretations in its application.

The recognition of customary justice institutions in the lives of indigenous peoples in Papua Province can be seen in Article 50 of Law Number 21 of 2021 concerning Special Autonomy for Papua Province which states that:

1. Judicial power in the Papua Province is exercised by the judiciary in accordance with the laws and regulations.
2. In addition to the judicial power as referred to in paragraph (1), it is recognized that the existence of customary courts in customary law communities is recognized.

Then in Perdasus Number 20 of 2008 concerning Customary Courts in Papua, namely in Article 4, the Customary Courts are not part of the state judiciary, but are the judicial institutions of the Papuan indigenous peoples, which is further regulated in Article 5:

1. The Customary Court is domiciled within the customary law community in Papua.
2. The environment of the customary law community as referred to in paragraph (1) is the customary law community based on a leadership system of religiousness, a king leadership system, an authoritative male leadership system, and a mixed leadership system.

Table 2: Recognition of customary courts in the Papuan Perdasus and Merauke Regional Regulations

Papuan Perdasus No. 8 of 2008 concerning customary justice	Merauke Regency Regional Regulation Number 5 of 2013 concerning Community-Based Natural Resource Management Malind Anim	Regional Regulation Number 4 of 2013 concerning Empowerment, Preservation, Protection and Development of Customs and Traditional Institutions
article 1 16). Customary justice is a system of settlement of cases that live in certain customary law communities in Papua. 17). Customary courts are institutions for resolving disputes or customary cases in certain customary law communities in Papua..	article 1 23) Customary courts are dispute resolution institutions or cases in the Malind Anim customary law community	article 1 10) Customary Institution is an organization/container that is formed from generation to generation or which has grown and developed in the history of the community or in the law of certain indigenous peoples within the customary law area which has the right and authority to regulate, manage and resolve various life problems related to customs. local customs and laws.

It can be seen from the above table that in Merauke, customary institutions have been regulated in regional regulations but for customary courts there is no special regulation that regulates this matter so that decisions made by this court are considered invalid if they have to deal with state courts. The Perdasus actually hopes for a Regional Regulation (Silambi et al. 2018) on customary justice as stated in Article 10:

1. The mechanism for receiving, administering, adjudicating, and making decisions is carried out according to the customary law of the indigenous peoples concerned.
2. The provisions as referred to in paragraph (1) can be regulated through Regency/Municipal Regulations.

Institutional recognition according to the author is insufficient to accommodate the customary justice in Merauke but also recognition of the decisions made by this institution. Therefore this institution must be regulated clearly including the authority, process, customary instruments and the determination of sanctions so that the judiciary can explain its duties and functions optimally. Although there is an acknowledgment of the customary justice institution as a legal entity, for the author this recognition is only a false confession because in its implementation this court is meaningless when it comes to dealing with the state court all decisions in this court can be overturned by the state court.

Based on abovementioned articles it may be described that the customary justice institution in Papua has been recognized legally but not in its implementation. Because it does not reflect the actual customary justice in accordance with the expectations of the Special Autonomy Law and the Perdasus Law.

From an editorial point of view, the acknowledgment of customary justice institutions in article 51 paragraph (1) may lead to a less distinct of norms contained in the phrase "customary justice is a justice of peace" because this phrase for the author is only considered as a forum for conciliation so that if there is no peace between the parties then will automatically be resolved according to the state court so the customary court here is only as a court that assists the state court in resolving a criminal case or civil dispute even though the task of the customary court is also to enforce the law through repression efforts in the form of applying sanctions and or customary corrections to parties who violate customary law (sigit Arfansyah Kamah, Abdurahman Konoras, 2021)

Institutionally, the existence of the customary court is difficult to identify because the customary court is not a formal judicial body that is easily recognized from the court building where judges are part of with salaried positions and other legal facilities. Customary courts cannot be identified from these attributes, because, as Soepomo once pointed out, (Sudantra, 2018) Customary justice is just one of the many functions and activities played by traditional leaders to maintain a harmonious life.

In the Malind Anim community, customary justice still plays a very important role in resolving cases, both civil and criminal offences, while the mechanism for customary justice in Merauke is as follows:

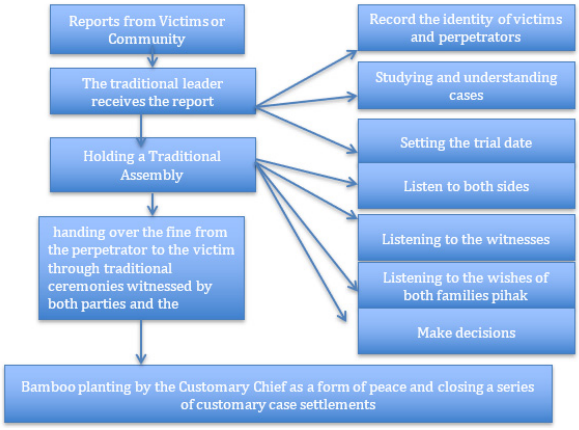

Figure 1: Mechanism of settlement of Malind Anim Customary Criminal Case

Regarding the cases handled in the Malind Anim customary law community, there are many variations as well as the types of customary sanctions imposed ranging from the lightest customary sanctions to the most severe sanctions which are usually only in the form of fines and there is also a decision to kill because their actions are considered very disturbing. community but then this case was brought to the district court.

The unclear recognition of customary justice in the legislation has an impact on the existence of customary courts. The judicial power which does not recognize judicial practices outside the state courts causes the peaceful settlement of cases that are commonly practiced by the community through customary courts and is no longer easy to find for implementation. The reason for the importance of recognizing customary justice is related to efforts to strengthening local wisdom and customary law to enrich the national legal system. Directions to strengthen local wisdom – of course, include the mechanism for resolving customary cases. It is considered important because local regulations (Pangerang, 2018) are one part of realizing the welfare of the people in the region. As said by Andi Pangerang in the book Principles of Regional Government Law that the main purpose of Regional Government Law is to realize the welfare of the people in the region.

The actualization of customary justice is also important to expand access to justice for the people, especially people in indigenous peoples. With the strong and effective functioning of customary courts, the people can have other alternatives to obtain justice other than through state courts. Indeed, formally justice can be obtained through the legal process in the Court, but not everyone is able to litigate through a formal court. It is common knowledge that a number of problems entangle the country's judicial system to achieve its vision as " house of justice for the people". Various weaknesses that exist, ranging from systemic and psychological weaknesses, increasingly distance the state judiciary from achieving its vision of justice. Systemically, the process to obtain justice through the state judiciary mechanism is very tiring, in addition to being complicated, it is also expensive. The legal principle "settling cases simply, quickly and at low cost" as stated in Article 2 paragraph (4) of Law Number 48 of 2009 concerning Judicial Power currently in force, it is still very difficult to realize because it is dealing with tiered judicial mechanisms, starting from the first level court (District Court), appeal level (High Court), and cassation level (Supreme Court).

The Government of the Republic of Indonesia with the law makers needs to change Law Number 48 of 2009 concerning Judicial Power, by recognizing customary courts as a judicial system outside the state courts. This is very important to accommodate customary courts. Things that need to be clearly regulated in the law on judicial power are:

1. Recognition of customary justice institutions
2. Classify criminal cases that can be resolved through customary courts (whether specifically only pure customary criminal cases, criminal cases that have no comparison in the Criminal Code or criminal cases committed by indigenous peoples)

According to the author, the two things above are very important so that there is no overlap in the exercise of authority and there is no *nebis in idem* which causes the justice race to be lost because it will be sanctioned twice, namely paying fines according to customary court decisions and also having to undergo punishment as a state court decision. In addition to customary crimes, customary courts should be given the authority to handle complaint offenses and ordinary offenses whose sentences are under five years, this is a form of legal synchronization at the statutory level related to the recognition of existing courts. In addition, the Draft Law on Indigenous and Indigenous Peoples which is currently being rolled out in the DPR-RI needs to be immediately transformed into a law.

The strategy for strengthening the structure of the customary justice in Merauke needs to be institutionalized with strategic steps so as not to abandon existing customary values and also be able to create a customary court that is able to adapt to the times. Therefore the ranks of the structure must be enacted in order to provide knowledge and skills of its personnel in resolving cases based on the principles of customary law. So that the judicial structure (Farida Patitingi, 2003) is not considered outdated which is only led by old people. Although it is undeniable that in the process of modernization, the expansion of the western world will remain a global pattern for progress, but

there is no need to abandon the culture and customs of Indonesian society.

In order for the judiciary to be able to survive in modern times like today, according to the author, customary justice must be clearly regulated in laws and regulations (E.D. Silambi, Yuldiana, Alputila, & Wijaya, 2019) so that it will not be swallowed up by the development of an increasingly advanced era. If customary courts are not clearly regulated, over time the customary courts will disappear and be replaced by national courts, people will seek justice only through national law without looking at the applicable customary law (Rahail & Syahruddin, 2018). The community's mindset about customary law must be changed because many think that when dealing with customary law, their thoughts will lead to thoughts that are considered tacky and many people don't want to be labeled as village. So they choose to use other alternatives outside the customary court. If this condition is allowed to continue, then it will not be too long before the customary court is completely gone. This prediction is not a myth, because, as Daniel S. Lev, (Sulistiyono 2005), has said, broad social and economic changes have caused changes in the legal culture of the community. The change in legal culture, among others, is shown by the behavior of suing through the courts which is increasingly pervasive in Indonesian society. If this is allowed to continue, then the models of peaceful settlement of cases through customary courts that are still alive in customary law community units in turn will also be increasingly eroded and eventually run out (Erni Dwita Silambi, 2015). So the only way to seek justice is through state law.

In order to maintain customary justice in modern times, it is necessary to make adjustments to the times where this institution must be properly organized, namely by giving recognition not only to the institution but also to clearly define the duties and authorities of this institution. And the regulation of legal substance needs to be well organized because the weak regulation of legal substance will affect the guarantee of justice for the community (Azisa, 2016)

According to the author, this institution should be given the authority to decide cases committed by indigenous peoples whose sentences are not more than five years, so all crimes(Darmawati, 2019) that have been resolved through customary (Wulansari, 2012) courts and the threat of a sentence of less than five years then the decision becomes a final decision, there is no need to add the word if both parties accept this decision because the word only makes the customary court a place to try their luck while for threats that are more than five years old, they must proceed to the national court and the customary court decision is only as a remedy in the community so that there are no disputes between members of indigenous peoples. Community.

4. Conclusion

The ideal concept for the recognition of customary justice is an improvement in the legal system, namely the components of legal substance, recognition of customary courts and decisions of customary courts in the law on judicial power in order to accommodate the recognition of customary judicial practices. This includes details regarding criminal acts that can be resolved through customary courts so that there is no ambiguity of norms and also the formation of a law that recognizes the rights of customary law community units needs to be ratified immediately. In the component sector of the legal structure, it is necessary to identify and strengthen the structure of customary justice so that it can carry out its functions effectively. Meanwhile, in the aspect of community legal culture, it is also important to do a strengthening so that public trust and confidence in the settlement process through customary justice can be fostered, strengthened and maintained so that it does not get lost in the development of an increasingly modernized and sophisticated world.

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